

**Colonial Legacies and the Asylum System:  
Language, Silence and the Portrayal of the Refugee ‘Other’**

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Thesis submitted in fulfilment of the requirements of the Ph.D.

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## *Abstract*

The United Nations High Commissioner for Refugees (UNHCR) is often presented either as a post-Second World War institution, or a Cold-War institution, but its origins within colonialism are rarely discussed. However, the UNHCR and the 1951 Refugee Convention are products of the colonial era. This thesis engages with the colonial legacy in the international refugee regime, to analyse how practices of colonialism are still emerging in the relationship between the host state and the refugee. Focusing specifically on how practices of language and silence control and determine the refugee regime, the thesis adopts a postcolonial framework to analyse the refugee regime at three levels. Firstly, it examines the international level, with a focus on the UNHCR itself and the construction of the 1951 Convention, viewing the use of language and silence in the construction of the refugee definition. Secondly, it turns to the regional level to examine how language employed here can advance our understanding and fill in the gaps of the 1951 Convention. Thirdly, it focuses at the state level with a detailed analyses of the British and Kenyan refugee regimes, examining how practices of language, silence, and labelling have effectively marginalised the would-be refugee, establishing idealised notions of what a genuine asylum seeker, ‘bogus’ refugee, or victim should be. The thesis culminates with a call to acknowledge the colonial legacy of the refugee regime, and bring about a ‘colonial turn’, arguing that colonialism, cannot and should not be viewed as a contained historical event. Colonialism shaped and affected both the coloniser and the colonised, and the othering that enabled colonialism, is still continuing and encompasses not only the colonial other, but the foreign other. For the thesis argues that to observe the refugee regime is to observe colonialism in action.

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## *Introduction*

*[Britain] was an alien and inimical country that did not conceal that it maintained its right of asylum for the sake of its own self respect, and not for the sake of those who sought it. Alexander Herzen, Russian refugee, (1852-1864)<sup>1</sup>*

*Something pushed them. I blame the Home Office. You are terrified they will come to the door. It is always in the morning that they come. For someone to commit suicide, they are choking, you know? They have reached a point where they can't take it anymore. How did these three people get to that stage?*

Tracey, Nigerian asylum seeker, Glasgow Red Road, (2010).<sup>2</sup>

### **Introducing the Serykh Family**

Russians, Serge and Tatiana Serykh, and their twenty-year old son, Stefan had been seeking asylum<sup>3</sup> since November 2007. Having received protection from the Canadian authorities but not citizenship or permanent residence, they travelled to London. Serge alleged that he was a Senior Russian Military Intelligence Officer and was seeking protection from his country due to his political views. Having been relocated to Glasgow's Red Road estate through the government's dispersal policy, they received confirmation on the 15<sup>th</sup> February 2010 that their claim for refuge had been deemed unfounded. The confirmation letter stated that although no deportation order had been given for them to leave the country, all financial and accommodation support was to be removed and they were requested to leave their accommodation at the Red Road flats by Sunday 7<sup>th</sup> March and seek assistance from the Scottish Refugee Council. Around 8:45am on Sunday 7<sup>th</sup> March, a concierge found the

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<sup>1</sup> Herzen, A. *My Past and Thoughts – The Memoirs of Alexander Herzen*, vol.III, (London: Chatto & Windus, 1968), p.1112.

<sup>2</sup> Tracey cited in Scott, K., Booth, R. and Harding, L. 'Red Road deaths: a tragedy of asylum, mental health and Russian intrigue', *The Guardian*, (Friday 12<sup>th</sup> March, 2010) <http://www.theguardian.com/uk/2010/mar/12/red-road-deaths-russian-asylum-seekers>, [accessed 18/03/2014].

<sup>3</sup> It should be noted, that throughout this thesis, I use the both the term 'asylum seeker' and 'refugee' interchangeably. The UN High Commissioner for Refugees *Convention and Protocol Relating to the Status of Refugees*, makes the distinction that a refugee is 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country'. Whereas, an asylum seeker is someone who has applied for refugee status and is waiting for their decision. Personally, there is no distinction between an asylum seeker or a refugee apart from in a technical sense to highlight someone who has not attained refugee status, and is still being processed. However, that is not to say that they are still not a refugee. Thus, within the parameters of this thesis, I do use the terms interchangeably as a way to challenge the rigidity of the labels defined by governments and the UNHCR that I see as not advancing the situation. UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, (Geneva: Media Relations and Public Information Service, 2006).

Serykh family at the bottom of the Red Road flats; they had jumped from their 15<sup>th</sup> floor balcony. To date, no enquiry has been carried out into the triple suicide of the Serykh family. With a history of psychological problems, along with their refusal of asylum, and then the stripping of their financial and accommodation support, the Serykh family were facing destitution on the streets of Glasgow. Having navigated the asylum system, why was suicide deemed the only option left for the Serykh family? Or more importantly, what kind of asylum system is in operation, when suicide is perceived as an option?

After the deaths of the Serykh family in March 2010, Harmit Athwal of the Institute of Race Relations documented a further five deaths, in 2010 alone, of individuals who were in the asylum system. But, according to her figures, between 2006-2010, there were a total of fifty-one deaths of asylum seekers in Britain.<sup>4</sup> This raises issues regarding the nature of the refugee system and questions regarding the relationship between the state and the asylum seeker. The figure of the asylum seeker has retained an insecure position for some time now. Since the 1980s, host states have been caught between positioning the asylum seeker as an economic threat to society and, at the same time, presenting the asylum seeker as a humanitarian figure in need of sanctuary. Host governments are open to providing hospitality, but under very precise terms and conditions, all the while being concerned that the asylum seeker is in fact abusing the generosity of the state. Indeed, in Britain since the 1980s, various policies have been introduced by the Conservative and New Labour governments, which have adopted the approach of deterrence as well as increased border controls in the quest to reduce the 'abuse' of the asylum system. The figure of the asylum seeker is on the back foot - they have to prove their worth as 'genuine' asylum seekers in order to attain refuge through various interviews with members of the government's border agency.

At the heart of the asylum process is the demand for an asylum narrative that speaks to issues of persecution and a 'well-founded fear'. Language is central in attaining refuge. For gaining refuge rests upon the telling of a story and having that story believed. Accordingly,

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<sup>4</sup> This figure includes deaths as an 'indirect consequence of the iniquities of the immigration/asylum system - by taking their own lives when claims were not allowed, by meeting accidental deaths evading deportation or during the deportation itself, by being prevented medical care, by becoming destitute in the UK... [or] died in prison custody, either being held for deportation or while awaiting trial or serving sentences for charges involving false documentation'. See: Athwal, H. '*Driven to Desperate Measures: 2006-2010*', Institute of Race Relations (2010), [http://www.irr.org.uk/pdf2/DtDM\\_2006\\_2010.pdf](http://www.irr.org.uk/pdf2/DtDM_2006_2010.pdf) [accessed 20/03/2013]. Athwal, H. Researcher at Institute of Race Relations, personal email correspondence, (March 2014).



language becomes one of the central barriers to attaining refugee status. The language in which the asylum applicant is required to recall the persecution is likely to influence the content, affect and organisation of the memory. This is massively important, for the asylum seeker is either speaking through a translator or in a second language, not their mother tongue. In having to make themselves heard by the host state, this raises various issues regarding the account being presented, for, as Peter Childs and Patrick Williams assert, ‘language is a major component of identity and representation’.<sup>5</sup> How is the asylum narrative changed by the host’s language? Jane Herlihy, Stuart Turner and Karen Jacobson note that this is a crucial question that ‘goes to the core of the assumption underpinning our current asylum process - that asylum seekers can be required to present a detailed, specific, description of an experienced event, in such a way that conforms with the norms of the host culture’.<sup>6</sup>

In this thesis, the focus is not upon the asylum seeker *per se*, but rather upon those who are doing the constructing, labelling and observing in the asylum system. This is based upon what I see as a discrepancy between the UN High Commissioner for Refugees *Convention and Protocol Relating to the Status of Refugees* (here on in referred to as the 1951 Convention) and the actual implementation of the convention. The emphasis is not upon the refugees - the minority others - as I feel they do not need to explain their behaviour. They are seeking an international right to asylum as laid out in Article 1.A(2) of the 1951 Convention.<sup>7</sup> They do not need to justify or provide a reason for their actions; they are seeking their international right to asylum. Instead, this thesis examines, from a postcolonial perspective, the ex-coloniser, by examining their position and behaviour in the refugee system. Sherene Razack makes the pertinent point that rather than focusing upon the other, the minority in society, people should focus their attention upon ‘the describers and imaginers whose gaze constructs asylum seekers from the third world’.<sup>8</sup> In the unequal relationship between the refugee and the host state, it is the state that is doing the labelling. The thesis examines how states, such as Britain, are observing and labelling the asylum seekers who are arriving, and

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<sup>5</sup> Childs, P. and Williams, P. *An Introduction to Post-Colonial Theory*, (Harlow: Pearson Education Limited, 1997), p.193.

<sup>6</sup> Herlihy, J., Jobson, L. and Turner, S. ‘Just Tell us What Happened to You’: Autobiographical Memory and Seeking Asylum’, *Applied Cognitive Psychology*, 26(2012): 661-676, p.669.

<sup>7</sup> UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, (Geneva: Media Relations and Public Information Service, 2006).

<sup>8</sup> Razack, S. *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (London: University of Toronto, 2008), p.88.

how this is impacting upon the asylum seekers, and shaping their experiences of the asylum system.

A core theme of the thesis is the impact of the colonial legacy of empire on the refugee regime. The thesis begins by engaging with postcolonial politics, specifically practices of language and silence, to examine the relationship of the state towards the refugee. It concludes by arguing for the acknowledgement of colonialism within the origins of the refugee regime. It is not only that ex-colonisers are operating in the refugee regime but that the institution itself is a colonial one - a history rarely acknowledged. Colonialism appears to have been silenced in the history of the United Nations High Commissioner for Refugees (UNHCR), with Glen Peterson arguing that this ‘aspect of the early UNHCR... seems so far to have escaped the attention of refugee scholars’<sup>9</sup> and Irial Glynn going as far as to say that historians have largely ignored the UNHCR as a whole.<sup>10</sup>

In sum then, the central focus of this thesis is an examination of the colonial legacies within the asylum system, focusing on the practices of language and silence and how colonial practices are continuing to frame, label and position the would-be refugee in particular ways.

### **The Structure of the Thesis**

As noted, the thesis begins by offering a postcolonial examination of the practices of language and silence in the refugee regime. It examines the various ways in which language and particularly silence have allowed various governments to control and retain their levels of self-determination in the refugee process. The thesis concludes with a call to acknowledge the colonial legacy of the refugee regime as a way to understand the behaviour of the host (ex-coloniser) state towards, not only the ex-colonial other, but the foreign other in general. The approach stems from a personal dissatisfaction with the refugee regime, with regard to what I see as discrepancies between the 1951 Convention and the actual implementation of the regime, which have resulted in various policies of detention, deterrence and deportation emerging over the past years. The thesis focuses on the role of language in the refugee

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<sup>9</sup> Peterson, G. ‘The Uneven Development of the International Refugee Regime in Postwar Asia: Evidence from China, Hong Kong and Indonesia’, *Journal of Refugee Studies*, 25(3)(2012):326-343, p. 327.

<sup>10</sup> Glynn, I. ‘The Genesis and Development of Article 1 of the 1951 Refugee Convention’, *Journal of Refugee Studies*, 25(1)(2011):134-148, p.135.

regime, and argues that language, in many ways, is a central feature of the refugee regime: from the international level, to the national level, and down to the personal level of the asylum interview. Both language and silence are integral parts of the refugee process, and this thesis, through a postcolonial framework, seeks to engage with the various ways in which they impact, particularly upon the asylum seeker, in a manner that could be viewed as detrimental to their asylum claim. For as Trinh Minh-ha writes, silence is often viewed in opposition to speech, but ‘silence as a will not to say or a will to unsay and as a language of its own has barely been explained’.<sup>11</sup>

In undertaking this research, the thesis adopts the following structure:

Chapter One of the thesis begins by examining the language that is embedded in the 1951 Convention, focusing particularly upon the language and understanding of the persecution criteria. The chapter draws upon archival material related to the creation of the 1951 Convention, the *travaux préparatoires*, as well as its predecessors, to identify how refuge and persecution were understood in the formation of an international refugee regime. The chapter examines the use and limitation of language in the 1951 Convention, highlighting the confusion and discrepancies in the international refugee regime, particularly surrounding the notion of persecution – a central concept of the 1951 Convention residing at Article 1 of the convention. I argue that the silences that I find in the 1951 Convention regarding the understanding of persecution criteria and refuge are built into the language of the refugee regime. It seems as though the criterion of persecution was never meant to be defined, for this allows states to engage with and enact the Convention individually, whilst adhering to the overall ethos of the regime. It allows for a level of state-control. Indeed, the language and the use of silence in the 1951 Convention have allowed for various divergent interpretations of meaning to emerge, which can be altered and changed to suit the needs of the state, and the refugee problem at hand. In this regard, I follow Eduardo Arboleda and Ian Hoy’s position, in which they state that ‘ironically, the humanitarian spirit behind the adoption of a term as flexible as persecution has been distorted by a narrow interpretation, made possible by that same self-flexibility’.<sup>12</sup> For the flexibility of the 1951 definition has allowed for a restrictive definition to emerge, which has resulted in a discrepancy between the protection being

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<sup>11</sup> Minh-Ha, T. ‘not you/like you: Postcolonial women and the interlocking questions of identity and difference’, in McClintock, A., Mufti, A. and Shohat, E. *Dangerous Liaisons: gender, nations, and postcolonial perspectives*, (London: University of Minnesota Press, 1997), pp.415-419, p.416.

<sup>12</sup> Arboleda, E. and Hoy, I. ‘The Convention Refugee Definition in the West: Disharmony of Interpretation and Application’, *International Journal of Refugee Law*, 5(1)(1993):66-90, p.66.

offered and the protection that is ultimately provided. The chapter seeks to highlight the strategic use of silence in language, as well as the discord surrounding the understanding of persecution. For, there appear to be assumptions as to what persecution equates to, yet no set definition. But, considering that this concept resides at the heart of the 1951 Convention, it is surprising how little discussion there is on the subject.

Due to the apparent gaps in the 1951 Convention, and with the convention failing in certain regards to meet the demands of contemporary refugee flows, there have emerged in the years since, various regional regimes that have sought to remedy the silences of Geneva. However, what is so interesting with regard to these regional refugee regimes is that they in turn highlight the difficulty of establishing an adequate regime. But, importantly, they draw attention through their use of language and broad definitions to the paucity of the 1951 Convention's understanding of refuge. Accordingly, Chapter Two of this thesis engages with filling the gaps in the Geneva Convention, by drawing upon the language employed beyond Europe. The chapter frames the refugee convention in an international arena and scrutinises the convention by drawing upon regional refugee regimes in order to highlight the various ways in which language and silence are utilised, as well as pointing to gaps inherent in the convention. By focusing specifically on the practices of language and silence, it allows the reader to peel back the layers of the refugee regime and examine how these practices have allowed states to maintain control and power, at the expense of refugees. By utilising postcolonial politics, the chapter argues that we should challenge the structures and regimes around us, re-engage and re-evaluate power structures and identities, and critically examine organisations such as the UNHCR. Chapter Two engages specifically with the regional refugee regimes of the Organisation of African Union (1969), Cartagena Declaration (1980), and the Bangkok Principles (1966/2001). By looking beyond Geneva, I find the language of refuge and persecution becomes more inclusive, having undergone a transformation into a more developed and broader concept. In comparison, the 1951 Convention appears stunted, restrictive, silent and inflexible to developments and changes, and raises the question, representation and protection for whom? At the core of this chapter is an analysis of how we can learn from regional refugee regimes. They shed light upon regional understandings of refuge, which Jane McAdams refers to as 'complimentary protections',<sup>13</sup> and have sought to challenge, broaden and disrupt the traditional Eurocentric understanding of refugee language.

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<sup>13</sup> McAdams, J. *Complimentary Protection in International Law*, (Oxford: Oxford University Press, 2007).

The regional regimes show an awareness of change, refugee flows and the need for flexibility. I argue that it would be beneficial not to view them as regional regimes, but instead as complimentary protection regimes that sit compatibly with the 1951 Convention. There is still a need for the 1951 Convention, but it is rigid and silent on many factors. By drawing upon regional regimes, we can create a more pragmatic approach to refuge that engages with the silences in language of the 1951 Convention.

Chapter Three brings the engagement of the thesis down to the state level with a focus upon the British asylum process. This focus is not so much on the policies per se, but on how those policies have framed the figure of the asylum seeker through the use of language, silence and binaries. Again the chapter engages with the discrepancy between the 1951 Convention and the protection offered. In this chapter, I argue that the government has not silenced asylum seekers through its policies, but that their positioning through the system and language of the policies directed at them has ultimately marginalised them. The chapter builds on E. Odhiambo-Abuya's assertion that the issues with the international refugee regime can be viewed as a new 'kind of western colonialism' whereby colonial practices manifest themselves in a 'western vision of international refugee law, which is predicated on ideas and structures that work in the interests of western nations and against the interests of the developing world and refugees'.<sup>14</sup> In undertaking this analysis, the chapter employs postcolonial politics, engaging with various practices of language, labelling and binaries to highlight how government policies have effectively marginalised and silenced the would-be refugee. It begins by examining the construction of a genuine asylum seeker by drawing upon archival material of parliamentary and House of Lords debates to present the various ways in which, through language, governments have sought to present an idealised notion of what the genuine asylum seeker should be. This analysis highlights how unequal relations of power, demonisation and marginalisation have emerged in the language of refuge that effectively silence potential refugees. The chapter continues with the focus on language, engaging with the various ways in which language, labelling and binaries have enabled various governments to position the asylum seeker in a politics of inclusion or exclusion. The chapter finishes by engaging with Jacques Derrida's notion of hospitality and examining how various British governments have been open to providing hospitality for the asylum seeker, but under specific circumstances, all the while being worried that the asylum seeker is abusing its

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<sup>14</sup> Odhiambo-Abuya, E. 'A Critical Analysis of Liberalism and Postcolonial Theory in the Context of Refugee Protection', *The King's College Law Journal*, 16(2005):263-291, p.264

hospitality.<sup>15</sup>

The focus of Chapter Four is upon the impact of language in the frontline process of the British asylum system. The chapter continues the focus on the British asylum system, but deepens the discussion by examining the significance of language, speech and silence in the process of ‘becoming’ a refugee. By centring the discussion upon the British system, and specifically on female asylum seekers with rape narratives, the chapter engages with the various potential psychological and structural barriers (for example shame, silence, trust and the culture of disbelief) that asylum seekers must confront when trying to speak of their persecution. The main thrust of this chapter, which is again grounded in postcolonial politics, is to examine the significance of language and silence in the process of seeking refuge in Britain. Gaining refuge rests upon the telling of a story and having that story believed. Language, consequently, is central to the process of asylum, but it also becomes one of the central barriers to attaining refugee status. Consequently, the chapter develops upon the material covered in Chapter Three and the focus on the idealised ‘genuine’ asylum seeker. The asylum seeker must be able to overcome trauma, wrestle with memory, shame and silence and be able to speak articulately and coherently of the event, in a timely manner whilst battling the suspicions of the British border agency. The asylum seeker needs to speak of unspeakable events, normally in a hostile environment, with little or no evidence, and in turn, have that story believed. Moreover, the asylum seeker needs to speak the language of the host state (the coloniser) in order to be heard - in what Jacques Derrida refers to as the first abuse of hospitality.<sup>16</sup> The chapter highlights the denial of victimhood as well as the uneven power relations at play in the asylum process and the various ways in which they manifest and silence the asylum seeker. The analysis in Chapter Four highlights the continuing disconnection between the 1951 Convention and the protection offered, and presents the various barriers to achieving refugee status, both within the asylum system, and within the personal nature of what constitutes a refugee.

Chapter Five provides a reflective examination of the process of becoming a refugee and engages at another level with the significance of language and silence in the refugee process. By drawing the thesis beyond Britain, and turning towards how one becomes a refugee in an

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<sup>15</sup> Derrida, J. *Of Hospitality. Anne Dufourmantelle invites Jacques Derrida to respond*, (California: Stanford Press, 2000).

<sup>16</sup> Derrida, J. *Of Hospitality*, p.15.

African, specifically Kenyan context, the chapter presents an alternative that allows us to engage thoughtfully with how we understand the notion of refuge. Importantly, the chapter continues to highlight the position of the other and the unequal power relationships at play in the refugee regime. In this chapter the analysis reveals how the individual is lost in the process of ‘becoming’ a refugee, and is consumed in the larger movement of people and the crisis. The chapter again employs a postcolonial framework and builds specifically on the concepts of Lisa Malkki’s clinical humanitarianism,<sup>17</sup> Arturo Escobar’s bureaucratisation of knowledge<sup>18</sup> and Rony Brauman’s humanitarian spaces.<sup>19</sup> The chapter analyses how the individual refugee story is silenced and how the voice that emerges out of the crisis emanates from the aid organisations themselves. Through their discourse of emergency, they construct a generalised victim, to whom they are to provide assistance. The refugees become involved in a top down process of action whereby they are the object to the aid agencies’ subjectivity. In this chapter the focus is on the possession of language, and I argue that both refugee and the aid organisations can speak, but only the aid agencies have the privilege of being listened to. This creates an unequal relationship of ‘us’ and ‘them’ / ‘I’ and ‘we’ that results in the silencing of the refugee - they are silenced but not silent. As noted, Chapter Five is intended as a reflective analysis, to invert the positions presented in Chapters Three and Four, and instead examine how the refugee has been constructed from an alternative perspective. Specifically, I want to focus upon the significance of language, speech, and the silence in another refugee regime, to highlight the centrality of these practices within the refugee process, as a whole.

The final chapter re-orientates the discussion back onto colonialism, and responds to Razack’s call to turn our gaze upon those who are doing the describing and the imagining, ‘whose gaze constructs asylum seekers from the Third World’.<sup>20</sup> With analysis drawing on postcolonial politics, the thesis has been able to identify and examine the various unequal relations of power that have been happening in the refugee regime, resulting in the marginalisation and objectification of the refugee. However, the thrust of Chapter Six is to

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<sup>17</sup> Malkki, L. ‘Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization’, *Cultural Anthropology*, 11(3)(1996):377-404.

<sup>18</sup> Escobar, A. *Encountering Development. The Making and Unmaking of the Third World*, (New Jersey: Princeton University Press, 1995).

<sup>19</sup> Tennant, V., Doyle, B. and Mazou, R. ‘*Safeguarding Humanitarian Spaces: Review of Key Challenges for UNHCR*’, UN High Commissioner for Refugees, Evaluation and Policy Analysis Unit, Working Paper, (February 2010), PDES/2010.01, <http://www.unhcr.org/4b68042d9.html>, [accessed 1/08/2013].

<sup>20</sup> Razack, S. *Looking White People in the Eye*, p.88.

examine the host state as ex-coloniser, re-examining their colonial heritage in order to reflect on their behaviour and practices of power in the refugee regime towards the refugee. Chapter Six turns to engage with the subject within this relationship, rather than the traditional focus upon the refugee object. The chapter begins by focusing on the origins of the UNHCR as a colonial institution, examining the developments in establishing the refugee regime and then framing the analysis within an era of colonialism; it provides a history of the institution that is so often overlooked and silenced in favour of histories that locate it in the Second World War or the Cold War. The chapter then addresses the figure of the ex-coloniser to discuss how the process of colonialism has impacted and shaped not only the colonised, but also the coloniser. In doing so, the chapter employs the work of Aimé Césaire,<sup>21</sup> Ashis Nandy<sup>22</sup> and Edward Said<sup>23</sup> to investigate the impact and degenerative nature of colonialism upon the coloniser. The chapter argues that the legacy of colonialism and the mentality towards the other is still manifest, particularly within the refugee regime, where the ex-coloniser comes into direct contact with the colonial other. I argue that introducing a ‘colonial turn’ regarding the refugee regime alongside an analysis based on postcolonial politics, allows for a long term engagement with the refugee regime, from its origins in a colonial era through to the continuation of colonial practices of othering towards the would-be refugee.

### **Approach**

A postcolonial approach is highly appropriate for an analysis of the refugee regime, a regime that emerged in the post-Second World War era, when colonialism was still engaged by numerous states such as Britain. Much of the literature regarding the UNHCR, the refugee regime, and the British asylum system fails to reflect upon the consequences of colonialism. Certainly, central works such as Gil Loescher’s *The UNHCR and World Politics* and James Hathaway’s *The Law of Refugee Status* focus upon the ‘ideology-charged atmosphere’ of the Cold War that surrounded the birth of the UNHCR, arguing that this spirit ‘dominated the thinking of the Western States that prepared the Convention’.<sup>24</sup> Louise Holborn also asserts, in her *Refugees: A Problem for Our Time*, that the developing tensions between the East and

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<sup>21</sup> Césaire, A. *Discourse on Colonialism*, (New York: Monthly Review Press, 2000).

<sup>22</sup> Nandy, A. *The Intimate Enemy: Loss and Recovery of Self Under Colonialism*, (Oxford: Oxford University Press, 2005).

<sup>23</sup> Said, E. *Orientalism*, (London: Penguin Books, 2003).

<sup>24</sup> Hathaway, J. C. *The Law of Refugee Status*, (London: Butterworths, 1991), p.100.



the West were a major political issue when establishing the UNHCR.<sup>25</sup> However, I find these arguments fail to convey or identify the political issues of colonialism that were still present in the years after the Second World War. There is a growing body of historical literature that is reflecting on what Michael Rothberg terms a ‘colonial turn’,<sup>26</sup> and many works such as those of Samuel Moyn, Mark Mazower, Makua Matua and Jordanna Bailkin draw out the complexities and fluidity of colonialism in the postcolonial era.<sup>27</sup> However, these texts neither focus specifically on the ex-coloniser, nor engage with the refugee regime. Indeed, there has been a failure of refugee literature to address the colonial legacy of the refugee regime. In many of the refugee texts cited above, there is a silence surrounding the relations between colonialism and the emerging refugee regime that is pervasive. And, whilst there is a wealth of literature engaging with postcolonialism and refugees, such as the work by B.S. Chimni, Jennifer Hyndman, Barbra Harrell-Bond, and E. Odhiambo-Abuya, which engages with the notion of colonialism and postcolonialism, their analysis is directed to experiences of refuge outside Europe and does not address the relationship between colonialism and the UNHCR, or between colonialism and the ex-coloniser as host.<sup>28</sup>

Thus, I find that there is a significant gap, or what I prefer to term a silence, surrounding the engagement with colonialism. For, as George Craddock, MP for Spelthorne argued in a 1950s House of Commons debate on colonial affairs, ‘the Colonial Empire... is one of the most important problems of British administration today.’<sup>29</sup> This was surely the case for states such as France, Portugal, Belgium, the Netherlands and Denmark in the Post-War period, states which at the time still retained large swathes of their own empires. Yet

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<sup>25</sup> Holborn, L. *Refugees: A Problem of our Time. The Work of the United Nations High Commissioner for Refugees 1951-1972*, vol. I, (New Jersey: The Scarecrow Press, 1975), p.57.

<sup>26</sup> Rothberg, M. *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization*, (Stanford: Stanford University Press, 2009).

<sup>27</sup> Moyn, S. *The Last Utopia: Human Rights in History*, (London: Harvard University Press, 2010); Mazower, M. *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations*, (Oxford: Princeton University Press, 2009); Mutua, M. ‘Savages, Victims and Saviours: The Metaphor of Human Rights’, *Harvard International Law Journal*, 42(10)(2001):201-245; and Bailkin, J. *The AfterLife of Empire*, (London: University of California Press, 2012), p.1.

<sup>28</sup> See: Chimni, B. S. ‘The Geopolitics of Refugee Studies: A View from the South’, *Journal of Refugee Studies*, 11(4)(1998):350-374; Hyndman, J. *Managing Displacement, Refugees and the Politics of Humanitarianism*, (London: University of Minnesota Press, 2000); Zolberg, A., Suhrke, A. and Aguayo, S. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, (Oxford: Oxford University Press, 1989); Betts, A., Loescher, G. and Milner, J. *UNHCR: The Politics and Practice of Refugee Protection*, (Oxon: Routledge, 2008); and Soguk, N. *States and Strangers. Refugee and Displacement of Statecraft*, (London: University of Minnesota Press, 1999), p.198.

<sup>29</sup> Craddock, G. B. MP. Hansards, House of Commons Debate, Colonial Affairs, 12 July 1950, vol.477. col 1430-91. Col.1437 [http://hansard.millbanksystems.com/commons/1950/jul/12/colonial-affairs-1#S5CV0477P0\\_19500712\\_HOC\\_434](http://hansard.millbanksystems.com/commons/1950/jul/12/colonial-affairs-1#S5CV0477P0_19500712_HOC_434) [accessed 27/03/2014].

colonialism has almost been removed from the official history of the UNHCR, with the central focus being instead on the post-war or Cold War, which Chimni argues was connected to the domination of contentious politics surrounding the era.<sup>30</sup>

My thesis contributes to the ‘imperial turn’ or ‘colonial turn’ literature, where, as Antoinette Burton notes the ‘attention to the impact of histories of imperialism on metropolitan societies in the wake of decolonization... provoked not a turn towards empire so much as a critical return to connections between metropole and colony, race and nation’.<sup>31</sup> Postcolonialism as Ato Quayson writes ‘is as much about conditions under imperialism and colonialism proper as about conditions coming after the historical end of colonialism’.<sup>32</sup> The theory engages with strategies of colonialism that were pervasive during, throughout and beyond the colonial period. Postcolonialism is a particularly relevant theoretical position to adopt for this research, as it ‘engages with the cultural history of colonialism’ in what Robert Young refers to as ‘making connections between that past and the politics of the present’.<sup>33</sup> Or rather, as Jordanna Bailkin writes, ‘how imperial missions were sustained or revamped by new actors in new forms... the ways in which the empire continued to be lived’.<sup>34</sup> This is why I find the work of Razack so pertinent to this issue, for she addresses the need to reflect critically upon those who are shaping the asylum process. She argues that when reflecting on our position, especially in the refugee regime:

We need to examine how we explain to ourselves the social hierarchies that surround us. We need to ask: Where am I in this picture? Am I positioning myself as a saviour of less fortunate people? As the progressive one? As more subordinated? As innocent? These are moves of superiority and we need to reach beyond them... Accountability begins with tracing relations of privilege and penalty. It cannot proceed unless we examine our complicity.<sup>35</sup>

Razack’s call provides the foundation for this research’s approach to refuge and its focus on the governments and institutions who are framing the refugee in such a way that incidents such that of the Serykh family become an occurrence. Razack’s work aims at averting ‘the

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<sup>30</sup> Chimni, B. S. ‘The Geopolitics of Refugee Studies’ and Chimni, B. S. ‘The Birth of a Discipline: From Refugee to Forced Migration Studies’, *Journal of Refugee Studies*, 22(1)(1999):11-29.

<sup>31</sup> Burton, A. ‘Introduction: On the Inadequacy and Indispensability of the Nation’ in Burton, A. *After the Imperial Turn: Thinking with and through the Nation*, (North Carolina: Duke University Press, 2006), pp.1-23, p.3.

<sup>32</sup> Quayson, A. *Postcolonialism: Theory, Practice or Process?*, (Cambridge: Polity Press, 2000), p.2.

<sup>33</sup> Young, R. *Postcolonialism: Historical Introduction*, (Oxford: Blackwell Publishing, 2003), p.7

<sup>34</sup> Bailkin, J. *The AfterLife of Empire*, (London: University of California Press, 2012), p.1.

<sup>35</sup> Razack, S. *Looking White People in the Eye*, p.170.

critical gaze from the racial object to the racial subject; from the described and imagined to the describers and imaginers; from the serving to the served'.<sup>36</sup> As Quayson asserts:

the point is that postcolonialism must be seen as a project to correct imbalances in the world, and not merely to do with specific 'postcolonial' constituencies. The justification for postcolonialism and postcolonializing must not be sought solely in the explicit forms of injustice that are often thought to be visited upon the hapless and the oppressed in and from formerly colonized societies.<sup>37</sup>

Analysing language within the asylum system, or within the asylum process, allows the complexities of language and postcolonialism to emerge, with power relations emerging that would be marginalised if they were not viewed through the lens of postcolonialism. As Childs and Williams assert, language is significant due to its 'colonial and "racial" fixings'. They argue that 'the dominance of English, and the other colonial languages, in itself, is one of the clearest examples of the way in which imperialism, both European and American, has created a postcolonial divide'.<sup>38</sup> Language in this sense provides a means for engaging with the power relations at play between the host state and the asylum seeker. Within the asylum system, the asylum seeker must speak and be heard, but in what language is she to speak, or be heard? For language is convoluted, and connected to identity and memory. In this regard, Trinh Minh-Ha warns us that to be cut off from one's own mother tongue, as happens within the asylum system, 'is to learn how to be silent and to speak again, differently'.<sup>39</sup> To speak in the host language is 'to call forth a problem of identity' that Simon During argues throws the individual 'into mimicry and ambivalence' in relations to the host state.<sup>40</sup> Through the frame of postcolonial politics this thesis analyses the practices of language and silence and the various ways in which they manifest and can be used within the refugee regime, in order to examine the construction and creation of idealised notions of what a 'genuine' asylum seeker should, or should not be. In this regard, language is central for viewing the framing of international conventions and regimes. It is possible to examine, as Homi Bhabha notes, the 'productive tensions of the perplexity of language'.<sup>41</sup> Importantly, when examining silence, I view the practice as strategic, either when viewed within the 1951 Convention, or when being discussed in relation to the refugee narrative. Silence is strategic: either through its use, or

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<sup>36</sup> Razack, S. *Looking White People in the Eye*, p.88.

<sup>37</sup> Quayson, A. *Postcolonialism*, p.11-12.

<sup>38</sup> Childs, P. and Williams, P. *An Introduction to Post-Colonial Theory*, p.193.

<sup>39</sup> Minh-Ha, T. 'Other than myself/my other self', in Robertson, G., Mash, M., Tickner, T., Bird, J., Curtis, B., and Putman, T. *Traveller's tales: Narratives of home and displacement*, (London: Routledge, 1994), pp.8-26, p.10.

<sup>40</sup> During, S. 'Postmodernism and post-colonialism today?', *Textual Practice*, 1(1)(1987):32-47, p.43.

<sup>41</sup> Bhabha, H. K. *The Location of Culture*, (London: Routledge, 1994), p.178.

through its enforcement.<sup>42</sup> However, the thesis also draws upon various forms of silence throughout the refugee process, such as passive silence, or else the process of silencing, whereby the individual is unable to articulate or form a coherent narrative due to traumatic memories, or else where the individual, though they can speak, has been silenced due to more dominant actors. Thus, as well as language, the thesis aims to engage with the different forms of silence/silencing in order to highlight how this practice positions the asylum seeker, and benefits the state.

In undertaking this analysis I have adopted an eclectic methodological approach. The methods applied are diverse. Drawing upon these various approaches has allowed for a depth of analysis to emerge and an assortment of empirical material to be drawn on and woven together throughout the thesis, providing distinct yet nuanced engagements with the material. The two main approaches utilised are archival analysis and interviews, as well as document analysis of a wide range of sources. The archival work covered the United Nations High Commissioner for Refugee archives based in Geneva, Switzerland; The National Archives in Kew, London; Hansard parliamentary debates; and the UNHCR's online archival tool, RefWorld. The UNHCR Archives, The National Archives and Ref World, provided the basis for the research in Chapter One specifically, with Ref World providing a wealth of material for the thesis as a whole. When utilising Hansard, I engaged with debates from the House of Commons and the House of Lords and much of the information gathered provides the empirical material for Chapter Three.

The thesis draws on twenty-one semi-structured interviews I conducted, which feed into Chapters Three, Five, and specifically Chapter Four. Conducted over an eighteen month period, the interviewees cover a range of occupations such as refugee community members, researchers, UNHCR staff, lawyers, translators, and members and ex-members of Parliament. Most of the interviews were conducted in person, with a few near the end of the thesis taking place over Skype or by telephone due to time constraints with travel. On average, the interviews were 1-2 hours in length.

My approach to the interviews followed what John Van Maanen and Deborah Kolb refer to as '... not a matter to be taken lightly but one that involves some combination of strategic

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<sup>42</sup> Maryns, K. cited at Translation and Asylum Claims: Matters of Law, Language and Silence. Workshop 3: Miscommunication and Silence: Problems and Potential Solutions, 14<sup>th</sup> June 2013, University of Glasgow.

planning, hard work and dumb luck'.<sup>43</sup> Although I was able to conduct twenty-one interviews, the refugee voice is noticeably absent from the research. I was only able to secure one interview with someone who had personal experience of the asylum system. In this regard, my work faces the dilemma that Gayatri Spivak writes about with regard to engaging with the subaltern refugee. I was unable to hear them and engage in a reciprocal dialogue with them.<sup>44</sup> As I developed the research, and realised that I was not going to be able to access some of the people that I had originally wanted to speak to, I developed a secondary means of making sure that the refugee voice entered into my research. I began to draw upon alternative, non-traditional sources, such as novels, stories and poetry written by refugees themselves, which allowed their voice to filter through. In particular, the Testimony Project, an online portal that provides a space for refugee women to speak and have their voices heard, was a major source of information and inspiration for the thesis.<sup>45</sup>

In sum, the thesis utilised an analytical approach based on postcolonial politics, focusing on practices such as language, silence, labelling and binaries in order to examine the relationship between the state and the asylum seeker. In so doing, the methodological approach adopted in the thesis is a mix of methods that allows for various layers of analysis and discussion to emerge in relation to the asylum system.

## Conclusions

At the heart of the thesis is my personal dissatisfaction with a refugee regime, where events such as the suicide of the Serykh family, whilst not the norm, are now not unheard of. A tragedy such as this raises important questions as to what kind of asylum system is operating. Accordingly, the central focus of this thesis is on examining the colonial legacy within the international refugee system, centring specifically on how practices of language and silences have been effectively worked to marginalise the refugee. The language, and what I find are silences within the 1951 Convention, appear to transform into contemptuous and marginalising practices at the state level. There appears to be an apparent disjuncture between international refugee law and the protection that is meant to come from it, resulting

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<sup>43</sup> Van Maanen, J. and Kolb, D. cited in Bryman, A. *Social Research Methods, Third Editions*, (Oxford: Oxford University Press, 2008), p.405.

<sup>44</sup> Spivak, G. C. 'Can the Subaltern Speak?' in Williams, P. and Chrisman, K. L. *Colonial Discourse and Post-Colonial Theory; A Reader*, (New York: Harvester, 1994), pp.66-111, p.104.

<sup>45</sup> *The Testimony Project*, <http://www.testimonyproject.org/aboutus>, [accessed 14/05/2014].

in the silencing and marginalisation of potential would-be refugees.

The thesis highlights the importance and necessity of engaging, not only with postcolonial politics, but also with colonialism itself and its history. The thesis analyses with the international refugee regime and the disjuncture between the regime and the protection offered, focusing on the various ways in which language and silence control and determine the refugee regime in the state's benefit. In using postcolonial politics the thesis employs various concepts, such as language, silence, speech, labelling, binaries and hospitality in order to understand the disjuncture between the 1951 Convention and the protection that is offered by states. Through these tools, the thesis presents the various ways in which a colonial politics of power, labelling and marginalisation are occurring within a system that is supposedly built to protect the refugee. States have been able to retain a high degree of self-determination whilst adhering to their international responsibility. However, postcolonial politics can only explain so much. By introducing colonialism into the discussion, I propose that the contemporary international refugee system can be viewed as bearing the traces of colonialism that are still manifest in its practices towards the colonial other.

The thesis argues that the colonial legacy has left a mentality regarding how the colonial state engages with, not only the colonial other, but also the non-colonised other. Colonialism is not merely bound by the relationship of the coloniser/colonised, but shapes how the (ex)coloniser engages with the foreign other. This is the legacy of colonialism and one which, I argue, needs to be considered when we are engaging with the refugee regime. Colonialism should not be bracketed and viewed as a contained historical event, but rather as a process: we are still able to witness the politics and practices of colonialism taking place. Thus, I hope that this research's contribution is to highlight the necessity for a 'colonial turn' as well as to reveal the impact and extent of colonialism within the refugee regime.

# Chapter One

## *The Use of Language and Silence in the 1951 Refugee Convention*

### **Introduction**

December 14<sup>th</sup> 1949 saw the establishment of the Office of the United Nations High Commissioner for Refugees (UNHCR). Created by the United Nations General Assembly with a three year mandate that was introduced in December 1950, the UNHCR was tasked with handling the refugee crisis in the wake of the Second World War.<sup>1</sup> Established as a ‘humanitarian and social’ non-political organisation’,<sup>2</sup> its purpose was to promote international instruments for the protection of refugees, and supervise their application.<sup>3</sup> The UNHCR through its mandate has been involved with some 47 million people of concern to-date, including refugees, stateless people and returnees, as well as the mammoth internally displaced population; it operates with a budget of US\$4.3 billion (2012 annual figure).<sup>4</sup>

However, it was with the establishment of The Convention Relating to the Status of Refugees in July 1951 (here on referred to as the 1951 Convention), that the international refugee regime was born. Through the 1951 Convention the signatory states ‘undertook to cooperate with the Office of UNHCR in the exercise of its functions and, in particular, to facilitate its specific duty of supervising the application of the provisions of these instruments’.<sup>5</sup> At the heart of the Convention resides the definitional understanding of what constitutes a refugee. The 1951 Convention defines who is, or is not, a refugee and thus, determines who will receive the various

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<sup>1</sup> UN High Commissioner for Refugees. *About*, <http://www.unhcr.org/pages/49c3646cbc.html>, [accessed 31/03/2014].

<sup>2</sup> UN High Commissioner for Refugees. *Statute of the Office of the United Nations High Commissioner for Refugees*, (Geneva: Media Relations and Public Information Service, 2005), p.4.

<sup>3</sup> UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, p.7.

<sup>4</sup> UN High Commissioner for Refugees. *History of UNHCR*, <http://www.unhcr.org/pages/49c3646cbc.html> [accessed 31/03/2014].

<sup>5</sup> UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, p.7.

entitlements preserved within the Convention. The Convention definition states that protection is reserved only for those who have left their country of origin. Accordingly, an individual deciding to cross an international border undergoes a transformation into an ‘object of concern’ under international refugee law, for that individual is missing or has been denied protection in their country of origin and is in need of alternative sources of protection.<sup>6</sup> Attainment of refugee status then allows individuals who have fled their country to attain sanctuary and the possibility of establishing a new life within their host country. To understand the 1951 Convention then, is to understand the nature of the refugee system, and understand to an extent those individuals who are seeking refuge within states. Only by understanding the 1951 Convention and the definitions of refuge and persecution is it possible to apprehend how the Convention has been wielded by states. It should be noted that since the founding of the UNHCR in 1950, the refugee situation has not abated and if anything, the situation for refugees globally is as perilous as ever.

The thrust of my thesis is to examine the various ways in which language, and particularly silence, have enabled various host states to manage, control and retain levels of self-determination within the refugee process. This is based on what I perceive as a discrepancy between the 1951 Convention and the actual implementation of the refugee regime. The thesis adopts a postcolonial approach to identify practices of power and subjugation in the refugee regime and identify the ways in which this has impacted on the framing of the refugee. Firstly though, it is essential to scale the research back to the UNHCR itself, particularly the 1951 Convention, to which the host states are signatory. This chapter examines the legal history of the establishment of the Convention, and analyses the discussions and debates surrounding the definition of what it means to be a refugee. By undertaking this approach, the chapter undertakes a broad critical analysis to develop an understanding of the criteria.

Before proceeding further though, it would be beneficial to lay out my understanding of the state, for the following discussion. When referring to the host state, I am speaking of the state as not a unitary actor. It is not *a* state but *the* state, with various process and practices, organisations and institutions operating together to create ‘the state’. Whilst I do not fully follow Roxanne

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<sup>6</sup> Helton, A. ‘What is a Refugee?’ in Steiner, N., Gibney, M. and Loescher, G. *Problems of Protection: The UNHCR, Refugees, and Human Rights*, (London: Routledge, 2003), pp.19-36, p.20.



Doty's discussion on viewing 'the state' as purely function on desire alone, I do view the state as '...not unitary. It is not rational. It is not an actor. It is not even a concrete thing. The state is ... manifested in practices of statecraft'<sup>7</sup>- and it is here where I identify where the state interests lie- within these practices and processes of the state. Hence, for the purposes of Britain for example, examining the state would include engaging with the Government, Parliament, as well as departments such as the Home Office and the border agencies- various processes and practices that work together within the framework of *a* state, to create *the* state.

In conducting this analysis, the chapter engages with how persecution is defined within the 1951 Convention, focusing on the practices of language as well as silences of the criteria. To do this, the analysis will draw upon the *travaux préparatoires*, official documents and records relating to the foundation of the UNHCR, in order to examine the discussions and debates surrounding the meaning and intention of persecution and refuge in the 1951 Convention. Through this examination, the complexities and silences surrounding the language of persecution will become apparent. In developing an understanding of the language of persecution, the chapter will provide a brief, but concise, engagement with the predecessor agencies of the UNHCR. Established by the UN but as independent, temporary organisations to handle all types of refugees, during, and in the wake of, the Second World War, the International Refugee Organisation and the Inter-Governmental Committee on Refugees provided the foundations for what would become the UNHCR in its current form, as well as the language of persecution. In examining these organisations, the chapter will engage with the discussions surrounding the development of the persecution criteria, as well as the political environments in which they were operating. In covering the historical roots of the 1951 Convention, and focusing upon the predominance of the Holocaust and the Cold War on the emerging refugee regime, the chapter examines how persecution has developed, and been perceived in international refugee law and highlights how the language of persecution was intended to be understood during the 1940s. Significantly, through its absence, chapter one will note the silence surrounding colonialism; for discussions of the political environment (and subsequent perception) has focused on the Second World War and the growing tensions between the West and the East. The fact that states such as

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<sup>7</sup> Doty, R. L. *Anti-Immigration in Western Democracies: Statecraft, desire and the politics of exclusion*, (London: Routledge, 2003), p.12.

Britain, France and Portugal for example, were still in full possession of their colonies during the drafting of the 1951 Convention, appears to be glaringly absent from the histories of the 1951 Convention and the UNHCR itself.

In seeking to understand the language of refuge, the chapter will then present an examination of the language of persecution beyond the 1951 Convention by examining alternative legalistic and scholarly sources in order to paint a broader picture of persecution. In undertaking this analysis, the chapter offers a breakdown of the legal and scholarly engagement with persecution, and illuminates the various criticisms and appreciations, as well complications that have arisen over the sixty years since the Convention was created. Crucially, it highlights the various ways in which persecution can be interpreted, and significantly, incoherently understood, highlighting the gaps and silences that states and scholars have sought to rectify through their own analysis.

Overall, chapter one seeks to engage with the concept of refuge and dissect the language surrounding the notion of what it means to be a refugee through an analysis of historical, legal and scholarly approaches. The chapter engages with the limitations of the language within the 1951 Convention as well as the strategic silence that is in-built to the Convention that have allowed states a degree of flexibility regarding the refugee. Accordingly, the thesis sheds light upon the importance, yet extreme confusion and silence that surrounds a central feature of international refugee law. For although the Refugee Convention has celebrated its sixty year anniversary, the idea and conceptual understanding and language of persecution is still fraught with confusion, discrepancy and silence which I argue creates a disjuncture between the 1951 Convention and the actual implementation of the refugee regime. Although the thesis is adopting a postcolonial approach to understanding the refugee regime, the purposes of this chapter are to set out and identify the legal understanding of refuge and to identify the issues that reside within the Convention. Once this has been done, then the thesis can progress further and address the postcolonial politics residing in the refugee regime.

### **The Origins of Persecution**

The 1951 Convention was established at the Conference of Plenipotentiaries on the Drafting of

the Convention Relating to the Status of Refugees between 2<sup>nd</sup> - 25<sup>th</sup> July, in Geneva. It was during this conference that the various definitions, articles and chapters of the Convention were created. At the time of the drafting, the UN was conscious that the convention would put a heavy burden upon states; however, in order to solve the problems of refugees, a new era of international responsibility and cooperation was seen to be required.<sup>8</sup> Speaking at the closing ceremony, the president of the Conference, Mr Knud Larson, remarked to the delegates:

we have not kept our eyes on the stars, and so created a sort of high-flown system which could not be translated into reality. On the other hand, we have not been too eager to consider only the interests of states... we have not satisfied all the desires and wishes of the refugees themselves... But I think we have none the less established a fairly good legal standard and legal status for these refugees, which might become a leading factor in international collaboration.<sup>9</sup>

These sentiments were shared by the newly appointed High Commissioner for Refugees, Dr Gerrit Jan van Heuven Goedhart, who asserted that the ‘the work of bringing this Convention into being has been long... The results are not as generous for the refugee as some hoped’; but the 1951 Convention was on the whole a clear advancement in the provision of the human rights regime.<sup>10</sup> Indeed, as one delegate noted:

The conference was about to adopt a legal definition of the term “refugee”. But in the course of the work it had so far completed it had by inference so defined that term that truth and justice demanded that the general impression thus created should be rectified... Its decisions had at times given the impression that it was a conference for the protection of helpless sovereign states against the wicked refugee. The draft Convention had at times been in danger of appearing to the refugee like the menu at an expensive restaurant, with every course crossed out except, perhaps, the soup, and a footnote to the effect that even the soup might not be served in certain circumstances.<sup>11</sup>

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<sup>8</sup> UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*.

<sup>9</sup> Larsen, K. cited in Conference of Plenipotentiaries on Draft Convention relating to the Status of Refugees, 25<sup>th</sup> July 1951, 35<sup>th</sup> Meeting, LI. VM. P.1. Fonds 4. G1/12/1/10 Box. 2. Archives of the UN High Commissioner for Refugees, Geneva, [accessed 17/10/2011].

<sup>10</sup> Van Heuven Goedhart, G. cited in Report of the United Nations High Commissioner to the General Assembly, Part II. 1<sup>st</sup> September 1951, Fonds 6, Series 1. Box 2. ECOSO 13<sup>th</sup> Session. Refugees and Stateless Persons Documents. DE/31 (Office of the High Commissioner for Refugees Documentation Centre), Archives of the UN High Commissioner for Refugees, Geneva, [accessed 25/10/2011].

<sup>11</sup> Statement of Mr Rees of the International Council of Voluntary Agencies, cited in Hathaway, J. *The Law of Refugee Status*, (Toronto: Butterworths, 1991), p.231.

With the closing of the Conference of Plenipotentiaries, the definition of refuge was finalised within Article 1.A(2) of the 1951 Convention and would henceforth be defined as an individual who:

owing to well-founded fear of being persecuted for reasons of *race, religion, nationality*, membership of a particular *social group* or *political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>12</sup>

The 1951 Convention contains the defining criteria for the parameters of what constitutes a refugee within contemporary international refugee law. A well-founded fear of persecution is the defining and determining factor of the refugee subject. The definition was agreed upon by the Third Committee of the United Nations General Assembly in December 1950 and was put forward to the Conference of Plenipotentiaries where the definition was finally accepted.<sup>13</sup> With the founding of the 1951 Convention, the definition of refugee as based upon a ‘well-founded fear of persecution’ would go on to provide the basis for a variety of regional and national conventions on refuge.<sup>14</sup>

In undertaking an examination of the 1951 Convention, it is apparent that the definition of what constitutes refuge and persecution is never alluded to. Article 1.A(2), through the adoption of the masculine pronoun only, states that persecution is based upon a well-founded fear, with the fear being connected to race, religion, nationality, political opinion or social group. The 1951 Convention originally had a temporal limitation built into it, applying only to those affected by events before 1<sup>st</sup> January 1951. Other than that though, the 1951 Convention fails to specify its intentions as to how the meaning of persecution and refuge should be understood and applied pragmatically. Even a reading of Article 33.1 of the 1951 Convention on Refoulement sheds

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<sup>12</sup> UN High Commissioner of Refugees. *Convention and Protocol Relating to the Status of Refugees*, Article 1.A(2), p.16, [emphasis my own].

<sup>13</sup> The Convention definition was agreed upon at their three hundred and thirty-fourth meeting by fifteen votes to five, with seventeen abstentions. Report of the Third Committee, Refugees and Stateless Persons, 12 December 1950, G 1/1/16 Statute of UNHCR 11-1950/05-1968 – General- Fonds 11, Series 1, Box 47, Records of the Central Registry, Archives of the UN High Commissioner for Refugees, Geneva, [accessed 18/10/2011].

<sup>14</sup> Chapter Two builds upon the analysis of chapter one and engages with the African Refugee Convention, the Cartagena Declaration and the Bangkok Principles to fill in the silences of 1951 and examine the appropriation of language beyond Geneva within regional refugee regimes.

little light upon the understanding of persecution and refuge, asserting that ‘[N]o 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’.<sup>15</sup>

The 1951 Convention sets out standards and actions for how the international community should be engaging with the developing refugee crises; however, it does leave the implementation of the refugee regime to the discretion of individual sovereign states. And, as the language of persecution is not defined expressly within the central refugee instrument, it then falls upon states to fill in the silences themselves. Although Eduardo Arboleda and Ian Hoy argue that the application of the Convention within the ‘developed world’ is problematic due to the ‘divergent interpretations of the terminology of the definitions’<sup>16</sup> (as will be discussed within Chapter Two), I would argue that this critique could be applied to Europe itself. Accordingly, there is a need to establish how the language of persecution has been interpreted, as well as to understand the political climate from which it emerged.

### The *Travaux Préparatoires*

Since I find the Convention is largely silent on the matter itself, the *travaux préparatoires* can provide a wealth of information and clarification on the intentions and thoughts of the delegates involved in the drafting, thus providing a possible definition of the meaning of persecution. The term *travaux préparatoires* refers to all of the archived materials and documentation that had a formative effect on the establishment of a Convention. For the 1951 Convention, this refers to the Ad Hoc Committee on Statelessness and Related Problems Reports, and the Conference of Plenipotentiaries Minutes (Summary Records) and Verbatim Records, all of which are held in the archives of the UNCHR Headquarters in Geneva.<sup>17</sup> When utilising the *travaux préparatoires*, Jane McAdam notes that they can greatly assist in establishing the significance of a convention, providing the background and context of the convention. But, they can be

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<sup>15</sup> UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, Article 33.1. p.33.

<sup>16</sup>Arboleda, E. and Hoy, I. ‘The Convention Refugee Definition in the West: Disharmony of Interpretation and Application’, *International Journal of Refugee Law*, 5(1)(1993):66-90, p.66.

<sup>17</sup> McAdam, J. ‘Part One; Background: Interpretation of the 1951 Convention’, in Zimmermann, A. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (Oxford: Oxford University Press, 2011), pp.75-115, p.90.

incomplete and they *can* be a source of inaccurate or unrepresentative accounts of events. Accordingly, as primary evidence, they should be handled with a degree of caution.<sup>18</sup>

From an analysis of the *travaux préparatoires* that are held in Geneva, as well as various Cabinet reports, letters and minutes from the British Home Office that are based in the National Archives, Kew, it became apparent that within the Conference of Plenipotentiaries, although there were discussions, debates and considerations of great length regarding the formulation of the Convention, and there were none specifically with regard to the definition of a refugee. From the various files, letters, minutes and notes, I could not find a detailed discussion regarding the nature of persecution or refuge, nor an exact meaning of how the drafters understood persecution. During the drafting stages, there was much discussion on who should be covered by the new convention, with debates on resettlement via repatriation and lengthy discussions over the language of the various articles within the Convention itself.<sup>19</sup> For example, in one Cabinet Report on the British reaction to the Conference of Plenipotentiaries, the report notes the temporal limitation of ‘events before January 1<sup>st</sup> 1950’ within the 1951 Convention, asserting:

The United Kingdom is not concerned at this stage to press further for this limit to be removed, and the definition meets the main points urged by the United Kingdom that the continuance of refugee status must depend upon inability to return owing to a well-founded fear of persecution... the definition can therefore be regarded as generally acceptable to its main lines.<sup>20</sup>

What this quote highlights is the British delegates’ approach to the refugee and persecution within the Conference of Plenipotentiaries, with little being mentioned within the report and no discussion or unpacking of the term occurring. Yet, the same report then goes on to discuss at great length whether the definition of refugee would apply to criminals or war criminals, raising numerous questions of ‘does it refer to persons against whom criminal proceedings are pending

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<sup>18</sup> McAdam, J. ‘Part One; Background: Interpretation of the 1951 Convention’, p.90.

<sup>19</sup> See: Annex II Comments of the Committee on the Draft Convention Relating to the Status of Refugees, 3<sup>rd</sup> January 1951, E/1618 E/AC.32.5, Fonds UNHCR 7: Collective Fonds Regarding Pre-UNHCR Refugee Matters, Series 2, Ad Hoc Committee on Stateless, Box, 4, Archives of the UN High Commissioner for Refugees, Geneva [accessed 27/10/2011]; UN General Assembly Fourth Session, Third Committee Item 63, Refugees and Stateless Persons, report of the Secretary General, 26<sup>th</sup> October 1949, A/C.3/527, Fonds 7, Series 2, Box. 0003, Convention on Status of Refugees Documents Relating to its Preparation. Archives of the UN High Commissioner for Refugees, Geneva, [Accessed 19/10/2011].

<sup>20</sup> Cabinet Report, British Reaction to Conference of Plenipotentiaries, 26<sup>th</sup> June 1951, BT 271/349, United Nations Draft Convention Relating to the Status of Refugees (1950-1951), National Archives, Kew [accessed 23/08/2011].

and, if so, whether these criminal proceedings are pending abroad or in the country of refuge, or whether it would cover persons already convicted either abroad or in the country of refuge'. The focus does not appear to be on laying out the understanding and meaning of persecution or refuge, but more upon defining to whom it is not applicable and who should be excluded.<sup>21</sup> Indeed, the lack of detailed engagement regarding the definition of persecution and refuge is apparent throughout the *travaux*. As Daniel Steinbock observes, it is surprising how little detail there is within the *travaux préparatoires* 'of what the drafters had in mind'; he notes that the 1951 Convention was established 'with very little discussion or elaboration'.<sup>22</sup>

In conducting a reading of the *travaux préparatoires*, a central point of reference is *The Refugee Convention, 1951: The Travaux Préparatoires*, written by Dr Paul Weis, former Head of the Legal Division of the Office of the United Nations High Commissioner for Refugees. Weis provides a detailed and engaging history of the Conference of Plenipotentiaries in an Article-by-Article breakdown of the 1951 Convention as it was created. However, Weis' *Travaux Préparatoires*, written during the 1980s, although providing a wealth of detail, only engage with Articles 2-37 of the 1951 Convention. Although his work does not cover Articles 38-46, it is apparent that a gap is present by the omission of Article 1 - the central Article relating to the granting, denying or discontinuing of refuge based on the grounds of whether the individual has a well-founded fear of persecution. According to Chaloka Beyani, the reason for this omission of Article 1 is a 'matter of conjecture'.<sup>23</sup>

In seeking a level of clarification from the *travaux préparatoires* on what constitutes persecution, Article 33 of the 1951 Convention is the final point of reference. As mentioned, Article 33.1 asserts that no contracting state can expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened. Persecution, in this sense, is understood as a threat to life or freedom in connection to the five

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<sup>21</sup> Cabinet Report, British Reaction to Conference of Plenipotentiaries, 26<sup>th</sup> June 1951, BT 271/349, United Nations Draft Convention Relating to the Status of Refugees (1950-1951), National Archives, Kew [accessed 23/08/2011].

<sup>22</sup> Steinbock, D. 'Interpreting the Refugee Definition', *UCLA Law Review*, 45(1997-1998):733-816, p.763-764.

<sup>23</sup> Beyani, C. 'Introduction' in Weis, P. *The Refugee Convention, 1951 The Travaux Préparatoires Analysed With a Commentary by Dr Paul Weiss*, Cambridge International Documents Series, vol.1, (Cambridge, Cambridge University Press, 1995), pp.xiii-xix.

grounds noted in Article 1, and has the same meaning as understood within Article 1.A(2).<sup>24</sup> The *travaux préparatoires* themselves reveal that no debate occurred around what could be construed as a threat to life or freedom, or how persecution should be understood and applied pragmatically. Instead, the majority of the commentary for Article 33 within the *travaux préparatoires* is focused upon Article 33.2, which engages with returning a refugee who has presented themselves as a danger to the host community or country.<sup>25</sup> The focus of the drafters' discussion within the *travaux préparatoires* is centred upon a state's right to remove a potential threat from its territory, with the understanding of persecution being possibly assumed, or merely sidelined. As a result, Weis' *Travaux Préparatoires*, as well as the *travaux préparatoires* themselves, retain a silence regarding 'clearly the most important factor concerning the determination of refugee status'.<sup>26</sup>

One possible reason for the apparent lack of a definition, or even a discussion during the conference regarding persecution, is that the drafters were aware that there would be various forms of persecution that could not possibly be imagined. As a result, the possibility of providing a detailed definition of persecution could lead to marginalising individuals seeking sanctuary in the future. Beyani asserts that although no definition was provided of persecution, 'the most important factor concerning determination of refugee' within the 1951 Convention, he argues that there might have been an 'underlying motive behind this', although none were offered.<sup>27</sup> It has been argued that the failure of the drafters to provide a definitive understanding of persecution was due to the fact that they assumed the concept to be adequately comprehensive, in what James Hathaway terms, 'to capture the spectrum of phenomena which had induced involuntary migration during and immediately after the Second World War'.<sup>28</sup> This position asserts that the drafters assumed persecution to be an array of activities that violated human rights.<sup>29</sup> As Terje Einarsen reflects:

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<sup>24</sup> Weis, P. *The Refugee Convention, 1951 The Travaux Préparatoires Analysed With a Commentary by Dr Paul Weiss*, Cambridge International Documents Series, vol.1, (Cambridge, Cambridge University Press, 1995), p.341.

<sup>25</sup> Weis, P. *The Refugee Convention*, p. 325-341.

<sup>26</sup> Beyani, C. 'Introduction', p.xv.

<sup>27</sup> Beyani, C. 'Introduction', p.xvii.

<sup>28</sup> Hathaway, J. C. *The Law of Refugee Status*, (Toronto: Butterworths, 1991), p.102.

<sup>29</sup> Hathaway, J. C. *The Law of Refugee*, p.103.



a reasonable inference is that the drafters in 1950 reckoned ‘persecution’ to be a well-known concept, taking into account the vast and basically European experience with persecution... One gets the impression that the drafters simply thought they knew who was a ‘refugee’ and that the application of a general definition would not be so difficult in practice.<sup>30</sup>

In this regard then, persecution and refuge could be equated to the horrors of the Second World War. In fact, one of the few references to the understanding of persecution within the *travaux préparatoires* is within a Report of The Ad Hoc Committee on Stateless and Related Problems (1950) by the UN Economic and Social Council. Within this report the nature of persecution is discussed in a rather vague manner, with it being asserted that a refugee refers to a person who has either actually been a victim of persecution or can show good reason why he fears persecution.<sup>31</sup> However, from the *travaux préparatoires* themselves, our understanding of what constitutes persecution is that the individual has either been a victim and is fearful of future persecution, or has a fear of being persecuted in his home country. This is the extent to which the Convention and the *travaux préparatoires* illuminate upon persecution.

Scholars such as Scott Rempell highlight that the lack of a definition could be due to the myriad of situations that the criteria might exclude, as any endeavour to identify the term must be flexible enough to incorporate the regrettable ‘inventiveness of humanity to think up new ways of persecuting fellow [citizens]’.<sup>32</sup> In this instance, a definition would never be expansive enough to cover the various harms conducted. However, on a side point, I find this discussion difficult to uphold, for when the 1951 Convention was established, it was done so with specific temporal limitations in-built. If the 1951 Convention was constrained by temporal limitations than a clear definition would be in the interest of the Convention. However, what we have is a defined temporally limited Convention, with an undefined definition.

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<sup>30</sup> Einarsen, T, ‘Part One; Drafting of the 1951 Convention and the 1967 Protocol’, in Zimmermann, A. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (Oxford: Oxford University Press, 2011), pp.37-73, p.56-57.

<sup>31</sup> Report of the Ad Hoc Committee on Stateless and Related Issues, United Nations Economic and Social Council, 16<sup>th</sup> January- 16<sup>th</sup> February 1950, E/1618 E/AC. 32/5,p.39.Fonds UNHCR 7, Collective Fonds Regarding pre-UNHCR Refugee matters. Series 2. Ad Hoc Committee on Statelessness Box 4. Archives of the UN High Commissioner for Refugees, Geneva, [Accessed 17/10/2011].

<sup>32</sup> Rempell, S. ‘Defining Persecution’, *Utah Law Review*, (2013):283-344, <http://epubs.utah.edu/index.php/ulr/article/viewFile/1094/807>. See: Zimmermann, A. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, and Hathaway, J. C. *The Law of Refugee Status*.

Considering that the 1951 Convention is the foundation for international refugee law, it is surprising that there is little to no clarification within the *travaux préparatoires* regarding the notion of persecution and refuge. I find there is a strategic silence surrounding what the definitional understanding of refuge should be, with states apparently, in the drafting process, assuming or presuming their knowledge of refuge. Due to the silences inherent within the 1951 Convention and the *travaux préparatoires*, the next section of the thesis extends the analysis to cover the UNHCR's predecessors to engage with the language employed within these pre-1951 refugee organisations, as well as to reflect upon the environment in which they were born, and how they shaped and formed our understanding, not only of persecution, but of the international refugee regime.

#### Pre-1951 Refugee Organisations: Seeking the Language of Refuge

In establishing the 1951 Convention, the drafters at the Conference of Plenipotentiaries drew upon existing international conventions to help develop the understanding of refuge and persecution. The 1951 Convention was not radically new in definition as it drew upon previous conventions,<sup>33</sup> but the historical context is of interest. Charged with establishing a concrete draft refugee convention, the Ad Hoc Committee on the Draft Convention Relating to the Status of Refugees,

thought it desirable on the one hand not to draw up a draft which would set out merely the existing practice common to all states represented on the committee. On the other hand, it considered it undesirable to formulate an ideal solution and thereby set out provisions which would not be likely to obtain the acceptance of many governments.<sup>34</sup>

Without state involvement, the 1951 Convention could not have operated; the Convention needed to be tailored to suit the needs of the ratifying states. Accordingly, the drafters of the 1951 Convention sought to situate the Convention in line with the Universal Declaration of

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<sup>33</sup> Edwards, A. 'Refugee Status Determination in Africa', *African Journal of International & Comparative Law*, 14(2006): 204-233.

<sup>34</sup> Annex II Comments of the Committee on the Draft Convention Relating to the Status of Refugees, 16<sup>th</sup> January-16<sup>th</sup> February 1950, E/1618 E/AC. 32/5 F. United Nations Ad Hoc Committee on Statelessness and Related Problems RM H-234. Fonds 7. Series 2. Box 4. Collective Fonds Regarding Pre-UNHCR Refugee Matters. Archives of the UN High Commissioner for Refugees, Geneva, [Accessed 27/10/2011].

Human Rights.<sup>35</sup> The Preamble of the 1951 Convention is grounded in Article 14 of the Universal Declaration of Human Rights (1948), which recognises the right of an individual to seek asylum from persecution in other countries.<sup>36</sup> However, it was not just the Universal Declaration of Human Rights from which the drafters sought guidance in developing the 1951 Convention. The notion of refuge and the reference to persecution pre-dates the 1951 Convention.

The International Refugee Organisation (IRO), from the time of its formation, was considered as merely a temporary international endeavour. The IRO was only provided with a set time frame for action, and was in operation from 1946-1952. The organisation was the first of its kind to engage systematically with the whole process of the refugee cycle<sup>37</sup>. The central concern of the organisation was repatriation and resettlement but the IRO supported the refugee continuously until the individual was resettled or repatriated, covering ‘identification, registration and classification, care and assistance’.<sup>38</sup> From the beginning in the preparatory meetings, the IRO convention was perceived as a ‘guide for future operations rather than as an unchangeable text’.<sup>39</sup> According to the *travaux préparatoires*, the establishment of the IRO was to be considered as a ‘compact, drawn up between friends to guide them in their joint efforts in dealing with a great world social problem’.<sup>40</sup> The IRO Convention had a broad definition of refugee that covered those individuals that had fled Nazi, Fascist, Quisling and Flangist regimes, as well as those individuals who had become refugees due to events prior to World War Two. In Part 1(C), it also made the following provisions, and offered refuge if an individual faced:

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<sup>35</sup> However, although situated within the Charter, the 1951 Convention makes no reference to human rights. SEE: Steinbock, D. L. ‘Interpreting the Refugee Definition’, *UCLA Law Review*, 45(1997-19998): 733-816

<sup>36</sup> United Nations. *The Universal Declaration of Human Rights*, (1948), <http://www.un.org/en/documents/udhr/> [accessed 12/01/10], Article 14.

<sup>37</sup> Holborn, L. *Refugees: A Problem of our Time. The Work of the United Nations High Commissioner for Refugees 1951-1972*, Vol.I, (New Jersey: The Scarecrow Press, 1975), p.31 and UN High Commissioner for Refugees. *The State of the World’s Refugees. Fifty Years of Humanitarian Action*, (Oxford: Oxford University Press, 2000), p.16.

<sup>38</sup> Holborn, L. *Refugees: A Problem of our Time*, p.31.

<sup>39</sup> Mr Martin (Canadian Delegate) cited in Sixty-Seventh Plenary Session, General Assembly, First Session: Text and Debates, 24 December, 1946, United Nations Journal No66, A-A/P.V.67, p.786, Fonds 6, Series 1, Box 12, K/38, A/PV/66 and 67, Plenaries- Verbatim Records, UNHCR Headquarter, Collection of the Documentation Centre, Archives of the UN High Commissioner for Refugees, Geneva, [Accessed 24/10/2011].

<sup>40</sup> Mr Martin (Canadian Delegate) cited in Sixty-Seventh Plenary Session, General Assembly, First Session: Text and Debates, 24 December, 1946, United Nations Journal No66, A-A/P.V.67, p.786, Fonds 6, Series 1, Box 12, K/38, A/PV/66 and 67, Plenaries- Verbatim Records, UNHCR Headquarter, Collection of the Documentation Centre, Archives of the UN High Commissioner for Refugees, Geneva [Accessed 24/10/2011].

Persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality, or political opinion, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations.<sup>41</sup>

In international refugee law, persecution was highlighted as the defining feature, or what Hathaway terms, the ‘exclusive benchmark’ of refugee status.<sup>42</sup> The IRO constitution and the focus upon persecution because of race, religion, nationality or political opinion reflects the contemporary era of the Convention. After the Second World War and the experiences of the Holocaust, it is not startling that these grounds were highlighted as the most serious violations that could warrant protection.<sup>43</sup> It reaffirms Einarsen’s point that the drafters ‘reckoned persecution to be a well-known concept, taking into account the vast and basically European experience’.<sup>44</sup> Yet, it appears from the archives, that there was little discussion on the intentions behind the meaning of persecution or what persecution should be construed as. As Arboleda and Hoy assert, ‘why it was chosen by the IRO is not clear’ and its incorporation into the UNHCR did not involve much discussion. Indeed, they argue that from its roots within international refugee law to its prominence within the 1951 Convention, persecution has remained aloof and undefined.<sup>45</sup>

The IRO though, can trace the origin of its Convention definition to a previous organisation in the shape of the Inter-Governmental Committee on Refugees (IGCR). Established in 1938, the IGCR was created to engage with the German government and achieve a safe and orderly mass departure of Jews from the country.<sup>46</sup> The IGCR Convention defined a refugee as any person who left Germany because of their political opinion, religious beliefs or racial origin. For the first time, as Jacques Vernant states, ‘persecution’ was equated with ‘a threat to life or liberty on

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<sup>41</sup> Report of the General Secretary. Refugees and Stateless Persons, Fourth Session, Third Committee, 26 October 1949, A/c. 3/527, Convention on Status of Refugees Documents Relating to its Preparation, Fonds 7, Series 2, Box .003, External Fonds, Archives of the UN High Commissioner for Refugees, Geneva. [Accessed 27/10/2011].

<sup>42</sup> Hathaway, J. C. *The Law of Refugee Status*, p. 99. Goodwin-Gill, G. S. *The Refugee in International Law, Second Edition*, (Oxford: Oxford University Press, 1996), p.6.

<sup>43</sup> Walker, K. ‘Defending the 1951 Convention Definition of Refugee’, *Georgetown Immigration Law Journal*, 17(2002-2003):582- 609, p.590.

<sup>44</sup> Einarsen, T. ‘Part One; Drafting of the 1951 Convention’, p.56-57.

<sup>45</sup> Arboleda, E and Hoy, I. ‘The Convention Refugee Definition’, p.78.

<sup>46</sup> Loescher, G. *The UNHCR and World Politics: A perilous Path*, (Oxford: Oxford University Press, 2001), p.33.

account of race, religion or political beliefs'.<sup>47</sup> The shaping of the IGCR Convention seems to reflect the socio-political environment at the time of its ratification, as well as the threat emanating from Nazi Germany. That the issue of persecution was connected to race, religion, nationality, political opinion and social group reflected the threat associated with Nazism. As such, this same historical underpinning was reflected within the IRO Convention and ultimately the 1951 Convention.<sup>48</sup> Daniel Steinbock argues that the central event that shaped the drafters' minds was the persecution conducted by the Nazis. As such, 'there is little about the conditions of World War Two and its immediate aftermath that would indicate an intention to override the language used in the Convention'.<sup>49</sup> Meanwhile, Aleinikoff takes the stance that from a reading of the *travaux préparatoires* as well as the text itself, the Convention was established with the 'intent to protect all persons (and groups) then existing in Europe', who had been or were likely to be victims of persecution; he argues that 'no forms of persecution were intentionally excluded'.<sup>50</sup>

Accordingly, it can be construed that the Holocaust and the Second World War have shaped and defined our understanding of refuge considerably. Due to these events, our understanding of what constitutes a refugee is founded upon the criteria of race, nationality, religion, social group or political opinion, as well as upon the notion of a well-founded fear of persecution. Indeed, it is because of these events that within the Convention, the 'agents of persecution' were, as a rule, states. States were seen as the main actors persecuting individuals; it was the state actor that one needed to be fleeing from in order to attain refuge. The 1951 Convention is premised upon the Western conception and social environment at the time of its birth. Having emerged out of the Second World War (and facing the ideological split of the Cold War), the state as the 'agent of persecution' was a fitting standard for the times. Hence, the 1951 Convention definition reflects the European historical background of totalitarianism whereby refugees, by and large, were the victims of persecution conducted by 'highly organized predatory states'.<sup>51</sup> Indeed, within archival documents from the 1940s regarding perceptions of the IRO, the rising tensions of the

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<sup>47</sup> Vernant, J. *The Refugee in the Post-War World. Preliminary Report of a Survey*, (Geneva: No Publisher Details, 1951), p.9.

<sup>48</sup> Walker, K. 'Defending the 1951 Convention Definition of Refugee', p.590.

<sup>49</sup> Steinbock, D. 'Interpreting the Refugee Convention', p.768.

<sup>50</sup> Aleinikoff, cited in Steinbock, D. 'Interpreting the Refugee Convention', p.769.

<sup>51</sup> Shacknove, A. 'Who is a Refugee?', *Ethics*, 95(2)(1985):274-284, p.276.

Cold War between the West and the East are apparent and these tensions were at the heart of the discussions. Issues focused specifically upon the definitional understanding of what a refugee was, with Dr Medved, Ukrainian Soviet Socialist Republic, denying the existence of political refugees, and instead terming them quislings or war criminals.<sup>52</sup> The notion of the refugee was discussed purely along political ideological lines, rather stunting the conversation as to the meaning and understanding of persecution. These ideological battles shaped the nature of refuge and determined, to a certain extent, the leaning towards political ideology and political persecution within the 1951 Convention, for ‘representatives would approach the matter from the political point of view’.<sup>53</sup> Indeed, Gil Loescher, James Hathaway and Louise Holborn highlight the impact of the Cold War on the development of the refugee regime, and discuss how the regime emerged within an ‘ideology-charged atmosphere’,<sup>54</sup> whereby the ethos was dominated by ‘ideologically inspired’ clashes between the East and the West.<sup>55</sup>

These criteria and the understanding behind their meaning are all connected back to the IGCR and the IRO. These organisations were the predecessors of the UNHCR, but they made lasting impressions on the international refugee regime, with the (undefined) definition of a refugee harking back to their origins. This could partly explain why persecution was not actually defined in the 1951 Convention and highlights why there is little discussion around this particular concept within the *travaux préparatoires*. To reiterate, the ‘drafters simply thought they knew who was a “refugee”’<sup>56</sup> and the experience and events of the Holocaust, the Second World War and the Cold War, covered the understanding of what defined, and was understood to be, persecution.<sup>57</sup>

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<sup>52</sup> Dr Medved, cited in General Assembly. First Session Text of Debates, Tuesday 24<sup>th</sup> December 1946, Sixty-Seventh Plenary Session, Journal No.66, Supplement A-A/P.V.67, Fonds 6, Series 1, Box 12, K/38, Plenaries-Verbatim Records, A/PV/66 and 67, Archives of the UN High Commissioner for Refugees, Geneva, [accessed 24/10/2011], p.797.

<sup>53</sup> Parro, A. (Peru Delegate) cited in Nineteenth Meeting, 11<sup>th</sup> November 1946, Journal 29: Supplement No.3 – A/C.3/51, Fonds 6, Series 1, Box 12, Third Committee Journals, AC/3/41, AC/3/140, Archives of the UN High Commissioner for Refugees, Geneva, [accessed 24/10/2011], p.49 and UN High Commissioner for Refugees, *The State of the World's Refugees. Fifty Year of Humanitarian Action*, (Oxford: Oxford University Press, 2000), p.19.

<sup>54</sup> Hathaway, J. C. *The Law of Refugee Status*, p.100.

<sup>55</sup> Hathaway, J. C. ‘A Reconsideration of the Underlying Premise of Refugee Law’, *Harvard International Law Journal*, 31(1)(1990):129-147, p.142 and Holborn, L. *Refugees: A Problem of our Time*, p.57.

<sup>56</sup> Einarsen, T, ‘Part One; Drafting of the 1951 Convention and the 1967 Protocol’, p.56-57.

<sup>57</sup> Hathaway, J. C. *The Law of Refugee Status*, p.102.

What is interesting though from this discussion is the lack of engagement with another major political tension of the time that was in operation. In the post-Second World War era, as well as the Cold War tensions, states such as Britain, France, Portugal, Denmark and the Netherlands were still in possession of their colonial territories during the drafting processes; they possessed considerable territory, as well as political power and control across the globe. Yet, the colonial origins of the UNHCR, as well as the 1951 Convention, are rarely discussed or mentioned. As noted within the Introduction, Glen Peterson argues that the colonial origins of the UNHCR ‘seems so far to have escaped the attention of refugee scholars’.<sup>58</sup> However, colonialism was an ever present factor in the formation and ratification of the 1951 Convention. Indeed, the following example from the archives highlights the extent to which the emerging refugee regime and the colonies clashed, with Mr Laurence Evans of the British Home Office asserting in March 1954, with regard to the British ratification of the 1951 Convention, that ‘the instrument of ratification contained several reservations and no extension was made to colonial territories. No comment appears to have been made on this either by Dr Goedhart or the U.N. Secretariat, which is just as well’.<sup>59</sup> Scholars such as Hathaway, Holborn and Loescher, in their central texts on refuge, do not discuss or refer to colonialism, except when discussing colonialism and decolonisation as a trigger for refugee flows within the late 1950s and 1960s. But what of the colonial origins that underpin the UNHCR and the 1951 Convention? I have raised this point here, in order to allow a reflection on the establishment of the Convention, as well as to show the centrality of the Second World War and the Cold War to official UNHCR history, at the expense of other histories. The relationship between colonialism and the UNCHR and the 1951 Convention will be discussed at greater length in Chapters Two, Five and Six.

### **Breaking the Silence of 1951**

The 1951 Convention, as the analysis so far has shown, does not define or explain what persecution stands for. The Convention does not define what is meant by persecution or refuge, and an analysis of the IRO and the IGCR Convention provides few details. Moreover, a reading

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<sup>58</sup> Peterson, G. ‘The Uneven Development of the International Refugee Regime in Postwar Asia: Evidence from China, Hong Kong and Indonesia’, *Journal of Refugee Studies*, 25(3)(2012):326-343, p. 327.

<sup>59</sup> Lawrence Evans Minutes on Ratification of Convention, 20<sup>th</sup> March 1954, US R 1824/24, FO 371/112630, Ratification by the UK and other countries of the International Convention Relating to the Status of Refugees of 1951: extension to UK colonial territories and reservations, The National Archives, Kew, [Accessed 18/08/2011].

of the *travaux préparatoires* offers little understanding but starkly highlights the lack of discussion surrounding this central concept. The silence surrounding persecution within the *travaux préparatoires* is startling, considering its primacy within the Convention. Since an examination of the 1951 Convention sheds little light on the matter, it is necessary to commence an examination of complimentary refugee legislation. By extending the scope of examination, the chapter seeks to illuminate the language of persecution and how it is intended to be applied and implemented practically.

In doing so, the following section will be split into two parts to incorporate a broad analysis of the engagement with persecution. The first part will identify a range of guidelines, treaties and conventions that make reference to persecution and refuge. The second part focuses on scholars and legal practitioners' discussions of persecution to analyse the various approaches that have been adopted. By initiating a broad approach to persecution, it is hoped that this discussion will shed light on the notion of persecution and refuge as presented in the 1951 Convention.

### The Legal Framework

Since the founding of the 1951 Convention, there has been a plethora of international guidelines, treaties and directives that have been established to assist states with the implementation of the international refugee regime, and these are essential points of reference for seeking clarification regarding the persecution criteria. Through the development of international law, the refugee regime has sought clarity, and at times, a harmonisation, as to how the 1951 Convention should be understood. These international texts have been utilised and when necessary implemented into national refugee regimes in order to provide an invaluable aid in understanding the scope of the 1951 Convention. The following section will thus embark upon a discussion of the various guidelines, treaties and directives regarding refuge, to examine whether through these initiatives the silence within the 1951 Convention is overcome by the emergence of a clear understanding of persecution and refuge.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status was created in 1979 as a means of providing guidance and a firm understanding of how the Convention should be implemented pragmatically. Initiated by the UNHCR's Executive



Committee in December 1977, it followed a request that after 26 years, the UNHCR ‘consider the possibility of issuing - for the guidance of Governments - a handbook relating to procedures and criteria for determining refugee status’.<sup>60</sup>

Within the Handbook, the definition of a refugee is established upon Article 1.A(2) with a ‘well-founded fear of persecution’ being the ‘key phrase of the definition’.<sup>61</sup> The focus is purely upon the understanding of persecution as a reason for an individual fleeing their country, with the Handbook asserting that ‘[T]he expression “owing to well-founded fear of being persecuted”- makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated.’<sup>62</sup> Other factors will be considered but the emphasis is on the persecution criteria.

The UNHCR Handbook is rather vague with regard to how persecution should be understood. While the guide notes that fear of persecution applies to those individuals who have experienced it, and to those who have fled for fear of persecution, the Handbook asserts that it needs to be determined on an individual basis. The Handbook highlights that the meaning of persecution is both subjective and objective, asserting:

To the element of fear a state of mind and a subjective condition is added the qualification “well-founded”. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.<sup>63</sup>

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<sup>60</sup> UN High Commissioner for Refugees. *Determination of Refugee Status*, (12 October 1977), No. 8 (XXVIII) - 1977, <http://www.unhcr.org/refworld/docid/3ae68c6e4.html>, [accessed 18/11/2011] and Mousalli, M. ‘Forward’ in UN High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992), <http://www.unhcr.org/3d58e13b4.html>, [accessed 18 November 2011].

<sup>61</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992), <http://www.unhcr.org/3d58e13b4.html> [accessed 18 November 2011], Chapter II, Section B.37.

<sup>62</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria*, Chapter II, Section B.39.

<sup>63</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria*, Chapter II, Section B.38.

While the guide stipulates that an asylum seeker (an individual seeking refuge) must provide as much information as possible regarding their claim, it also calls upon the state to utilise their knowledge of the country of origin in order to establish the reasonable degree of likelihood; it does not elaborate on how persecution should be understood and applied.<sup>64</sup> When deciding the case, the UNHCR Handbook stresses that states must be aware that the actual expression, ‘fear of persecution’, may not be a familiar expression for the individual fleeing from their country of origin, but that the phrase should be evocative within their story, and ‘while a refugee may have very definite opinions for which he has had to suffer, he may not, for psychological reasons, be able to describe his experiences and situation in political terms’.<sup>65</sup> It is here that the UNHCR acknowledges the struggle that asylum seekers may face when articulating their personal experience of persecution; struggling to employ language to express the experience that forced them from their country of origin.<sup>66</sup>

In understanding the nature of persecution, the UNHCR Handbook advises that determining persecution necessitates an individual evaluation of the person concerned and states that ‘... due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary’.<sup>67</sup> The UNHCR Handbook does stress that ‘there is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success’.<sup>68</sup> As a result, no definition is offered. Furthermore, the discussion surrounding persecution is very unspecific highlighting both the subjective and objective elements, as well as referring back to Article 33(1) on *Refoulement* as guidance to understanding the meaning of persecution. As previously noted, Article 33 asserts that persecution may occur when ‘life or freedom would be threatened’ in connection with the categories of race, religion, nationality, membership of a particular social group or political opinion. Through Article 33, the reader is then referred back to Article 1 for interpretation and

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<sup>64</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria*, Chapter II, Section 2(a)42.

<sup>65</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria*, Chapter II, Section 2(a)46. Furthermore the UNHCR handbook notes that a good gauge to determining an individual having a well-founded fear of persecution is if they are in possession of a valid travel document; however, it does stipulate that this needs to be based on an individual basis. It cannot be universally applied to all cases, for possession of a valid document does not equate to loyalty to a state.

<sup>66</sup> This aspect of the barriers to articulating traumatic memories of persecution within the asylum system, as a coherent and detailed narrative will be discussed within Chapter Four of the thesis.

<sup>67</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria*, Chapter II, Section 2(b)52.

<sup>68</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria*, Chapter II, Section B.51.

understanding. However, a little of the silence can be broken by a reading of Chapter 3 of the UNHCR Handbook. It asserts that where an individual or family has suffered an ‘atrocious form of persecution’, then they should not be expected to return to their country of origin; even if there has been a change and developments in the country, repatriation cannot be expected.<sup>69</sup>

From the 1951 Convention and the UNHCR Handbook, it is apparent that persecution, within this context, is understood to encompass a well-founded fear due to one of the five Convention nexuses and it can be equated to an individual’s life and freedom being threatened. Moreover, an individual who has suffered an atrocious form of persecution may then be eligible for refugee status. However, no clear definition is provided to clarify what constitutes persecution, although the Handbook does refer to the subjective and objective assessment of the situation, as well as making reference to particulars such as ‘atrocious forms of persecution’. It is through this understanding that we realise how subjective the assessment of refuge and persecution becomes - subjective as to what the refugee experienced, but also subjective as to what the host will then classify as persecution. As Guy Goodwin-Gill reminds us, the UNHCR and the 1951 Convention say ‘nothing about procedures for determining refugee status, and leaves to States the choice of means as to implementation at the national level’.<sup>70</sup> The silence created leaves massive scope for states to be ‘the sole arbiters’ in interpreting the criteria for refuge.<sup>71</sup>

As well as the UNHCR Handbook, the European Union’s discussion on refuge provides a wealth of material. Practitioners can look towards the European Union Asylum Qualification Directive; this 2004 legislation sought minimum standards and harmonisation of the refugee system across European states. It is a prime policy document for engaging with the implementation of the persecution criteria. Although only relevant to the needs of third country nationals or stateless persons, the Qualification Directive, established by The Council of the European Union, sought specifically to attain a ‘common concept of persecution’<sup>72</sup> as well as ‘to ensure that Member States apply common criteria for the identification of persons genuinely in

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<sup>69</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria*. Chapter III, Section B. 136(1).

<sup>70</sup> Goodwin-Gill, G. S. *The Refugee in International Law, Second Edition*, (Oxford: Oxford University Press, 1996), p.34.

<sup>71</sup> Loescher, G. *The UNHCR and World Politics: A Perilous Path*, p.352.

<sup>72</sup> European Union. *Asylum Qualification Directive*, Council Directive (2004)(21), European Commission Home Affairs, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>, [accessed 28/10/2011].

need of international protection'.<sup>73</sup>

The Qualification Directive locates the 1951 Convention within its Preamble and as such it also defines persecution as due to a well-founded fear based upon the five nexuses of race, religion, nationality, political opinion and social group membership.<sup>74</sup> Within Chapter II, Articles 5, 6 and 7, as well as Chapter III, Articles 9 and 10, the EU's understanding of persecution is laid out. The Qualification Directive dictates that persecution is defined as 'sufficiently serious' acts or repetition of acts to 'constitute a severe violation of basic human rights' that can be based upon physical or mental violence, sexual violence, 'legal, administrative, police, and/or judicial measures', inconsistent or prejudiced based prosecution or persecution, as well as acts of a 'gender-specific or child-specific nature'.<sup>75</sup> However, the directive stresses that it is not enough to face persecution with regard to only one of these matters; they must be connected to the five nexuses based Article 1.A(2) of the 1951 Convention.<sup>76</sup> Moreover, it states on numerous occasions that persecution occurs when a real risk or serious harm has occurred. However, the Qualification Directive acknowledges the need for a subjective element that takes into consideration the varying effects, and the individual and varied personality of each person who has experienced violations of human rights.

The only clarification as to what can constitute a real risk or serious harm is within Chapter V, Article 15. Article 15 engages with the Qualification for Subsidiary Protection and elaborates that serious harm can be understood as the:

death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>77</sup>

Following the Qualification Directive, an individual seeking refuge has to have experienced a real risk, serious harm, or severe violation of their human rights. However, how do you implement the Qualification Directive when the language is couched in vague terms such as a

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<sup>73</sup> European Union. *Asylum Qualification Directive*.

<sup>74</sup> European Union. *Asylum Qualification Directive*, Note 1.

<sup>75</sup> European Union. *Asylum Qualification Directive*, Chapter III, Article 9.

<sup>76</sup> European Union. *Asylum Qualification Directive*, Chapter III, Article 9.

<sup>77</sup> European Union. *Asylum Qualification Directive*, Chapter V, Article 15.

real risk, severe violation, or serious harm, which lack specificity?<sup>78</sup> Indeed, the exact meaning is very much down to individual interpretation. Hence, the harmonisation of the Qualification Directive still embraces individual interpretation. Once again, the notion of what equates to persecution is discussed; however, the extent to which the variables are to be experienced is never stated.

Within the area of European law, in seeking an understanding of the meaning of persecution, it is necessary to look towards the European Convention for the Prevention of Torture or Degrading Treatment or Punishment. This Convention is based upon Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Article 3: Prohibition of Torture, asserts that '[N]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.<sup>79</sup>

Once again though, there is no elaboration as to what constitutes this - there is no explanation as to how the convention understands persecution. Of course, where torture is concerned the guideline of inhuman, degrading treatment or punishment should be sufficient to cover persecution on the grounds of torture. And while it is true that torture amounts to persecution, the opposite is not true; different forms of persecution do not always amount to torture. So how do we understand persecution? Yet again, the understanding of persecution is not elaborated or fully developed in order to draw a definitive understanding. Moreover, even in the guidelines with regard to torture, how is the bar being set for the understanding of persecution and the level of risk, severity and harm that an individual needs to endure in order to gain refugee status? The only potential explanation provided is from the World Organization Against Torture (OMCT) - a 'coalition of international non-governmental organisations' campaigning against 'torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment'.<sup>80</sup> Its 2006 Handbook is not a guideline as to what persecution encompasses, but a

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<sup>78</sup> Bruce-Jones, E. '*The Meaning of 'Persecution' in LGBTI Refugee Claims, Asylum and Migration*'s Second Annual Lecture Series, San Francisco. (24 October 2011), <http://madikazemi.blogspot.com/2011/10/video-meaning-of-persecution-in-lgbti.html>, [accessed 12th November, 2011].

<sup>79</sup> European Council of Europe. 'Convention for the Protection of Human Rights and Fundamental Freedoms', (1951), <http://conventions.coe.int/treaty/eb/treaties/gtml/005.html>, [accessed 4/11/2011].

<sup>80</sup> World Organisation Against Torture. <http://www.omct.org/>, [accessed 2/04/2014].

guideline for the procedure for verifying persecution. It states that an individual seeking protection from persecution needs to provide the following evidence:

of the ill-treatment such as medical reports, eye witness affidavits, custody records, court transcripts, domestic complaints, and any other documents showing that the ill-treatment occurred and that the complaints and relevant evidence were brought to the attention of the national authorities, and 2) applicants must show that the alleged ill-treatment was severe enough to cross the threshold of the Article 3 prohibition.<sup>81</sup>

In examining these conventions, treaties and guidelines, the understanding that emerges of persecution is of a notion based upon a real risk and serious harm to an individual based on the five nexuses of race, religion, nationality, social group or political opinion. Persecution is understood as an individualistic occurrence. It also stressed that the notion of persecution is evaluated as a serious threat to life and liberty, as well as torture or inhuman or degrading treatment or punishment. However, the Conventions do not offer a practical understanding as to how the definition of persecution should be implemented. What they do highlight though is the need for interpretation and a subjective stance towards identifying persecution and refuge. That they highlight various means in which to engage with persecution I think presents part of the problem with the notion of persecution and refuge: how is it to be applied? Importantly, the various approaches to explaining persecution highlight the ambiguous nature of the 1951 Convention. There is a silence surrounding the functional aspects of the Conventions in respect of their 'real' world intentions. And, it is due to this ambiguity (or silence) that sovereign states are free to implement and interpret the 1951 Convention accordingly. This has resulted in the bar for persecution as a 'real risk', 'serious harm' or an 'atrocious form of persecution' being set at different levels within states' asylum systems. For example, due to this ambiguity and despite the harmonisation process, European countries have ended up with distinct asylum systems, whereby Somali, Iraqi and Darfuri refugees would be offered protection in the Netherlands regardless of where they came from in these countries, but this would not happen in Britain. Within Britain the asylum seeker would need to be from a certain region of the country in order to be viewed as potentially suffering from persecution, as the rest of the country is assumed to be

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<sup>81</sup> Erdal, U and Bakirci, H. *Article 3 of the European Convention on Human Rights. A Practitioners Handbook*, World Organisations Against Torture, (2006), [http://www.omct.org/files/2006/11/3633/handbook1\\_full.pdf](http://www.omct.org/files/2006/11/3633/handbook1_full.pdf), [accessed 2/04/2014], p.116-117.

safe as well as ‘relocatable’.<sup>82</sup> The silence surrounding persecution has allowed states a high degree of control when operating and implementing the 1951 Convention, often, as highlighted, at the expense of the would-be refugee.

### The Scholarly Framework

As has been identified, the term persecution was not defined within the 1951 Convention, the *travaux préparatoires* or any of the subsequent international conventions, guidelines or directives. These references and conventions do little to help advance the understanding of persecution or the type of harm or risk that can be understood as persecution. They provide a significant degree of flexibility for the individual state to establish its own perception at, I would argue, the expense of the refugee.<sup>83</sup> However, importantly, what becomes obvious is the silence that resonates from these various international treaties and conventions. There is a muteness or an ambiguity at least, that resides within the legal texts - an assumption of knowledge that has not been passed on. Hence, over sixty years after the founding of the 1951 Convention, there is still a silence regarding persecution. As Daniel Wilsher pertinently writes, even after so many decades ‘and thousands of judicial decisions after its signature, the Refugee Convention continues to produce novel interpretations of central concepts such as the meaning of ‘persecution and ‘protection’’.<sup>84</sup> As the UNHCR themselves note, at the time of drafting, little thought was actually paid to the various forms in which persecution could manifest, particularly gender-based persecution<sup>85</sup> or persecution by non-state actors. As a result, there have emerged wildly differing and increasingly restrictive interpretations of the meaning of persecution.<sup>86</sup> Interestingly, and fitting with this analysis, B.S. Chimni’s 2009 paper, ‘*The Birth of a*

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<sup>82</sup> Still Human, Still Here, *At the End of the Line: Restoring the Integrity of the UK’s Asylum System*, (Still Human, Still Here: No Place of Publication, 2010), p.12. What is being spoken of here, is a form of temporary protection and fairly contentious for Lisa Schuster highlights that it has allowed certain states a means to further ‘hollow out’ the 1951 Convention. Whereas states such as the Netherlands view it as a means of offering quick protection to as asylum seekers as a start to permanent protection. See: Schuster, L. ‘Comparative Analysis of Asylum Policy of Seven European Countries’, *Journal of Refugee Studies*, 13(1)(2000):118-131.

<sup>83</sup> Maiani, F. ‘The Concept of “Persecution” in Refugee Law: Indeterminacy, Context-Sensitivity, and the Quest for a Principled Approach’, *Les Dossiers du Grihl, Groupe de Recherches Interdisciplinaires sur l’Histoire du Littéraire*, (2010), <http://dossiersgrihl.revues.org/3896?lang=en>, [accessed 10/11/2011], p.5. Chapter Three and Four of the thesis focuses specifically upon the British asylum system examining how language and silence have been utilized in order to construct, as well as curtail the asylum seeker.

<sup>84</sup> Wilsher, D. ‘Non-State Actors and the Definition of a Refugee in the UK: Protection, Accountability or Culpability?’, *International Journal of Refugee Law*, 15(1)(2003):68-112, p.106.

<sup>85</sup> UN High Commissioner for Refugees. ‘The Wall Behind Which Refugees Can Shelter’, *Refugees*, 2(123)(2001):1-31. p.12.

<sup>86</sup> UN High Commissioner for Refugees. ‘The Wall Behind Which Refugees Can Shelter’, p.14.

*'Discipline': From Refugee to Forced Migration Studies'* brings this discussion of the refugee definition down to a battle between power and knowledge, where power has simply deterred the critical engagement with the refugee definition because it has not in the interests of states.<sup>87</sup> Since the 1990s, Chimni argues that discussions regarding the refugee label have been 'abandoned' with an assumption emerging that the Convention definition is unchangeable.

What is interesting, as was raised in discussions of the legal framework in the previous section, is that the academic discussions and engagements with the concept of persecution, although not seeking a salient definition, identify what the existing definition fails to capture in terms of persecution and refuge. Importantly, the academic discussions surrounding the meaning and language of persecution present a variety of interpretations and approaches, highlighting how contentious the concept of persecution is. They highlight a gap, or a silence, that is present in the language of the 1951 Convention and offer, in their own ways, various platforms from which to bridge the gap.

### *Deciphering Persecution*

In seeking an explanation for the silence within the 1951 Convention (and subsequent treaties and Conventions), Atle Grahl-Madsen argues that this was probably deliberate, as the drafters possibly wanted to install a level of flexibility into the concept so that it could be applied to individual scenarios as they arose. The drafters permitted a degree of elasticity to allow for the 'inventiveness of humanity' in creating novel methods of persecuting their fellow humans.<sup>88</sup> Scholars like Francesco Maiani stress that 'the indeterminacy' surrounding the allows the refugee definition to achieve an 'indispensable' level of flexibility'.<sup>89</sup> However, that same indeterminacy makes the concept of persecution vulnerable to restrictive and narrow interpretation as well as causing it to suffer from inconsistency both within and across states and judiciary systems. The level of indeterminacy experienced with regard to persecution could lead to contradictory understandings of what amounts to persecution, with the indeterminacy

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<sup>87</sup> Chimni, B. S. 'The Birth of a 'Discipline: From refugee to Forced Migration Studies', *Journal of Refugee Studies*, 22(1)(2009):11-29, p.15-16.

<sup>88</sup> Grahl-Madsen, A. cited in Maiani, F. 'The Concept of "Persecution" in Refugee Law', p.3.

<sup>89</sup> Maiani, F. 'The Concept of "Persecution" in Refugee Law', p.3.



potentially resulting in unfair outcomes for those seeking refuge.<sup>90</sup> This same point is raised by Eduardo Arboleda and Ian Hoy, who argue that persecution was never meant to be interpreted restrictively, yet assert that ‘the humanitarian spirit’ that imbued the flexibility of persecution ‘has been distorted by a narrow interpretation, made possible by that same self flexibility’.<sup>91</sup> However, the positions proposed by Grahl-Madsen and Maiani do not account for the original temporal boundary imposed upon the 1951 Convention - if the Convention, as they argue, was to be this flexible, why then did the drafters impose such rigid limitations on the Convention in the first place? As such, what we gain from the various Conventions, *travaux*, guidelines and treaties is that persecution can stem from state or non-state actors (providing the state actor was unable or unwilling to provide necessary protection). It can also be established that, although the ‘singling out requirement’ is utilised in various refugee systems, the understanding of persecution is construed as a ‘well-founded fear’ that can be targeted at either an individual, a group or a population, so long as it is connected to one of the five Refugee Convention nexus (race, religion, nationality, membership of political group or social group). Still, as Maiani argues, the central problem *par excellence* still remains: what is the meaning of persecution under refugee law? What types and degrees of harm are adequately serious to come within its scope?<sup>92</sup>

Considering the level of academic thought that has been focused upon the refugee regime over the last two decades, it is not unexpected that ‘glosses’ regarding the meaning of certain words, and the objectives and silences of the drafters of the convention, have had an uneven influence on the understanding and function of the refugee process. Guy Goodwin-Gill argues that casual ‘throw away’ remarks have a certain magnetism that results in reducing a thorny concept such as persecution to an attainable and recognisable concept that is placed in a familiar category such as human rights. What this can result in though, is a distancing of our understanding of persecution from those who are actually experiencing it.<sup>93</sup> As a result, Goodwin-Gill argues that ‘if persecution, by definition, must involve the violation of a core entitlement of a fundamental

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<sup>90</sup> Rempell, S. ‘Defining Persecution’.

<sup>91</sup> Arboleda, E. and Hoy, I. ‘The Convention Refugee Definition in the West: Disharmony of Interpretation and Application’, *International Journal of Refugee Law*, 5(1)(1993):66-90, p.78.

<sup>92</sup> Maiani, F. ‘The Concept of “Persecution” in Refugee Law’, p.4.

<sup>93</sup> Goodwin-Gill, G. S. ‘*Refugees and their human rights*’, Working Paper for the Centre of Refugee Studies, University Oxford, (2004), [http://www.rsc.ox.ac.uk/publications/working-papers-folder\\_contents/RSCworkingpaper17.pdf/view?searchterm=goodwin](http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper17.pdf/view?searchterm=goodwin) [accessed 18<sup>th</sup> November, 2011], p.13.

human right, rather than just any old human right, then we had better be absolutely sure about what we are looking for, and how to recognize it when we find it'.<sup>94</sup> Yet, even with a level of engagement with the refugee definition, attaining a clear and recognisable understanding of the criteria is a difficult task to achieve.

In seeking to elaborate upon what constitutes persecution, Grahl-Madsen noted that the phrase 'well-founded fear of persecution' has paved the way for numerous interpretations.<sup>95</sup> As early as the 1960s, Grahl-Madsen was aware that the sovereign prerogative in deciphering the 1951 Convention was having a detrimental effect upon the international refugee regime. Grahl-Madsen argued that states were in no mood for a liberal refugee regime and that if anything they were seeking various means in order to hamper the flow of their international responsibility.<sup>96</sup> Grahl-Madsen highlighted that to combat the international approach to the refugee regime, developing a uniform interpretation and application of the eligibility criteria by creating some kind of eligibility appeals commission, perhaps on a regional level, would be an interesting approach to developing a more harmonised and respectful refugee regime.<sup>97</sup> He argued that refuge should be based upon on a 'broad-minded consideration of the total situation of the individual concerned, placing emphasis on the humanitarian nature of the act of admitting refugees'. In doing so, a simplistic policy guideline would be extremely beneficial; it would highlight the need for protection 'in the form of admission and permission to stay, but, on the other hand, emphasize... that the humanitarian considerations have to be balanced against important reasons of state'.<sup>98</sup> Grahl-Madsen understands persecution as follows:

acts or circumstances for which the government(or, in appropriate cases, the ruling party) is responsible, that is to say: acts committed by the government (or the party) or organs at its disposal, or behaviour tolerated by the governmentin such a way as to leave the victims virtually unprotected by the agencies of the State.<sup>99</sup>

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<sup>94</sup> Goodwin-Gill, G. S. 'Refugee and their human rights', p.113

<sup>95</sup> Grahl-Madsen, A. cited in Zimmerman, A. and Mahler, C. 'Part Two: General Provisions: Article 1A, para2. 1951 Convention', in Zimmerman, A. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (Oxford: Oxford University Press, 2011), pp.281-465, p335.

<sup>96</sup> Grahl-Madsen, A. 'Refugees and Refugee Law in a World of Transition', *Michigan Yearbook of International Legal Studies*, 3(1982):65-90, p, 70.

<sup>97</sup> Grahl-Madsen, A. 'Refugees and Refugee Law in a World of Transition', p, 71.

<sup>98</sup> Grahl-Madsen, A. 'Refugees and Refugee Law in a World of Transition', p, 71.

<sup>99</sup> Grahl-Madsen, A. cited in Zambelli, P. 'Problematic Trends in the Analysis of State Protection and Article 1F(a) Exclusion in Canadian Refugee Law', *International Journal of Refugee Law*, 23(3)(2011):1-36, p.3.

Persecution within this understanding would be conducted, not by ‘a small group of men in exalted positions, but as the machinery which should secure tranquillity and order in the territory of the State’.<sup>100</sup>

In offering an alternative position regarding persecution, Scott Rempell provides an interesting examination of persecution that highlights its central underpinnings: harm, severity and legitimacy, and makes a claim for a unified definition. For Rempell, these three underpinnings of harm, severity and legitimacy account for the true foundations of persecution. In examining persecution through these categories, Rempell seeks to establish a consistent criterion to aid the refugee regime.<sup>101</sup> A definitional understanding of persecution by Rempell is ‘the illegitimate infliction of sufficiently severe harm’. His definition of persecution is based upon the understanding that, as the persecution criteria are at the foundation of refugee law, harm is at the core of persecution.<sup>102</sup> An analysis of what constitutes harm and how harm can be understood would then directly impact upon how we engaged with the meaning of persecution. In adopting this position, and understanding persecution as harm, the criterion of persecution is then provided with a strong and detailed connotation that can be applied and utilised far more widely than the simplistic notion of a threat to life and liberty. Essentially, Rempell ‘hones persecution’s core while eliminating descriptors that are peripheral to its focus’.<sup>103</sup> Incorporating the category of harm into the understanding of persecution allows for a greater engagement and applicability to emerge. Rempell argues that the definition of persecution should not incorporate ‘unhelpful or incorrect qualifiers, such as an incorporation of the threats to life or freedom language, references to other elements of the refugee definition, gauges linking offensive conduct to persecution, or a requirement that a persecutor inflict harm for punitive reasons’.<sup>104</sup> Instead, he argues strongly against the use of gauges such as discrimination and harassment. Following Richard Plender’s understanding of persecution, the criteria should not cover discrimination or harassment, as these are flawed gauges that ‘hinder the need to focus on the

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<sup>100</sup> Grahl-Madsen, A. cited in Zambelli, P. ‘Problematic Trends in the Analysis of State’, p.17.

<sup>101</sup> Rempell, S. ‘Defining Persecution’.

<sup>102</sup> Rempell, S. ‘Defining Persecution’, p.286.

<sup>103</sup> Rempell, S. ‘Defining Persecution’, p.344.

<sup>104</sup> Rempell, S. ‘Defining Persecution’, p.344.

severity of harm'.<sup>105</sup>

However, Mirko Bagaric and Penny Dimopoulos argue the opposite and claim that discrimination is the touchstone of persecution in refugee law. Through their analysis and utilisation of discrimination, they state that the concept unifies and explains more of the standards and doctrines that currently exist.<sup>106</sup> By focusing upon discrimination as a means of understanding persecution, Bagaric and Dimopoulos state that it would lead to greater coherency, consistency and certainty within the area of refugee law. However, Rempell's position asserts that persecution is the 'illegitimate infliction of sufficiently severe harm'. Within this context, harm is understood and identified as conduct that covers 'physical harms, restraints and deprivations of privacy, resource and opportunity limitation, psychological harms, and infringements on human rights standing alone or attendant to the previously mentioned categories'.<sup>107</sup> Yet, indicating that harm has transpired is not satisfactory in itself to ascertain whether the behaviour in question was tantamount to persecution. Rempell's quest for establishing a 'unified' definition of the persecution criteria undertakes a deconstruction of the meaning of persecution and breaks the notion down into the categories of harm, severity and legitimacy. In seeking to develop a coherent understanding of how persecution should be understood, and significantly how it should be applied, Rempell's work provides an intriguing and practical means of breaking down the criteria in order to understand the concept as a whole.

### *A Human Rights Approach*

In developing an understanding of the concept of persecution, there are several approaches that can be adopted. One of the main approaches is the position that argues that persecution is the infringement of a human right. Reflecting on international refugee law, Deborah Anker argues that it has matured over the last couple of decades, especially with refugee law affirming its international human rights origins.<sup>108</sup> Certainly, the human rights approach to refuge (and persecution) has become the accepted stance, and has been endorsed by the UNHCR as well as

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<sup>105</sup> Rempell, S. 'Defining Persecution', and Plender, R. 'Admission of Refugees: Draft Convention on Territorial Asylum', *San Diego Law Review*, 15(1)(1977):45-62.

<sup>106</sup> Bagaric, M. and Dimopoulos, P. 'Discrimination as the Touchstone of Persecution in Refugee Law', *Journal of Migration and Refugee Issues*, 3(1)(2007):14-40.

<sup>107</sup> Rempell, S. 'Defining Persecution', p.343.

<sup>108</sup> Anker, D. cited in Price, M. E. 'Persecution Complex: Justifying Asylum Laws Preference for Persecuted People', *Harvard International Law Journal*, 47(2006):413-465, p.415.

various national refugee regimes. Understanding refugee law within a human rights framework has become a vital component of the refugee regime. Indeed, the EU Qualification Directive, Article 9 explicitly endorses the approach when it states:

Acts of persecution within the meaning of article 1 A of the Geneva Convention must: be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention of Human Rights, or be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual.<sup>109</sup>

Many states are now interpreting an understanding of refuge as ‘the sustained or systemic violation of human rights demonstrative of a failure of state protection’. This understanding is derived from the scholarly work of James Hathaway.<sup>110</sup> Hathaway argues that when a state either disregards, or is not capable of reacting to, justifiable expectations and norms as identified in international human rights law, the state is failing to provide its ‘basic duty’. It is then acceptable for the citizens of that state to have the right to lawfully disengage from that society and seek protection in another country.<sup>111</sup> Through his work, Hathaway has shaped the international refugee system, and his work has been utilised in courts and tribunals of common law as a means of deciphering the labyrinth that is the 1951 Convention.<sup>112</sup> As B.S. Chimni writes, Hathaway is one of the ‘ablest critics’ of the refugee regime.<sup>113</sup>

Hathaway asserts that his definition of refuge is based not only upon the Convention itself, but is also founded upon the three fundamental covenants of the international human rights system: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>114</sup> Hathaway draws upon the human rights that are embedded within the UDHR in

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<sup>109</sup> Maiani, F. ‘The Concept of “Persecution” in Refugee Law’, p.6.

<sup>110</sup> Hathaway, J. C. *The Law of Refugee Status*, p.101.

<sup>111</sup> Hathaway, J. C. cited Price, M, E. ‘Persecution Complex’, p.453.

<sup>112</sup> Refugee Case Law, University of Michigan Law School, James Hathaway, <http://www.refugeecaselaw.org/contributors.aspx> , [accessed 03/04/2014].

<sup>113</sup> Chimni, B. S. ‘The Geopolitics of Refugee Studies: A View From the South’, *Journal of Refugee Studies*, 11(4)(1998):350-374, p.362.

<sup>114</sup> Hathaway, J. C. *The Law of Refugee Status*, p.106.

order to establish a meaning and system for comprehending persecution. Using a human rights approach, the definition of persecution can be summarised as:

[T]he sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community. The types of harm to be protected against include the breach of any right within the first category [UDHR], a discriminatory or non-emergency abrogation of a right within the second category [ICCPR], or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources [ICESCR].<sup>115</sup>

In establishing a definition of persecution within a human rights framework, highlighting a state's basic duty of protection, Hathaway created three categories of rights the breach of which could, under certain conditions, constitute persecution. As noted, the first category of persecution is connected to the rights that are situated within the Universal Declaration of Human Rights and that are immediate and binding on signatories in the form of the International Covenant on Civil and Political Rights (ICCPR). The breach of any of the following rights, for Hathaway, constitutes persecution:

Freedom from arbitrary deprivation of life; protection against torture or cruel, inhuman, or degrading punishment or treatment; freedom from slavery; the prohibition on criminal prosecution for ex post facto offences; the right to recognition as a person in law; and freedom of thought, conscience and religion.<sup>116</sup>

Hathaway's second category of persecution is connected to the rights within the ICCPR and is an example of the rights a state can contravene under certain situations such as public emergencies. The breaching of these rights for prejudice or non-emergency reasons is, for Hathaway, tantamount to persecution. As such, the ICCPR rights that, when infringed, can be construed as persecution, are:

Freedom from arbitrary arrest or detention; the right to equal protection for all, including children and minorities, the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved; the protection of personal and family privacy and integrity; the right to internal movement and choice of residence; the freedom to leave and return to one's country; liberty of opinion, expression, assembly, and association, the right to form and join trade unions; and

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<sup>115</sup> Hathaway, J. C. *The Law of Refugees Status*, p.112.

<sup>116</sup> Hathaway, J. C. *The Law of Refugees Status*, p.109.

the ability to partake in government, access public employment without discrimination and vote in periodic and genuine elections.<sup>117</sup>

The third category of rights Hathaway has identified, the breach of which can amount to persecution, are the rights established within the UDHR that form the non-binding International Covenant on Economic, Social and Cultural Rights (ICESCR). Hathaway proposes that when a state does fail to implement one or more of these material rights in a prejudiced manner or and it is not 'grounded in the absolute lack of resources' it could then be construed as persecution against the individual. It is to be noted, though, that a claim of persecution on the grounds of financial or generalised hardship would not be tantamount to persecution. As a result, the rights the violation of which could equate to persecution encompass the following:

The right to work, including just and favourable conditions of employment, remuneration, and rest; entitlement to food, clothing, housing, medical care, social security, and basic education; protection of the family, particularly children and mothers; and the freedom to engage and benefit from cultural, scientific, literary, and artistic expression.<sup>118</sup>

At the core of Hathaway's understanding of persecution is the understanding that persecution is the result of 'the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community'. Persecution, according to Hathaway, occurs when a sustained or systemic breakdown in state protection occurs and is harmful to an individual; or, put another way, 'refugeehood becomes an autonomous response to human rights abuse'.<sup>119</sup> By constructing the human rights approach to understanding persecution, Hathaway allows for the various levels of refuge to emerge and highlights the individualistic nature of the refugee regime. However, maintaining an understanding of persecution that is purely focused upon the threat to life and liberty promotes these rights at the expense of social, economic and cultural rights. As Hathaway suggests, whilst this is a correct observation, it does truthfully echo the contemporary hierarchy of international human rights law.<sup>120</sup> A serious threat to life is treated more severely than a serious threat to material security, hence the plight of those affected by climate change: they fall out with the scope of what can be

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<sup>117</sup> Hathaway, J. C. *The Law of Refugees Status*, p.109-110.

<sup>118</sup> Hathaway, J. C. *The Law of Refugees Status*, p.110-111.

<sup>119</sup> Hathaway, J. C. 'Reconceiving Refugee Law as Human Rights Protection', *Journal of Refugee Studies*, 4(2)(1991):113-131, p.124.

<sup>120</sup> Hathaway, J. C. *The Law of Refugees Status*, p.107-114 and particularly, p.115.

understood as persecution under the current refugee regime. Yet, with Hathaway's three-tiered framework of persecution based upon the human rights structure, the understanding of persecution would be able to be utilised broadly and provide protection to a broad level and array of individuals who fall within one of the three structures, whilst at the same time taking into consideration the 'perceived self-interest of states'.<sup>121</sup> Accordingly, it installs flexibility and allows for a generous interpretation of persecution to enter international refugee law.

Following in Hathaway's steps, Guy Goodwin-Gill has also taken on board the human rights approach to defining persecution. He stresses that persecution can be understood as being when actions harm individuals and the honour and natural dignity of an individual are disrespected to an extent that is unjustifiable under either current international norms or national standards with the country that is hearing a claim for refuge.<sup>122</sup> Persecution in this instance is intertwined with the notion of discrimination and can be basically regarded as an infringement of one or more of the basic rights located within international human rights law.<sup>123</sup>

It has been noted that the use of the human rights approach within the refugee regime has resulted in intriguing outcomes. Mikhail Izrailev highlights how a human rights framework is an interesting referencing tool within the refugee regime, for inherent within that framework is the explicit statement within the Universal Declaration of Human Rights that everyone has the right to live without fear. Thus for Izrailev, the most significant issue to be asked when determining a refugee claim is 'when fear rises to the level of being well-founded due to a protected ground'.<sup>124</sup> To determine whether the harm experienced, or predicted, is likely to rise to levels tantamount to persecution, Izrailev argued for a holistic evaluation of various factors that include 'the nature of the threatened rights, the nature of the threat itself, and the gravity of the harm threatened'.<sup>125</sup>

However, the human rights approach, as highlighted by those such as Hathaway, Goodwin-Gill

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<sup>121</sup> Hathaway, J. C. 'Reconceiving Refugee Law', p.114.

<sup>122</sup> Goodwin-Gill, G. S. cited in Aleinikoff, A, T. 'The Meaning of Persecution in the United States Asylum Law', *International Journal of Refugee Law*, 3(1)(1991):5-29, p.12.

<sup>123</sup> Goodwin-Gill, G. S. 'Refugees and their human rights'.

<sup>124</sup> Izrailev, M. 'A New Normative Approach for the Grant of Asylum in Cases of Non-State Actor Persecution', *Cardozo Journal of International Law and Complimentary Law*, 19(2011): 171-203, p.185-186.

<sup>125</sup> Izrailev, M. 'A New Normative Approach for the Grant of Asylum', p.197.



and Izrailev, has been criticised for merely rendering persecution as a human rights abuse. The UNHCR stipulated in a 2004 report that:

...while international and regional human rights treaties and the corresponding jurisprudence and decisions of the respective supervisory bodies influence the interpretation of the 1951 Convention, persecution cannot and should not be defined solely on the basis of serious or severe human rights violations.<sup>126</sup>

This position has been repeated on numerous occasions by the UNHCR. Erika Fuller, speaking in 2002 as Director for the Department of International Protection, stated unequivocally that the concept of persecution should not be purely grounded within the human rights regime. Fuller stressed:

Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution, or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin.<sup>127</sup>

The human rights approach has also faced criticisms from various courts, where it has been argued that the 1951 Convention and international human rights law were not intended to defend ‘all refugees from all harm’.<sup>128</sup> Indeed, the approach has faced criticism for its scope in determining who could potentially be situated within the refugee regime. Steinbock argues that such a broad account of persecution would transform international refugee law, or that the decision making process regarding refugees would need to be founded on some other criterion than the type or level of harm ‘such as the quantity or probability’. Steinbock asserts that, for either of these options, the practical implications for the regime would be massive.<sup>129</sup> Hence, Aristide Zolberg, Astri Zührke and Sergio Aguayo note that the choice of persecution ‘as the key

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<sup>126</sup> UN High Commissioner for Refugees. *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*. (28 January 2005), OJ L 304/12 of 30.9.2004, <http://www.unhcr.org/refworld/docid/4200d8354.html>, [accessed 11/11/2011], p.20.

<sup>127</sup> Fuller, E. Statement by Ms. Erika Feller, Director, Department of International Protection, UNHCR, SCIFA ( 6 November 2002) UN High Commissioner for Refugees, <http://www.unhcr.org/42bab1b52.html>, [accessed 11/11/11].

<sup>128</sup> Izrailev, M. ‘A New Normative Approach for the Grant of Asylum’, p.202.

<sup>129</sup> Steinbock, D. L. ‘Interpreting the Refugee Definition’, p.782.

operational criterion was in keeping with the desire of the international community to make the status of refugee exceptional, so as to preclude overwhelming numbers'.<sup>130</sup>

### *Reconceptualising Persecution*

There are calls for the complete rethinking of refuge and persecution, with scholars such as Andrew Shacknove and Michael Dummett arguing for a definition based upon humanitarian principles, in the broadest sense, to replace the narrow confines established by the 1951 Convention. They argue for a definition that acknowledges that there are circumstances beyond a well-founded fear of persecution that would force an individual to leave their home: 'such as the impossibility of living a decent life'.<sup>131</sup> Shacknove puts forth that 'neither persecution nor alienage captures what is essential about the refugee'. For him, persecution is a sufficient, but not a necessary condition for the 'severing of the normal social bond'. Indeed, it allows for a deficiency in state protection under predatory state rule, yet it does not allow for the possibility of the polar opposite - 'the chaotic extreme where a government (or society) has, for all practical purposes, ceased to exist'.<sup>132</sup> The collapse of society manifests in various forms and is often unrelated to state persecution. For example, in the twenty-first century, a main issue of concern has been the need to address global warming and the impact that environmental degradation will have on human security. As Bonnie Docherty and Tyler Gianni note, studies predict that by 2050 the number of climate refugees will far exceed the number of traditional refugees.<sup>133</sup> But how do these individuals attain refuge within the confines of the persecution criteria or the 1951 Convention? B. Ibhawoh and Matthew Price argue that the legal construction of the 1951 Convention does not take adequate account of socio-economic issues such as starvation, war, and environmental disasters as a root cause of refugee status, arguing that the narrow understanding of refuge mirrors the 'Eurocentric liberal rights paradigm' from which it materialised. Particularly with the collapse of communism, 'globalisation superseded the old polarisation, with mass migration and numerous regional conflicts replacing superpower stand-offs'.<sup>134</sup> The agents

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<sup>130</sup> Zolberg, A., Suhrke, A. and Aguayo, S. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, (Oxford: Oxford University Press, 1989), p.25.

<sup>131</sup> Dummett, M. cited in Friedman, E. and Klein, R. *Reluctant Refugee: The Story of Asylum in Britain*, (London: The British Library, 2008), p.8.

<sup>132</sup> Shacknove, A. 'Who is a Refugee?', *Ethics*, 95(2)(1985):274-284, p.277.

<sup>133</sup> Doherty, B. and Gianni, T. 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees', *Harvard Environmental Law Review*, 33(2009):349-403, p.349.

<sup>134</sup> Friedman, E. and Klein, R. *Reluctant Refugee*, p.57.

of persecution are no longer necessarily state actors, but non-state actors, or even sub-state actors, rebels and militia. By following the 1951 Convention route to refuge, whole swathes of individuals are excluded from attaining refuge as they fail to comply with the UNHCR definition of what constitutes a refugee. Those who are excluded due to lacking the persecution label are:

people caught in the crossfire of civil war or generalized violence, starving people, people without economic resources to subsist, people forced to flee their countries due to environmental catastrophe, people recruited to rebel militia, and battered women unable to attain police protection.<sup>135</sup>

The 1951 Convention centres on the infringement of the traditional liberal rights approach for which the state can be liable, and ‘is less concerned about violations of social and economic rights that may not necessarily be occasioned by the state’.<sup>136</sup> Hence, Angela Oels notes that states, rather than engaging with the need to broaden the horizons of the legal definition of refuge, are instead, through aspects of the climate discourse, centring upon the image of not just the ‘climate refugee’ being at risk, but ‘we’, the Western industrialised states, which ‘if not literally flooded, will most certainly be flooded by the ‘climate refugees’.<sup>137</sup> The threat and risk to individual human life is inverted and instead, it is the threat to the Western state that is seen as the more pressing issue that needs to be preserved. Yet, as Zolberg, Suhrke, and Aguayo assert, what creates a refugee is immaterial; what is central is that their security has been threatened:

whether the individuals are activists or passive bystanders simply caught in conflict is immaterial from the point of view of their immediate security. Their need clearly could be the same regardless of the cause... it follows that in a... normative sense, the three types of refugees are equally deserving. The activists, the target, and the victim have an equally valid claim to protection from the international community.<sup>138</sup>

By engaging with persecution through legal documents, as well as the discussions of various refugee scholars, it is apparent that there are myriad ways of defining, understanding and engaging with the notion of persecution. In examining these various legal texts, as well as

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<sup>135</sup> Price, M. E. ‘Persecution Complex’, p.417.

<sup>136</sup> Ibhawoh, B. ‘Defining Persecution and Protection: The Cultural Relativism Debate and the Rights of Refugees’, in Gibney, N. and Loescher, G. *Problems of Protection: The UNHCR, Refugees, and Human Rights*, (London: Routledge, 2003), pp.61-78, p.67.

<sup>137</sup> Oels, A. ‘Saving “climate refugees” as bare life? A theory-based critique of refugee status for climate-induced migrants’, *Paper prepared for presentation at the ESF-ZiF-Bielefeld Conference on Environmental Degradation and Conflict*, Germany, 5-9<sup>th</sup> December (2010), p.14.

<sup>138</sup> Zolberg, A., Suhrke, A. and Aguayo, S. *Escape from Violence*, p.269.

refugee theorists such as Hathaway, Rempbell, Shacknove and Zolberg, what is clear is that there is no consensus surrounding the notion of persecution. Importantly, they do point towards a silence, or an ambiguity that resides within the 1951 Convention, hence their own engagement. What is more, it could be argued that the silence of the 1951 Convention has resulted in an ambiguity within the field of refugee studies, with no unified understanding emerging. To reiterate Daniel Wilsher's point, even after so many decades 'and thousands of judicial decisions after its signature, the Refugee Convention continues to produce novel interpretations of central concepts such as the meaning of 'persecution' and 'protection''.<sup>139</sup> The silence surrounding the language of persecution is highlighted through the previous analysis, and this needs to be understood specifically in practical terms. How then are states implementing a concept that has little definitional meaning? Are states utilising this silence within the language of refuge in order to apply ever more restrictive policies to protect their own national interests? And, is this silence positioned strategically, as Chimni himself asks, to serve the state,<sup>140</sup> with silence allowing hostility to replace hospitality.

## **Conclusion**

The purpose of this chapter has been to set the scene, so to speak, of the international refugee regime, engaging directly with the 1951 Convention to examine how the refugee is defined. With the focus particularly upon the defining features of persecution, chapter one sought to engage with the concept of refuge and dissect the language surrounding the notion of persecution through historical, legal and scholarly approaches. By analysing the discussions and debates surrounding the refugee definition and focusing on the practices of language and silence, the chapter undertakes a broad critical analysis to develop an understanding of the criteria. The chapter engages with the limitations of language within the 1951 Convention as well as the ambiguities in Article 1(2)A. The analysis has shown there is a silence regarding how the persecution criteria should be implemented pragmatically. Through a primary analysis of the *travaux préparatoires*, a definitional understanding of what persecution equates to is not apparent. During the construction of the 1951 Convention, there was little to no discussion on the

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<sup>139</sup> Wilsher, D. 'Non-State Actors and the Definition of a Refugee in the UK', p.106.

<sup>140</sup> Chimni, B. S. 'The Birth of a Discipline', p.16.

interpretation of refuge. The language employed was not explicit, and as a result there are gaps, or strategic silences in the narrative construction of refuge. In many of the documents discussed, an assumption appears to emerge that persecution equated to the horrors of the Second World War, as well as being connected to the tensions of the Cold War politics of the time; however, this was never discussed in detail, again with a silence in the language emerging. This same silence continues through the legal texts external to the 1951 Convention, with the UNHCR Handbook, the Qualification Directive, the European Human Rights Act as well as refugee scholars failing to resolve the silence surrounding the understanding of persecution. The discussion sheds light upon the confusion and discrepancies that surround a central feature of international refugee law. What is clear though, through the various scholarly and legal engagements with persecution, is that they point towards a silence or an ambiguity that resides within the 1951 Convention, a silence that I argue has allowed states to establish a disjuncture between the 1951 Convention and the protection then provided.

The thesis will now continue with the themes of language and silence with regard to persecution. Chapter Two, *Filling in the Gaps of Geneva: Regional Refugee Conventions and the Expansion of Refugee Language*, will focus upon regional refugee regimes beyond the 1951 Convention. In doing so, it will conduct a postcolonial engagement with the Western-centric 1951 Convention and engage with regional conventions, such as the African Convention, the Cartagena Declaration and the Bangkok Declaration, to examine the broadening of the language employed within these regimes, to see what can be gained from regional understandings of refuge and persecution. The chapter, by adopting a wider field of reference, aims to disturb the silence surrounding the 1951 Convention, and ‘fill in the gaps’ of Geneva.

## Chapter Two

### *Filling in the Gaps of Geneva: Regional Refugee Conventions and the Expansion of Refugee Language*

#### **Introduction**

With the ratification of the 1951 Convention a refugee was defined as an individual who has left their country of origin, and is unable or unwilling to return ‘owing to the well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion’.<sup>1</sup> This definition has been the defining feature of the international refugee regime for over sixty years and, to date, some 47 million vulnerable people have fallen within the United Nations High Commission for Refugees (UNHCR) mandate, consisting of both stateless persons and refugees, as well as internally displaced persons. The figure of the refugee occupies a significant presence within twenty first century international society. Since the founding of the UNHCR and the 1951 Convention, the refugee situation has not abated and if anything, the situation for refugees globally is as perilous as ever.

Within Chapter One I argued that there is a silence within the 1951 Convention as to how to implement pragmatically the notion of refuge and persecution. This silence, I argue, has resulted in a discrepancy between the 1951 Convention and the protection offered to the refugee. The chapter presented the language of persecution criteria, and revealed the strategic silences inherent within the Convention. It engaged with the limitations and discrepancies of the language as well as the silences that are in-built. There appear to be assumptions as to what persecution equates to, but considering that this concept is at the heart of the 1951 Convention, it is surprising how little discussion there is on the subject. States then through this silence, have the

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<sup>1</sup> UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, (Geneva: Media Relations and Public Information Service, 2006), p.7.

flexibility to restrict (or broaden) how persecution should be employed. Indeed, even when there has been a call to harmonise EU asylum policies, this has not been done in the interests of the refugee but rather for ‘the self-interested preoccupations of asylum states’.<sup>2</sup>

Due to the silence of the 1951 Convention, Chapter Two aims to broaden the engagement with the refugee regime beyond Europe. I will argue that the analysis should engage with regional understandings outside of Europe, and draw upon the language of refuge being employed by states beyond Geneva. The chapter will engage with regional refugee regimes in order to learn from the language being utilised beyond the 1951 Convention and determine whether it can help bridge the silence of Geneva. Does the language of refuge residing within the African Refugee Convention, the Cartagena Declaration and the Bangkok Principles help break some of the silences of 1951? Moreover, if the 1951 Convention (as well as the 1967 Protocol) were the pinnacle of international refugee law, why then did the regional refugee regimes emerge? What do these regional refugee regimes offer and provide that the 1951 Convention does not? What silence in language resides in the 1951 Convention definition of a refugee that the regional regimes seek to elaborate upon and break? It should be noted though that the focus of this chapter is the 1951 Convention as well as regional refugee regimes that are subject to state ratification. The focus is not upon the UNHCR’s Mandate; this is a separate instrument, which is not subject to state ratification. The UNHCR Mandate though, has expanded over time, developing into a more inclusive and pragmatic instrument of protection. However, it is only used by the UNHCR and states are not subject to it. The thesis will address this aspect of the UNHCR and the emerging discrepancy with the 1951 Convention in Chapter Six.

Accordingly, Chapter Two aims to frame the 1951 Convention within an international arena and scrutinise the convention by drawing upon regional regimes, in order to highlight the variations in language.

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<sup>2</sup> Hathaway, J. C. *The Law of Refugee Status*, (Toronto: Butterworths, 1991), p.231.

## **Geneva and Beyond:**

The 1951 Convention is a product of its times. The Convention spoke of refugees in a particular light, and was relevant to events prior to 1951. It addressed a certain individual within a temporal dimension. A refugee under these circumstances was a fairly specific person, and was not necessarily a universal figure. Even with the 1967 Protocol, the notion of the refugee was still a product of its times, with the understanding of persecution and refuge being impacted not only by the Second World War, but also the ideological battles of the Cold War, and the subsequent East/West divide. A refugee was a political figure and through the Cold War, was curtailed to mainly the European region; for refugees were generally understood as communist defectors, moving from East to West in search of refuge. However, more importantly although normally overlooked, the 1951 Convention is also a product of its colonial times.

The 1951 Convention emerged during an era of colonialism, and this is bound to have had an impact upon how the Convention and the organisation were structured, written, interpreted and implemented. However, this is so often overlooked, in what Gruffydd Jones terms ‘an abstraction and sanitization’<sup>3</sup> of history. As Peter Harris asserts, this deflection of the organisation’s colonial origins is ‘a flagrant misrepresentation of something that rightfully belongs to the history, mindset and process of imperialism’.<sup>4</sup> For instance, an interesting (albeit, minor) example of the colonial setting of the 1951 Convention, is the British reaction to ratifying the 1951 Convention in 1954. The Convention was made applicable only to the UK, the Channel Islands and the Isle of Man, with no mention of any precincts being raised ‘so as not to call attention to the colonies’, as the Government was still considering whether to make the Convention applicable to the colonies. For the ‘extension can only be made as and when local legislation is in accordance with the provisions of the Convention, subject to such reservations as may be requested in respect of the territory concerned. This is inevitably a slow process’.<sup>5</sup>

It is important to remember that postcolonialism is concerned with history before, during, and

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<sup>3</sup> Jones, G. cited in Harris, P. ‘Decolonizing the special relationship: Diego Garcia, the Chagossians, and Anglo-American relations’, *Review of International Studies*, 39(3)(2013):707-727, p.720.

<sup>4</sup> Harris, P. ‘Decolonizing the special relationship’, p.720

<sup>5</sup> Letter by Mr Nigel Nicolson to Parliament. FO 371/ 112630 Ratification by the UK and Other Countries of the International Convention Relating to the Status of Refugees of 1951: Extension to the UK Colonial Territories and Reservations, US R 1824/ 14 (15<sup>th</sup> February 1954), The National Archives, Kew, [accessed 18/8/2011].



after colonialism. It is an overarching term that incorporates the breadth of the colonial engagement as well as the relations after the colonial encounter itself. Marie-Bénédicte Dembour argues that a postcolonial approach is essential for bringing to light our colonial past and its relation to our present. She insists that the significant word is not the prefix 'post', but instead the adjective 'colonial', 'which we so would like to forget, think we do not need to talk about any more and most often act as if it had nothing to do with the way we are today'.<sup>6</sup> Postcolonialism, as Dembour notes, constitutes the development from colonialism, yet is still deeply connected with the power structures of the colonial era as well as with the former colonisers and emphasizes, as Jennifer Hyndman argues, the 'continued relevance of history and geography'.<sup>7</sup> For colonialism can be observed as a rational, constant history in which colonial pasts are connected to the liberal present. Following in this line, as well as in the analysis of Sonia Tascón, this chapter argues that colonialism has 'shaped the world radically and produced practices and events that continue to this day'.<sup>8</sup>

Odhiambo-Abuya notes how the drafters of the 1951 Convention were predominantly white, European states who sought to tackle a trans-European crisis.<sup>9</sup> This European underpinning resulted in the 1951 Convention having a strong European orientation, which, Odhiambo-Abuya argues, it has maintained to this day. The 1951 Convention is a product of its times, having been created in order to tackle the challenges of the Second World War. Accordingly, Odhiambo-Abuya asserts that the criterion that defines a refugee embodies a particularly Western understanding. By this, he means that refugee flows within a European dimension are normally characterised under the 1951 Convention with the individuals having fled owing to a well founded fear of persecution from (generally) a predatory state actor.<sup>10</sup> This is how the refugee movements of the Second World War, and the emerging Cold War, could be understood.

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<sup>6</sup> Dembour, M. 'Postcolonial Denial: Why the European Court of Human Rights finds it so difficult to acknowledge racism', in Clarke, K. M. and Goodale, M. *Mirrors of Justice. Law and Power in the Post-Cold War Era*, (Cambridge: Cambridge University Press, 2010), p.58.

<sup>7</sup> Dembour, M. 'Postcolonial Denial: Why the European Court of Human Rights finds it so difficult to acknowledge racism', and Hyndman, J. *Managing Displacement Refugees and the Politics of Humanitarianism*, (London: University of Minnesota Press, 2000), p.119.

<sup>8</sup> Tascón, S. 'Refugees and the Coloniality of Power: border-crossers of postcolonial whiteness', in Robinson, A. *Whitening Races: Essays in Social and Cultural Criticism*, (Canberra: Aboriginal Studies Press, 2004), pp.239-253, p.240.

<sup>9</sup> Odhiambo-Abuya, E. 'A Critical Analysis of Liberalism and Postcolonial Theory in the Context of Refugee Protection', *King's College Law Journal*, 16(2005):263-29, p.281.

<sup>10</sup> Odhiambo-Abuya, E. 'A Critical Analysis', p.282.

Although the Convention is silent as to how persecution should be understood, it was based upon a shared European history of persecution, with a European citizen primarily as its subject.<sup>11</sup>

As noted in Chapter One, it was, to an extent, assumed by the drafters that persecution equated to the shared experiences of the horrors of the Second World War. However, how is this understanding of refuge and persecution applicable then to refugees outside of Europe? Although it was a world war, the horrors of the Holocaust and of the Nazi party were primarily based within Europe. Odhiambo-Abuya argues that the crises that have generated, and that continue to generate refugee flows within (particularly) an African perspective, vary considerably from the production of refugee movements in Europe. Indeed, B. S. Chimni highlights how refugee flows within the Southern hemisphere are perceived as being drastically different from those flows that occurred within the European continent, those same refugee flows that inspired the 1951 Convention, to the extent that a ‘traditional’ figure of the ‘normal’ refugee emerged. This refugee was ‘white, male and anti-communist’ and was juxtaposed sharply to the figure of the ‘new’ refugee emerging from the Southern hemisphere.<sup>12</sup> This argument has been advanced by Alexandria Inness, who asserts that values surrounding the liberal structures of the refugee system are inherently based upon a ‘normative whiteness’, which leads to an unequal refugee system emerging.<sup>13</sup> The basis for the figure of the refugee is still inherently inclined towards a Eurocentric individual, who is facing state persecution.

However, as Chimni notes, this fosters a myth of difference between what constitutes a refugee from the North and a refugee from the South. Following this myth, the ‘new’ refugee of the

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<sup>11</sup> Article 1(B)1 of the 1951 Convention asserts that ‘For the Purposes of this Convention, the words “events occurring before 1 January 1951” in Article 1, section A, shall be understood to mean either (a) “events occurring in Europe before 1 January 1951”; or (b) “events occurring in Europe or elsewhere before 1 January 1951”.’ Contracting states when ratifying the 1951 Convention had to specify either A or B. Only 4 states specified A (Turkey, Monaco, Madagascar and Congo) with the rest specifying B. As such, the 1951 Convention can be viewed as a universal convention, yet with a vague, European based notion of persecution and with the events needing to have occurred prior to 1<sup>st</sup> January 1951. UN High Commissioner for Refugees. ‘*State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*’, <http://www.unhcr.org/3b73b0d63.html>, [accessed 9/4/2014].

<sup>12</sup> Chimni, B. S. ‘The Geopolitics of Refugee Studies: A View from the South’, *Journal of Refugee Studies*. 11(4)(1998):350-374, p.351.

<sup>13</sup> Inness, A. ‘Normative Whiteness and Racist Effects in Liberal Refugee Policy: A Critical Study of Refugee Protection in Africa’ Paper presented at the annual meeting of the International Studies Association Annual Conference "Global Governance: Political Authority in Transition", Le Centre Sheraton Montreal Hotel, Montreal, Quebec, Canada, March 16, 2011.

South, rather than possessing ideological or political values like the traditional European refugee, is seeking refuge for unlikely reasons, abusing hospitality and arriving in ever increasing numbers.<sup>14</sup> Accordingly, what then occurs through the Western international refugee system, as Lisa Malikki points out, is the development of an endemic, ‘even if unintended, silencing of persons who find themselves in the classificatory space of ‘refugee’’.<sup>15</sup> What emerges is the connotation of a justified refugee, as well as its opposite - an unjustified refugee. Significantly, it is not just a North-South divide that highlights discrepancies in the understanding of the refugee, but a prevalent East-West divide that reveals the lack of universality in the international refugee regime. There is a lack of engagement by the East with the international refugee regime, but Sara Davies puts this down to the issue that the Eastern understanding of refuge is based upon the ‘new’ refugee experience, compared to the traditional Western individualistic, state-based model. In Asia, as with Africa, refugees flee political persecution but they are also exposed to other forms of persecution, such as ‘ethnic conflicts, man-made environmental disasters, natural disasters, failed (Western inspired) development projects, coups, and civil and interstate conflicts over borders’.<sup>16</sup>

As a result of these discrepancies, the East and the West, and the North and the South, have adopted varying positions towards refuge, and importantly, their own regional understanding as to what constitutes a refugee. This essentially highlights a regional evolution of the discourse surrounding the term refugee, rather than a universal discourse and consensus surrounding the political, social and economic factors that generate refugee flows. Within the international refugee regime, Davies argues that ‘currently, international refugee law is a discourse that the West dominates, framing knowledge claims about what a ‘true refugee is’’.<sup>17</sup> Hence, the West and institutions such as the UN, as Davies argues, have dominated the discussion of refugee law at the international level.<sup>18</sup> Accordingly, international refugee law is, and will continue to generate, a universalistic regime that is Eurocentric and Western in scope.

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<sup>14</sup> Chimni, B. S. ‘The Geopolitics’, p.357.

<sup>15</sup> Malikki, L cited in Limbu, B. ‘Illegible Humanity. The Refugee, Human Rights and the Question of Representation’, *Journal of Refugee Studies*, 22(3)(2009):257-282, p.268.

<sup>16</sup> Davies, S. E. ‘‘Truly’ International Refugee Law? Or Yet Another East/West Divide?’, *Social Alternatives*, 21(4)(2002):37-44, p.39.

<sup>17</sup> Davies, S. E. ‘‘Truly’ International’, p.39.

<sup>18</sup> Davies, S. E. ‘‘Truly’ International’, p.39.

Interestingly, Balakrishnan Rajagopal highlights concern regarding institutions such as the UN. He argues that the UN, as the home of the human rights and refugee discourse, maintains the preeminent international moral discourse for our time. Yet, it upholds a self-image of being a post-colonial institution, untouched by the Western colonial politics of pre-1948, when the Universal Declaration of Human Rights (UDHR) gave birth to the contemporary human rights movement. Rajagopal argues that this self-worth is merely a facade, for the new regime merely superseded the old international system of colonialism and the foundational conventions, such as the Universal Declaration of Human Rights (UDHR) were born within the colonial era.<sup>19</sup> Ratna Kapur follows this thought and contends that through analysing the development of the refugee and human rights regime through a postcolonial lens and by examining the colonial past it is possible to recognise the processes of power and their impact on knowledge and how they shape the conditions of inclusion and exclusion within the postcolonial era.<sup>20</sup> For as Dembour notes, the ‘way ‘we’ represent the other is imbued with relations of power, whether we are conscious of them or not’.<sup>21</sup> Kapur argues that there is a real urge to ‘address the complicity of human rights in making the world less stable, less peaceful, more divisive, more polluted and more violent’.<sup>22</sup> From this position, human rights have failed to unite the human family and instead have merely perpetuated the division between an ‘us’ with rights and a ‘them’ who are denied them. The unison or harmonisation that international treaties such as the UDHR and the 1951 Convention promised, has failed. The human rights discourse is founded upon the existence of a liberal subject, which assumes the existence of a counter subject, an excluded, non-liberal subject ‘other’, who is denied access or entitlements to the liberal project.

The liberal sovereign and the liberal subject are founded upon the notion of set borders, with ‘clearly identifiable interests and identities’<sup>23</sup>. What Kapur argues is that there is the establishment of ‘new non-humans, or lesser humans, as well as super-humans’ and these social

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<sup>19</sup> Rajagopal, B. ‘Counter-hegemonic International Law: rethinking human rights and development as a third world strategy’, *Third World Quarterly*, 27(5)(2006):767-783, p.769.

<sup>20</sup> Kapur, R. ‘The Citizen and the Migrant: Postcolonial Anxieties, Law and the Politics of Exclusion/Inclusion’, *Theoretical Inquiries in Law*, 8(2)(2007):537-570, p.539.

<sup>21</sup> Dembour, M. ‘Postcolonial Denial’, p.52.

<sup>22</sup> Kapur, R. ‘The Citizen and the Migrant’, p.583.

<sup>23</sup> Kapur, R. ‘The Other side of Globalization: The Legal Regulation of Cross-Border Movements’, *Canadian Women Studies*, 22(3)(2003):6-15, p.12.

divisions are shaped within and through the discourse of human rights.<sup>24</sup> Ultimately, they are embedded within our structures and treaties of international human rights and refuge. As Hathaway writes:

refugee law as currently administered allows Western states to maintain the facade of universal, humane concern without the necessity of affording genuine protection. The failure to acknowledge the disharmony of law and social reality makes it possible to avoid the discussion of basic principles which would logically follow, and which would require developed states either to enhance their contributions to refugee protection or to temper their much prized discourse of humanitarianism and human rights. Sadly, most less developed states have acquiesced in this silence.<sup>25</sup>

The Refugee Convention provides the traditional individualistic definition of what constitutes a refugee, the focus being upon persecution, with the main actor being a state. This has been seen as the classical understanding of refuge. This is the definition at the heart of international refugee law, and the Eurocentric understanding of refuge has shaped how we analyse contemporary refugee movements. As discussed in Chapter One, there is a disagreement in refugee law, as well as among the various guidelines and scholars, as to how to understand and interpret persecution and refugee.

The language of the Convention presents the state as the main actor of persecution, with persecution being connected to the five nexus.<sup>26</sup> Yet, as Chapter One highlighted, how we understand persecution pragmatically is not clear. An evaluation of the *travaux préparatoires* reveals a silence surrounding the understanding of persecution, with theorists such as Terje Einarsen and James Hathaway noting that the drafters assumed that persecution equated to the horrors of the Second World War. Certainly, a historical reading of the 1951 Convention reveals very little about how refuge and persecution should be applied. Even an engagement with legal documents and theorists such as Hathaway, Mikhail Izrailev, Daniel Steinbock, Scott Rempbell and Andrew Shacknove does not present a homogenous view of persecution. Some equate persecution to human rights, whilst others have sought to redefine the concept altogether. Importantly, their engagement with persecution and refuge points to a gap in knowledge within

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<sup>24</sup> Kapur, R. 'The Citizen and the Migrant', p.568.

<sup>25</sup> Hathaway, J. C. 'A Reconsideration of the Underlying Premise of Refugee Law', *Harvard International Law Journal*, 31(1)(1990):129-183, p.180.

<sup>26</sup> The five nexus being political, social, ethnic, religious, or nationality.

the 1951 Convention that they are seeking to fill. Indeed, with the silences that surround the understanding of persecution within the 1951 Convention, it becomes necessary to extend the enquiry further afield in order to break the silence, or the silencing nature of the language employed.

Looking beyond the Western perception of what constitutes a refugee, we find a far more inclusive concept. The language of the refugee undergoes a transformation, with a development and breadth not seen within the 1951 Convention. This in turn allows for interesting insights into the meaning of refuge to emerge, for as Eduardo Arboleda writes, states sought to develop the 1951 Refugee Convention to match the principles of humanitarianism, as well as those of expediency.<sup>27</sup> The environment encompassing the drafting of the 1951 Convention, post-Second World War, was restrictive in nature and failed to sufficiently react to the situations of the following decades, as the drafters of the 1951 Convention overlooked and failed to imagine the problems that might be generated from underdeveloped states of the south.<sup>28</sup> Accordingly Chapter Two aims to address this silence within the 1951 Convention by engaging with regional refugee regimes and examining how their notion of a refugee has sought to challenge, broaden, and disrupt the traditional language and understanding of refuge.

In focusing upon the regional refugee regimes, or as Jane McAdams terms them, ‘complimentary protection’,<sup>29</sup> it is hoped that this will highlight the discrepancies in the 1951 Convention that have been picked up at the regional level. As Jennifer Hyndman notes, the creation of regional refugee regimes identify ‘an uneven geography of definitions in international law’.<sup>30</sup> Accordingly, what can be learned linguistically, from the regional refugee conventions beyond Geneva? How do these conventions speak to, and of, the 1951 Convention? The following section is going to examine each of the following in turn: the African Refugee Conventions (1969), the Cartagena Declaration (1980) and the Bangkok Declaration (1966), and discuss how each one challenges, broadens and enriches the traditional understanding of refugee that is espoused by the 1951 Convention, as well as discussing what can learnt from the use of

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<sup>27</sup> Arboleda, E. ‘Refugee Definition in Africa and Latin America: The Lessons of Pragmatism’, *International Journal of Refugee Law*, 3(2)(1991):186-207, p.186.

<sup>28</sup> Arboleda, E. ‘Refugee Definition’, p.188.

<sup>29</sup> McAdams, J. *Complimentary Protection in International Law*, (Oxford: Oxford University Press, 2007).

<sup>30</sup> Hyndman, J. *Managing Displacement*, p.14.

language within these regional conventions. For as Hathaway noted, speaking of the OAU and Cartagena declaration, they ‘demonstrate a comparable degree of generosity premised on mutuality of interest and cultural compatibility’.<sup>31</sup>

### **The OAU Definition of Refugee**

The Organisation of African Unity (OAU) established the Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969. The OAU felt that in light of the struggles for independence across the continent, the Refugee Convention needed to be elaborated in order to be effective in handling the myriad refugee problems facing Africa. The period after 1951 witnessed the rise of decolonisation and independence movements, as states sought to overthrow the colonial powers that had controlled and dictated from afar. The processes of decolonisation generated mass movements of people as they sought to flee the resulting conflicts. However, as Emmanuel Opoku Awuku states, these people were not recognised as refugees by the international community.<sup>32</sup> They had fled owing to a well-founded fear but they did not receive protection as the crises were after 1 January 1951, although material assistance through the UNHCR’s ‘Good Office’ policies was provided.<sup>33</sup> During this period, High Commissioner for Refugees Felix Schnyder was conscious of the fact that the contemporary international refugee framework was not appropriate for handling refugee flows within the third world and recognised that their mandate, as well as the 1951 Convention, was out of touch with the developing contemporary refugee crises. The refugees emanating from the Third World did not fit the traditional definition of the 1951 Convention. That is to say, they had not fled due to circumstances before 1951, and the vast majority did not meet the requirements of an individual Euro-centric notion of persecution as defined within the Convention, for the refugees of the African continent were fleeing en masse.<sup>34</sup> As Loescher states, decolonisation created large masses of destitute people escaping unrest such as decolonisation movements or national

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<sup>31</sup> Hathaway, J. C. ‘A Reconsideration of the Underlying Premise of Refugee Law’, p.176.

<sup>32</sup> Awuku, E. O. ‘Refugee Movements in Africa and the OAU Convention on Refugees’, *Journal of African Law*, (39)(1)(1995):79-86, p.80.

<sup>33</sup> Chapter Six provides a detailed engagement with the ‘good offices’ policy highlighting how the UNHCR sought to develop its mandate beyond the confines of the 1951 Convention and reach out to the new refugee crises of the decolonization era.

<sup>34</sup> Awuku, E. O. ‘A Critical Analysis of Liberalism and Postcolonial Theory in the Context of Refugee Protection’, *The Kings College Law Journal*, (16)(2005):263-291, p.282.

liberation efforts, and the new independent states within the African continent required assistance to handle the emerging crises.<sup>35</sup> The 1951 Convention, as Eduardo Arboleda argues, had been ‘rendered obsolete by evolving realities in the Third World’.<sup>36</sup> Or at least, as Zolberg, Suhrke and Aguayo note, the OAU Convention was born out of political solidarity ‘on behalf of the ongoing struggles against white rule in southern Africa, as well as retrospectively in Algeria’<sup>37</sup>, which Chimni notes is so often overlooked. The OAU Convention was born out of the context of anti-colonial struggles in Africa.<sup>38</sup>

Fledgling states in Africa, emerging out of the throes of decolonisation, had to manage a mass movement of people without any assistance, since they were excluded from the 1951 Convention.<sup>39</sup> And, as was mentioned previously, states such as Britain had purposefully avoided the inclusion of their colonies when ratifying the 1951 Convention. Opoku Awuku asserts that it was at this stage that the refugee crises of Africa led to the need to adopt an African approach. Drawing upon Franz Fanon, Edwin Odhiambo-Abuya argued that ‘by taking this approach Africa stands to make great strides, “so long as [it] does not imitate Europe, so long as [it] is not obsessed by the desire to catch up with Europe”’.<sup>40</sup>

The OAU Convention highlights the needs of the African states in meeting the refugee crises and ‘reflect[s] the generosity of the African peoples in granting hospitality to those in distress’<sup>41</sup>. Chimni asserts that the definition of refuge ‘clearly bore the imprint of the anti colonial political context’<sup>42</sup>, and as Isabelle Gunning put it, was the OAU’s chance to ‘Africanize’ international

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<sup>35</sup> Loescher, G. *The UNHCR and World Politics: A Perilous Path*, (Oxford: Oxford University Press, 2001), p.124.

<sup>36</sup> Arboleda, E. ‘Refugee Definition, p.188.

<sup>37</sup> Zolberg, A., Suhrke, A. and Aguayo, S. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, (Oxford: Oxford University Press, 1989), p.29.

<sup>38</sup> Chimni, B. S. ‘*The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia*, Regional Centre for Strategic Studies, Policy Studies 4, (1999) <http://rcss.asia/view-publication.php?recordNo=44&page=1> [accessed 12/-5/2013], p.3.

<sup>39</sup> Rankin, M. B. ‘Extending the Limits of Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’, *South African Journal on Human Rights*, (21)(2005):406-435, p.407

<sup>40</sup> Odhiambo- Abuya, E. ‘A Critical Analysis of Liberalism and Postcolonial Theory in the Context of Refugee Protection’, *King’s College Law Journal*, 16(2005):263-291, p.278.

<sup>41</sup> UN High Commissioner for Refugees. ‘*Note on Accession to International Instruments and the Detention of Refugees and Asylum-Seekers*’, 19<sup>th</sup> August 1986, EC/SCP/44, <http://www.unhcr.org/refworld/docid/3ae68cce18.html>, [accessed 04/07/2011].

<sup>42</sup> Chimni, B. S. ‘*The Law and Politics*, p.3.



refugee law.<sup>43</sup> This was especially the case in relation to the 1967 Protocol, which was established in order to drop the temporal limitations of the 1951 Convention and broaden the reach of the convention. However, it still failed to make the 1951 Convention universal, as:

Only persons whose migration is prompted by a fear of persecution in relation to civil and political rights come within the scope of Convention-based refugee protection. This means that most Third World refugees remain de facto excluded, as their flight is more often prompted by natural disasters, war, or broadly-based political and economic turmoil than by “persecution” at least as that term is understood in the European context.<sup>44</sup>

Africa needed a convention that was created by Africans, in Africa, for Africans. All things considered though, the OAU Convention is regarded as being in harmony with the Refugee Convention,<sup>45</sup> as much of the drafting was done in conjunction with legal representatives of the UNHCR. Paul Weis, a senior lawyer for the UNHCR, during the drafting of the OAU Convention, wrote that the OAU ‘expressed the wish that the African instrument should regulate the specific aspects of the problem of refugees in Africa and that it should be an effective regional complement of the United Nations Convention’.<sup>46</sup> Asserting this position, Micah Bond Rankin argues that the creation of the OAU Refugee Convention was less to do with creating a distinct refugee definition, and he asserts that the drafters were more inclined towards ‘filling the conspicuous gaps left by the 1951 Convention’s temporal and geographical limitations’. Indeed, Rankin argues that it was not until the late 1960s that the 1951 definition was perceived as possibly not pertaining to refugees ‘from independent states and those from countries struggling against colonial rule or domination by a white minority’.<sup>47</sup> Alice Edwards provides a similar argument, highlighting that the OAU definition was established ‘merely to engage with the temporal’ and European orientation of the 1951 Convention.<sup>48</sup>

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<sup>43</sup> Gunning, I. R. ‘Expanding the International Definition of Refugee: A Multicultural View’, *Fordam International Law Journal*, 13(1)(1989):35-85, p.47.

<sup>44</sup> Hathaway, J. C. ‘A Reconsideration of the Underlying Premise of Refugee Law’, p.162.

<sup>45</sup> Organisation of African Unity. ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’, <http://au.int/en/content/oau-convention-governing-specific-aspects-refugee-problems-africa>, [accessed 02/12/2010], Article I, Sect 2.

<sup>46</sup> Weis, P. ‘The Convention of the Organisation of African Unite Governing the Specific Aspects of Refugee Problems in Africa’, *Human Rights Journal*, 3(1970):3-70, p.5.

<sup>47</sup> Rankin, M. B. ‘Extending the Limits of Narrowing the Scope?’, p.409.

<sup>48</sup> Edwards, A. ‘Refugee Status Determination in Africa’, *African Journal of International and Comparative Law*, 14(2)(2006):204-233.

The OAU Convention Governing the Specific Aspects of Refuge in Africa (which came into force on June 20<sup>th</sup> 1974) situates the 1951 Convention, the 1967 Protocol and the UNHCR firmly within its Preamble, asserting that they constitute ‘the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment’.<sup>49</sup> In fact, Article 1(1) of the OAU Convention repeats the classical definition of refuge as that enshrined within Article 1.A(2) of the 1951 Convention. Moreover, Article 8(1) asserts that member states shall cooperate with the UNHCR and Article 8(2) asserts that the OAU convention is ‘an effective regional complement in Africa’ to the 1951 Convention.<sup>50</sup> However, the OAU Convention then deviates in language by establishing a conceptualisation of refuge, not seen within the 1951 Convention. Weis notes that at the time the classical definition of refuge, was not ‘considered sufficiently wide’ to be applicable to contemporary African refugee crises.<sup>51</sup> Hence, the OAU Convention defined a refugee within Article 1(2), so that the term:

shall also apply to every person who, owing to *external aggression, occupation, foreign domination or events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>52</sup>

The OAU definition of refuge was, as Andrew Shacknove argues, the first ‘salient challenge’ to the idea that persecution was the fundamental criteria for refuge.<sup>53</sup> The new definition, Loescher notes, ‘offered a significantly broader interpretation of ‘refugee’ than the [1951] Convention and the Protocol’.<sup>54</sup> The OAU definition allows for the fact that, yes, unfortunately states will still persecute their citizens, thus creating refugees; however it recognizes, where the 1951 Convention does not, that the link between the citizen and the state can be dissolved in numerous ways with persecution being but one way. Significantly, Arboleda notes that ‘for the first time the legal term ‘refugee’... was extended to individuals forced to leave their countries owing to

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<sup>49</sup> Organisation of African Unity. ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’, Preamble.

<sup>50</sup> Organisation of African Unity. ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’, Article 8, [emphasis my own].

<sup>51</sup> Weis, P. ‘The Convention of the Organisation of African’, p.8.

<sup>52</sup> Organisation of African Unity. ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’, Article 1, Sect 2. [emphasis added]

<sup>53</sup> Shacknove, A. ‘Who is a Refugee?’, *Ethics*, 95(2)(1985), 274-284, p.275.

<sup>54</sup> Loescher, G. *The UNHCR and World Politics*, p.126.

aggression by another state and/or as a result of an invasion'.<sup>55</sup> The OAU definition, Hathaway argues, in this regard 'broke new ground'<sup>56</sup> by broadening the traditional understanding of refugee to include language that was not usually found in refugee law.

The OAU Convention allowed for a number of unique specifications within its definition. Article 1(2) highlighted that the term refugee would be available to individuals who had fled their country of origin owing to *external aggression, occupation, foreign domination, or events seriously disturbing the public order*. Unlike the 1951 Convention, individuals under the OAU Convention could obtain *ipso facto* (by the fact itself) refugee status. They did not have to provide evidence of persecution. As Arboleda notes:

the new definition of refugee is qualitatively different from the classical definitions for it considers situations where the qualities of deliberateness and discrimination need not be present... they allowed the grant of refugee status to asylum-seekers whose fears were grounded in the accidental but nonetheless dangerous consequences of intensive fighting and associated random lawlessness in their countries of origin.<sup>57</sup>

The language of the OAU definition allows for the recognition and legitimation 'of flight in circumstances of generalized danger'.<sup>58</sup> It is through this development and expansion of language Carlos Miranda argues that the African Convention is able to embrace individuals who have been affected by disease, pandemics or famine for example,<sup>59</sup> and is not just tied to the notion of persecution. For example, the OAU definition includes the phrase 'events seriously disturbing public order' which is broad and encompassing in nature, allowing for a high level of flexibility. The nature of the definition is founded upon objective criteria, and as Hathaway notes, the OAU definition:

... leaves open the possibility that the basis or rationale for the harm may be indeterminate. So long as a person "is compelled" to seek refuge because of some anticipated serious disruption of 'public order', she need not be in a position to demonstrate any linkage between her personal status (or that of some collectivity of

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<sup>55</sup> Arboleda, E. 'Refugee Definition', p.189.

<sup>56</sup> Hathaway, J. C. *The Law of Refugee Status*, (Toronto: Butterworths, 1991), p.16

<sup>57</sup> Arboleda, E. 'Refugee Definition', p.195.

<sup>58</sup> Hathaway, J. C. *The Law of Refugee Status*, p.18.

<sup>59</sup> Miranda, C. O. 'Toward a Broader Definition of Refugee: 20<sup>th</sup> Century Development Trends', *Californian Western International Law Journal*, 20(1990):315-327, p.323.

which she is a member) and the impeding harm... [as it] emphasizes assessment of the gravity of the disruption of public order rather than motives for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight.<sup>60</sup>

By removing the focus upon the ‘well-founded fear of persecution’ and expanding the understanding of refuge, the refugee does not then have the burden of proof. This then allows the individual far more freedom to seek sanctuary when and where they choose.

The fact that the 1951 Convention is addressed within the Preamble, Article 1(1) and Article 8(2), highlights that the OAU Convention was less about developing a ‘new’ refugee definition, and more concerned with developing a definition that would be applicable and appropriate to the new refugee crises. The OAU Convention definition highlighted the evident humanitarian issues, and presented a realistic solution to the issue of establishing refugee status for the mass movements of people occurring within the continent.<sup>61</sup> In doing so, it is what Hathaway terms a ‘dramatic extension’ of international refugee law.<sup>62</sup> For as George Okoth-Obbo argues, the expressive language found within the OAU definition is a step forward in ‘scholarship... from the shared human rights values around which all mankind should rally, and from the direction in which refugee law should instead be moving’.<sup>63</sup> He argues that due to the advanced language of the OAU definition, the convention should not be viewed purely as a regional legal document, but as an instrument that has reach beyond Africa. It should be perceived as an international accompaniment to the 1951 Convention, rather than as a regional accompaniment. As Isabelle Gunning notes:

The Convention is more representative of the dominant circumstances currently causing individuals to flee. Moreover, the African definition is more representative of the goals and of the multicultural character of an international society as envisioned by the United Nations Charter.<sup>64</sup>

It is at this point that the OAU definition starts to look like a bridging mechanism. By this, I mean that the OAU Convention can be perceived not only as a regional convention, but as a

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<sup>60</sup> Hathaway, J. C. *The Law of Refugee Status*, p.18.

<sup>61</sup> Arboleda, E. ‘Refugee Definition’, p.195.

<sup>62</sup> Hathaway, J. C. ‘A Reconsideration of the Underlying Premise of Refugee Law’, p.176.

<sup>63</sup> Okoth-Obbo, G. ‘Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’, *Refugee Studies Quarterly*, 20(1)(2001):79-138, p.113.

<sup>64</sup> Gunning, I. R. ‘Expanding the International Definition of Refugee: A Multicultural View’, p.37.

Convention that seeks to rectify the gaps and silences discussed in Chapter One. It sought to broaden the representational reach of the 1951 Convention. The OAU, due to its nature and origin, was born out of the colonial struggles for independence and was a legal document created to tackle the contemporary (and) regional refugee crisis. The OAU definition goes some way to rectifying the silence of the 1951 Convention and provides a workable and practical definition that is orientated towards the contemporary refugee crisis within the African context. By implementing the language of the 1951 Convention as its basis, the OAU Convention is then able to enhance and widen the scope of the refugee definition by employing language that is broader, and more descriptive and encompassing than that seen within the 1951 Convention. In doing so, the language of the OAU is able to break the silence of 1951 and provide a level of clarity as to the pragmatic nature of the refugee definition. As Hyndman observed, the OAU was ‘improving upon the inadequacy’ of Geneva.<sup>65</sup>

By dropping the focus upon persecution and including language such as ‘external aggression, occupation, foreign domination and events seriously disturbing public order’, the OAU language breaks the restrictive nature of Geneva. It highlights at once both the narrow legal scope of the 1951 Convention, and the reach and pragmatic nature of the OAU definition. This then provides for a more encompassing, yet pragmatic approach to refugee protection - one that is not fixed purely upon the concept of persecution, which it does not necessarily address, but circumvents.

### **The Cartagena Approach to Refugee**

The Cartagena Declaration on Refugees was adopted in November 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama. Cartagena represented, as Robert Cuéllar et al note, the emergence of Latin America into the contemporary international refugee regime.<sup>66</sup> The decades prior to Cartagena had seen an intense proliferation and diversity of conflict within the Latin American region, with fighting being the catalyst for the mass movement of hundreds of thousands of people across the region - specifically the Southern Cone. As a result, as early as 1965, there were calls from the Organization of American

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<sup>65</sup> Hyndman, J. *Managing Displacement*, p.13.

<sup>66</sup> Cuéllar, R., Garcia-Sayan, D., Montano, J., Diegues, M. and Lanza, L. V. ‘Refugee and Related Developments in Latin America: Challenges Ahead’, *International Journal of Refugee Law*, 3(3)(1991):482-498.

States (OAS) for a conference on refugee matters and forced displacement, with an OAS/UNHCR report highlighting that ‘the Inter-American System [...] lacks an adequate definition of refugee to meet the needs of the current large scale flows’.<sup>67</sup> The needs of refugees within the Latin American region were acute, and Cartagena was the regional response to the situation. However, Cartagena should not be viewed merely as a regional approach to the 1951 Convention, but importantly, as a framework for peace and stability within a then fragile Latin America.<sup>68</sup> Indeed, the overall aim of the colloquium was to support and promote the founding values of international refugee law, with a strong focus upon humanitarian protection.<sup>69</sup>

The drafters of the Cartagena Declaration followed in similar footsteps to the OAU, and advocated for the traditional definition of refuge to be developed and expanded to suit the needs of the region.<sup>70</sup> This demonstrates what Zolberg, Suhrke and Aguayo state were the endeavours of the Latin American governments to adjust the 1951 Convention of refuge to meet the needs of mass displacement occurring within the region.<sup>71</sup> Or more significantly, as Hyndman stresses, it signifies a regional advance in recognising and rectifying the paucity of the 1951 refugee definition.<sup>72</sup> With the evolving nature of refugee flows within the Latin American region, the definition of a refugee needed to be broadened, altered and developed beyond the 1951 Convention term. As Roberto Cuellar et al assert, there was a call to re-evaluate the law of refuge and develop from the traditional ‘rigid and somewhat outdated’ 1951 Convention a modern directive with the ‘necessary flexibility’ to engage with contemporary refugee crises.<sup>73</sup> It should be noted that in the period between 1960 and 1970, Central America experienced massive internal conflicts and political unrest across the region. Economically advanced countries such as Chile, Brazil, Uruguay and Argentina underwent massive state changes, in what Samuel Moyn calls a breathtaking ‘domino effect of dictatorship’ with democratic governments being replaced

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<sup>67</sup> UN High Commissioner for Refugees. ‘The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugee of 1984’, (Discussion Document, November 2004), *International Journal of Refugee Law*, 18(1)(2006):252-270.

<sup>68</sup> Cuéllar, et al, ‘Refugee and Related Developments’, p.485.

<sup>69</sup> Reed-Hurtado, M. ‘*The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America*’, UN High Commissioner for Refugees *Legal and Protection Research Series*, PPLA/2013/03, (June 2013):1-33, p.9.

<sup>70</sup> Miranda, C. O. ‘*Toward a Broader Definition of Refugee*’, p.324.

<sup>71</sup> Zolberg, A., Suhrke, A. and Aguayo, S. *Escape from Violence*, p.220.

<sup>72</sup> Hyndman, J. *Managing Displacement*, p.13.

<sup>73</sup> Cuéllar, et al, ‘Refugee and Related Developments’, p.484.

by repressive military regimes.<sup>74</sup>

The ‘new’ refugees within the Central American region were challenging. These were not the political individuals of the 1960s. The ‘new’ refugees were not predominantly from the urban areas, nor were they driven from the ranks of the social or political elite escaping authoritarian rule.<sup>75</sup> Latin America was witnessing an ‘unprecedented phenomenon of displacement’.<sup>76</sup> The ‘new’ refugees of Latin America were drawn from the rural regions; ethnically diverse individuals who settled in the inhabited border area close to their own country. As the Inter-American Commission on Human Rights reported:

The problem of the American political refugees has fundamentally changed over the last years. The situation is no longer characterized by the refugees of former times, who were generally few in number and were fundamentally constituted as leaders that had some source of wealth. Currently the problems lies in that, as a result of the political movement that has taken place in the majority of American countries and the absence of democratic stability in some of them, a large amount of persons, most of them without means of any sort, are transferring to the territory of other American Republics as a result of being the object of persecution.<sup>77</sup>

Due to the scale and severity of the displacement, it was felt that a revised definition was needed to handle the issues within the region in order to protect the life, liberty and security of the people, as well as to bring some level of stability and peace. From a legal perspective, Matthew Gibney and Randell Hansen note that due to the movement of people during this crisis, many of them would not actually have qualified for refuge under the 1951 Convention. In some instances, whole communities were on the move; thus the traditional individualistic nature of 1951 had to be re-thought.<sup>78</sup> Interestingly though, although the 1951 Convention did not adequately address the emerging refugee situation, many of the states were actually not

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<sup>74</sup> Moyn, S. *The Last Utopia: Human Rights in History*, (London: Harvard University Press, 2010), p.140-141 and Handelman, H. *The Challenge of Third World Development*, (New Jersey: Pearsons 2006), p.11.

<sup>75</sup> Arboleda, E. ‘Refugee Definition’, p.200.

<sup>76</sup> Espiell, H. G., Picado, S., and Lanza, V. L. ‘Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returns and Displaced Persons in Latin America’, *International Journal of Refugee Law*, 2(1)(1990):83-117, p.87. See: Cantor, D. J. ‘European Influences on asylum practices in Latin America: accelerate procedures in Colombia, Ecuador, Panama and Venezuela’, in Lambert, H. McAdams, J. and Fullerton, M. *The Global Reach of European Refugee Law*, (Cambridge: Cambridge University Press, 2013), pp.71-80, p.76.

<sup>77</sup> Inter-American Commission on Human Rights cited in Reed-Hurtado, M. ‘The Cartagena Declaration on Refugees’, p.7.

<sup>78</sup> Gibney, M. J. and Hansen, R. *Immigration and Asylum: From 1900 to the Present*. (Santa Barbara: ABC, Clio 2005), p.71.

signatories in the first place, with only Ecuador, Brazil, Colombia and Argentina signing the Convention within its first decade.<sup>79</sup> That said, although they had not ratified the 1951 Convention, states were open and generous to the idea of refuge. But, with the developing refugee crises, a new approach needed to be advanced.

The Cartagena Declaration, much like the OAU Convention, utilised the 1951 Convention and the 1967 Protocol as its basis, emphasising the close commitment between the two, and dedicating Chapter 2, Article 1 solely to the continuation of the work of the 1951 Convention as well as the UNHCR.<sup>80</sup> But, Cartagena then opened up the scope of the definition to allow for a more inclusive and pragmatic understanding of refuge. In establishing the Cartagena Declaration, the colloquium sought a response conducted in ‘the light of the necessary co-ordination and harmonization of universal and regional systems and national efforts’.<sup>81</sup> Accordingly, the definition of a refugee in Conclusion 3 was set out as:

...the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refuge persons who have fled their country because *their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed the public order.*<sup>82</sup>

The language of the Cartagena Declaration did not follow classical international refugee law terminology.<sup>83</sup> Instead, it created a broad and extensive definition that was pragmatic for the regional refugee movements of Latin America. For the first time, refugee law recognised that there were alternative ways of becoming a refugee, and Cartagena sought to embrace these.<sup>84</sup>

The Cartagena Declaration utilises broad, expansive and inclusive definitional language -

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<sup>79</sup> Reed-Hurtado, M. ‘The Cartagena Declaration on Refugees’, p.8.

<sup>80</sup> UN High Commissioner for Refugees. ‘*Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*’, <http://www.unhcr.org/refworld/docid/3ae6b36ec.html>, [accessed 21/01/2011], Chapter Two.

<sup>81</sup> UN High Commissioner for Refugees. ‘*Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*’, Chapter One.

<sup>82</sup> UN High Commissioner for Refugees. ‘*Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*’, Chapter One [emphasis added]

<sup>83</sup> Gibney, M. J. and Hansen, R. *Immigration and Asylum*, p.72.

<sup>84</sup> UN High Commissioner for Refugees. ‘The Refugee Situation in Latin America’, p.11



statements not seen within the 1951 Convention. For Arboleda, this constitutes to-date, the most ‘expansive language’ used thus far to define refugees, and goes further in developing the term of refugee than the OAU definition.<sup>85</sup> In this regard, the language of Cartagena sought to bridge gaps in what the UNHCR terms the normative framework of the international refugee regime.<sup>86</sup>

The 1951 Convention was perceived as an inadequate piece of legal text that was unable to be applied pragmatically within Latin America to engage with the mass and prolonged flights of people unique to the region. The new regional text that emerged allowed for an expansion and broadening of the original refugee definition, with more pragmatic language being employed, and it presented the various means in which an individual could fall into the category of refugee. Through the use of language such as ‘generalized violence’, ‘massive violations of human rights’ and ‘internal conflict’, the Cartagena Declaration gave a more encompassing definition, one that was still founded upon the need to demonstrate that ‘their lives, safety or freedom was threatened upon’ but that was not based solely upon persecution. Significantly, Cuéllar et al assert that by eliminating the need to qualify persecution, Cartagena was able to then be framed around the larger and broader concept of humanitarianism. Persecution, as a result, was no longer one of the central tenets of refugee law for Latin America, and the change in language allowed for the broadening of the definition, as well as the situating of protection at the heart of the new declaration. Indeed, Cuéllar et al note that the Cartagena Declaration widened the applicability of human rights norms to refugee flows and affirmed ‘massive violations of human rights as a significant cause of forced migration’.<sup>87</sup> Cartagena was more than just a regional refugee regime, but it has been reduced to this, with the ‘fundamental humanitarian and legal protection principles that the Cartagena process championed’, being marginalised.<sup>88</sup>

The UNHCR asserted that the definition of a refugee within the Cartagena Declaration represented ‘a flexible and practical instrument that articulates and attempts to harmonize the legitimate preoccupations for security, and regional stability with the humanitarian needs for

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<sup>85</sup> Arboleda, E. ‘Refugee Definition’, p.203.

<sup>86</sup> UN High Commissioner for Refugees. ‘High Commissioner’s Dialogue on protection Challenges “Protection Gaps and Responses”, Breakout Session 1: Gaps in the International; Framework and in its Implementation’, (8-9 December 2010), <http://www.unhcr.org/4d09e47a9.pdf>, [accessed 10/04/2014], p.4.

<sup>87</sup> Cuéllar, et al. ‘Refugee and Related Developments’, p.491.

<sup>88</sup> Reed-Hurtado, M. ‘The Cartagena Declaration on Refugees and the Protection of People’, p.5.

protections of persons'.<sup>89</sup> Regarded by the UNHCR as both 'innovative and creative',<sup>90</sup> the Cartagena Declaration was pioneering in its approach towards engaging with the regional refugee crisis through its use of broad and expressive language. Indeed, the UNHCR applauded Cartagena, for 'its singularity lies precisely in its pragmatic focus and its innovation based on the complementary use of the distinct branches of International Protection Law'.<sup>91</sup>

The Cartagena Declaration, I would argue, broke part of the silence within the 1951 Convention. By moving beyond persecution towards a humanitarian ethic and upholding principles placed upon protection, the Cartagena Declaration was to prove not only pioneering but also liberating and inspirational<sup>92</sup> within international refugee law. The Cartagena Declaration embeds the UNHCR within its foundation, yet with the developments in language, as well as the removal of persecution as a central tenet, it becomes a far more workable and applicable refugee convention that engages with the myriad ways in which an individual can fall into the category of a refugee. Cartagena then acts as a bridge between the traditional understanding of refuge based upon persecution, and a contemporary understanding that is focused broadly upon protection, humanitarianism and human rights. Cartagena successfully fills in some of the protection and humanitarian gaps of the 1951 definition, allowing the regional declaration more scope and applicability.

The fact that it is not legally binding, nor 'officially sanctioned' (due to being established at a colloquium by government and academic experts<sup>93</sup>), should not detract from its significance or its importance in expanding the refugee definition. As Hector Espiell, Sonia Picado and Leo Lanza note, the declaration reveals the consensus regarding particular practices and procedures pertaining to refuge in the region. They argue that the declaration has gained strong international recognition from various sources such as the United Nations General Assembly, the General Assembly of the Organisation of American States, the Inter-American Commission on Human Rights, the Andean Parliament, the European Parliament and the Executive Committee of the Programme of the United Nations High Commissioner for Refugees - adding both prestige and

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<sup>89</sup> UN High Commissioner for Refugees. 'The Refugee Situation in Latin America', p.11.

<sup>90</sup> UN High Commissioner for Refugees. 'The Refugee Situation in Latin America', p.25.

<sup>91</sup> UN High Commissioner for Refugees. 'The Refugee Situation in Latin America', p.254.

<sup>92</sup> UN High Commissioner for Refugees. 'The Refugee Situation in Latin America'.

<sup>93</sup> Reed-Hurtado, M. 'The Cartagena Declaration on Refugees', p.9.

weight to this non-binding agreement.<sup>94</sup> The impact of the Cartagena Declaration has been extensive, as it has established normative guidelines to regulate how states within the Latin American region should engage with contemporary refugee crises; it has become a ‘roadmap for protection practices’.<sup>95</sup> Most Latin American states have now adopted the definition successfully as a ‘matter of practice’<sup>96</sup>, and to-date, seventeen states within the region have integrated the definition at the national level<sup>97</sup>. However, it must be stressed that although Cartagena is heralded as a great advancement in refugee protection, Michael Reed-Hurtado argues that the regional definition is rarely applied, with Cartagena and the 1951 Convention being conflated and ‘in many cases, the default is to use the least inclusive (i.e. the Convention definition) rather than the most inclusive definition (i.e. Cartagena)’.<sup>98</sup> However, in highlighting the lack of applicability, I do not want to detract from the language of the declaration itself.

These two non-Western declarations pertaining to refugees allow for a more open and engaging, yet pragmatic and relevant refugee system, which actively removes barriers, unlike the 1951 Convention, thus working for the benefit of the refugee. Both the Cartagena Declaration and OAU Convention, through their expressive language, have established regional norms that are able to engage with the stresses of contemporary refugee movements, having built upon the gaps in the refugee language within the 1951 Convention. Arboleda argues that ‘a good grasp of the OAU Convention and the Cartagena Declaration can motivate scholars and policy-makers to fill the growing gaps between ‘Convention’ refugees and those ‘other’ refugees, thus establishing a more pragmatic and workable definition’.<sup>99</sup> Furthermore, due to its position, flexibility and pragmatism, Hathaway points out that the Cartagena Declaration may actually be ‘something of a compromise between the Convention standard and the very broad OAU conceptualisation’ of refugee law.<sup>100</sup> However, with regard to analysing regional conventions to fill in the gaps and silences of the 1951 Convention, there is another - although less reported regional (or complimentary) convention - which this thesis will turn to now. The Bangkok Principles of 1966

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<sup>94</sup> Espiell, H. G., Picado, S. and Lanza, V, L. ‘Principles and Criteria for the Protection’, p.89.

<sup>95</sup> Reed-Hurtado, M. ‘The Cartagena Declaration on Refugees’, p.10.

<sup>96</sup> Jastram, K. and Achiron, M. *Refugee Protection: A Guide to International Refugee Law, Handbook for Parliamentarians*, No 2. (UNHCR, Location of publication not known, 2001), p.15.

<sup>97</sup> Reed-Hurtado, M. ‘The Cartagena Declaration on Refugees and the Protection of People’, p.16.

<sup>98</sup> Reed-Hurtado, M. ‘The Cartagena Declaration on Refugees and the Protection of People’, p.21.

<sup>99</sup> Arboleda, E. ‘Refugee Definition’, p.187.

<sup>100</sup> Hathaway, J. C. *The Law of Refugee Status*, p.21.

are not discussed as much as the OAU or the Cartagena Declaration, but for the purposes of this research it is crucial to examine the language of this regional convention to ascertain and examine how this piece of legislation utilises expanded language regarding refuge and persecution.

### **The Bangkok Principles**

The Bangkok Principles on the Status and Treatment of Refugees were established on 3<sup>rd</sup> December 1966, by the Asian-African Legal Consultative Organization (AALCO); they were reaffirmed in 1987, and finally adopted on 24<sup>th</sup> June 2001 at the AALCO's 40th Session in New Delhi.<sup>101</sup> Although originally established during the 1960s, it was felt that the Bangkok Principles needed to be revised in order to meet the needs of contemporary refugee flows. The experiences of member states, as well as the nature of refugee flows within the region, had developed and changed over the decades, and the Bangkok Principles needed to come into line with contemporary regional needs.<sup>102</sup> Accordingly, they were effectively updated at the 1987 Conference in Bangkok, where eight principles regarding refugee protection were decided. The Principles were then agreed upon in full in 1998 at the New Delhi Regional Consultation on 'Refugees and Forced Migrants', before being finally adopted. The AALCO, in establishing the instrument, had as its goal the call for greater international responsibility and burden-sharing with regard to the refugee. The AALCO asserted that the refugee phenomenon was not just a regional issue, but a global one, that demanded global attention, as well as global legislation. For this reason, the Bangkok Principles can be viewed within this light as a regional refugee regime.<sup>103</sup>

In defining a refugee, the Bangkok Principles do not make explicit reference to the 1951 Convention. Andreas Schloenhardt notes that with the Bangkok Principles, it was clear from the

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<sup>101</sup> The AALCO was formerly known as the Asian Legal Consultative Committee and stood as part of the Non-Aligned Movement during the Cold War, as a united group of less developed states who sought a third way beyond the powers of the United States and the Soviet Union. See: Smith, M 'The Bangkok Principles on the Status and Treatment of Refugee Status', *Fahamu Refugee Programme*, News Letter (3<sup>rd</sup> December 2011) <http://www.srlan.org/sites/srlan/files/fileuploads/FRLANDec2011.pdf> [accessed 30/05/2013].

<sup>102</sup> Oberoi, P. 'Regional Initiatives on Refugee Protection in South Asia', *International Journal of Refugee Law*, 11(1)(1999):193-201, p.195.

<sup>103</sup> Chimni, B. S. 'The Law and Politics', p.5.

very beginning that they were not to ‘duplicate the Refugee Convention; instead they would “fill in the gaps left by the mother Convention and bring it up to date without supplanting it”’.<sup>104</sup> This takes us to Jane McAdams’ notion of ‘complementary protection’ of a regional regime that was founded upon the traditional 1951 Convention. Since it was to fill in the ‘gaps’ of Geneva, the Bangkok Principles (like the OAU and Cartagena) employ Article 1(2) of the 1951 Convention within their text, yet with a broader and more expressive language being utilised, which is complementary to the original refugee definition. They define a refugee within Article 1(1) as a ‘person who, owing to persecution or a well-founded fear of persecution for reasons of race, *colour*, religion, nationality, *ethnic origin*, *gender*, political opinion or membership of a particular social group’ is outside their country of origin and is unable, or unwilling to avail themselves of their state’s protection.<sup>105</sup>

However, as well as the traditional definitional basis, the Bangkok Principles extended the classical definition by also following in the footsteps of the OAU Convention and the Cartagena Declaration, by defining a refugee within Article 2(1) as a:

person who, owing to *external aggression, occupation, foreign domination or events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>106</sup>

The scope and breadth of language such as external aggression, occupation, foreign domination and events seriously disturbing public order allow the Bangkok Principles to move beyond the confines of the 1951 Convention and the persecution criteria. The language utilised within the legal text is very informative for helping us to understand and engage with the refugee question. Article 1(1) is almost an exact copy of the refugee definition in the 1951 Convention. However, note the addition of *colour*, *ethnic origin* and *gender* to the traditional 1951 Convention definition. These are all aspects of refuge that are absent from the Geneva definition, the focus being only on race, religion, nationality, membership of a particular social group or political

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<sup>104</sup> Schloenhardt, A. *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asian Pacific Region*, (Letchworth: Turpin Distribution Series, 2003), p.367.

<sup>105</sup> Asian-African Legal Consultative Organization, ‘*The Bangkok Principles on the Status and Treatment of Refugees*’, (31<sup>st</sup> December 1966), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3de5f2d52>, [accessed 30/05/13], Article 1, [emphasis added].

<sup>106</sup> Asian-African Legal Consultative Organization, ‘*The Bangkok Principles*’, Article 2, [emphasis added].

opinion. With the inclusion of these extended categories within the Bangkok Principles, the definition is already far wider and more encompassing. By inserting *colour, ethnic origin* and *gender* into the refugee definition, this automatically makes the Principles broader in scope allowing them to encompass more potential refugees. Within Article 2(1) the Bangkok Principles push the definition of a refugee further, following the OAU, in asserting that refugee applies to those effected by ‘*external aggression, occupation, foreign domination or events seriously disturbing public order*’. Through the language employed in Article 2(1), the definition of a refugee here is not merely confined to acts of persecution, especially with the wording ‘*events seriously disturbing public order*’, which allows for a whole range of issues not conceived within the 1951 Convention to now fall within the definition of a refugee. Thus, the Bangkok Principles become pragmatic and relevant, engaging with a range of individuals who fall into the category of refugee beyond the constricted, classical understanding of refuge, as found within the 1951 Convention.

The Bangkok Principles, although non-binding, are the only ‘codified and comprehensive’ legislation pertaining to refugee protection within Asia<sup>107</sup> and constitute the only formal legal agreement for refugees and their protection within the region.<sup>108</sup> As the Executive Committee of the UNHCR noted, the principles aim ‘at inspiring Member States for enacting national legislation for the Status and Treatment of Refugees and as a guide to deal with the refugee problems’.<sup>109</sup> Indeed, the UNHCR asserts that the Bangkok Principles ‘are declaratory in nature’ and ‘represent the result of serious and lengthy negotiations. They reflect an important understanding of who is a refugee in the contemporary context in parts of the world with significant experience in receiving and hosting refugees’.<sup>110</sup> Although the Bangkok Principles are a legal precedent within the region, it is important to note, as Lui argues, that although they are the only ‘codified standard of protection’ within the region, they do not constitute a

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<sup>107</sup> Oberoi, P. ‘Regional Initiatives on Refugee Protection’, p.197.

<sup>108</sup> UN High Commissioner for Refugees. ‘Executive Committee for the High Commissioner, Note on International Protection’, 52<sup>nd</sup> Session, General Assembly, (13<sup>th</sup> September 2001), A/AC.06/951, <http://www.unhcr.org/3bb1c6cc4.html>, [accessed 11/04/2014].

<sup>109</sup> UN High Commissioner for Refugees. ‘Executive Committee for the High Commissioner, Note on International Protection, 52<sup>nd</sup> Session, General Assembly’, (13<sup>th</sup> September 2001), p.2.

<sup>110</sup> UN High Commissioner for Refugees. ‘Global Consultations on International Protection/Third Track: Complementary Forms of Protection’, (4 September 2001), EC/GC/01/18, <http://www.refworld.org/docid/3bfa84345.html>, [accessed 31 May 2013].

convention obligation. Sara Davies observes that because of this, the Bangkok Principles ‘have had little discernible effect on Asian states’ practices in relation to refugees’.<sup>111</sup> Indeed, Lui argues that to a large extent the Principles have been futile.<sup>112</sup> This position was highlighted by the then UNHCR Director of the Division of International Protection, Dennis McNamara. He spoke to the AALCO in Bangkok in 1998 and asserted that:

Here in Asia, the Bangkok Principles adopted by Asian-African Legal Consultative Committee some thirty years ago... regrettably have been largely overlooked. Despite its positive traditions and hospitality to refugees, Asia remains the region with the fewest number of states parties to international refugee instruments, and with relatively undeveloped national legislation and procedures for handling refugee issues...<sup>113</sup>

The Bangkok Principles do ‘contain favourable mechanisms’ for engaging with refugees who are seeking protection within the Asian region from states who have not endorsed either international refugee law or human rights law.<sup>114</sup> In the Asian region, there are a significantly low number of signatories to the 1951 Convention.<sup>115</sup> Robyn Lui highlights that of the states within the region engaging with protracted refugee crisis, only China is a signatory to both the 1951 Convention and the 1967 Protocol.<sup>116</sup> Within the AALCO, as Michelle Smith notes, there are only 47 members, and of that number, 23 are not signatories to either the 1951 Convention or the 1967 Protocol.<sup>117</sup> However, the significance and importance of the Bangkok principles should not be understated. As William Worster notes, a large and geographically diverse number of states have ratified the Bangkok Principles, and they also happen to be countries that account for a high proportion of refugees, for example Syria, Iran, Pakistan, Jordan, China, Kenya, Saudi Arabia, Uganda, Sudan, India, Nepal, Thailand, Yemen, Zambia, Egypt, and Cameroon. Meanwhile certain states such as Tanzania, Egypt, Kenya, Ghana and Gambia for example, have

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<sup>111</sup> Davies, S. E. ‘The Asian Rejection? International Refugee Law in Asia’, *Australian Journal of Politics and History*, 52(4)(2006):562-575, p.564.

<sup>112</sup> Lui, R. N. ‘Such a Long Journey: Protracted refugee Situations in Asia’, *Global Change, Peace & Security*, 19(3)(2007):185-203, p.194.

<sup>113</sup> UN High Commissioner for Refugees. ‘Opening Remarks by Mr. Dennis McNamara, Director, Division of International Protection, UNHCR, to the Symposium Commemorating the 50th Anniversary of Universal Declaration of Human Rights’, (Bangkok, 25 May 1998), 25 May 1998, <http://www.refworld.org/docid/42b96dda2.html>, [accessed 31 May 2013].

<sup>114</sup> Schloenhardt, A. *Migrant Smuggling*, p.367.

<sup>115</sup> Khan, I. ‘Protecting the Rights of Refugees’, in Samaddar, R. *Peace Studies. An Introduction to the Concept, Scope and Theme*, (London: Sage Publications Ltd, 2004), pp.190- 205, p.197.

<sup>116</sup> Lui, R. N. ‘Such a Long Journey’, p.193.

<sup>117</sup> Smith, M. ‘The Bangkok Principles on the Status’, p.1.

ratified both the Bangkok Principles and the OAU Convention.<sup>118</sup>

What the Bangkok Principles highlight is that revision and renegotiation of language and definition are central to refugee legal issues. First established in 1966, the AALCO was aware that the definition and language of refuge needed to be moderated and updated in order to be applicable and workable. The fact that the original understanding of a refugee was revised, reconsidered and renegotiated, highlights the fact that the drafters of the Bangkok Principles knew that the definition of a refugee was not static; it needed to evolve and develop, with the language expanding (or contracting) in order to be applicable to the contemporary refugee crisis. The lesson that we should be taking from the Bangkok Principles is that the language of refuge is neither untouchable nor static. That evolution of the refugee language process is natural and beneficial for contemporary refugee flows and should be encouraged throughout other regional conventions, but more importantly within the confines of the traditional 1951 Convention.

### **Filling in the Gaps of Geneva**

With the founding of the 1951 Convention, a refugee would henceforth be defined within Article 1.A(2) as an individual who:

owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>119</sup>

The language of refuge within the 1951 Convention is ambiguous, being defined solely as a ‘well founded fear of persecution’ and resting upon the five Convention nexus of race, religion, nationality, membership of a particular social group or political opinion. The previous chapter highlighted how, even with an analysis of the origins of the Convention and the *travaux préparatoires*, there is little knowledge surrounding the conventional definition of a refugee.

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<sup>118</sup> Worster, W. ‘The Evolving Definition of the Refugee in Contemporary International Law’, *Berkeley Journal of International Law*, 30(1)(2012):101-167, p.119.

<sup>119</sup> UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, <http://www.unhcr.org/3b66c2aa10.html>, [accessed 27/03/14], Article 1.A(2).



Being tied purely to the concept of persecution and the Convention nexus, the classical understanding of refuge is restrictive, not to mention unclear. However, through the language of the OAU, Cartagena and the Bangkok Principles, the regional regimes allow for a more pragmatic, relevant and flexible refugee regime for engaging with contemporary refugee flows. The regional definitions expand and give meaning to the use of persecution, as well as reaching beyond the concept altogether, allowing the definitions to embrace a wider population. Importantly though, the language of these regional regimes highlights the narrowness as well as the silence (or at least the silencing effect) that surrounds the 1951 Convention - its failure to open up pragmatically beyond the undefined persecution criteria. In understanding this approach of the 1951 Convention through a postcolonial lens, we can draw upon Frantz Fanon's response to the behaviour of the coloniser, when he asserted that 'this behaviour [of the colonizer] betrays a determination to objectify, to confine, to imprison, to harden. Phrases such as 'I know them', 'that is the way they are', show this maximum of objectification successfully achieved'.<sup>120</sup> The 1951 Convention, the drafters and the states, assumed they knew the figure of the refugee. Indeed, Homi Bhabha writes in a similar vein of the persistence of dominant (colonial) practices and behaviours that are invaluable for understanding the centrality of the 1951 Convention, as well as the changeless figure of the refugee. He asserts that:

an important feature of colonial discourse is its dependence on the concept of 'fixity' in the ideological construction of otherness. Fixity, as the sign of cultural/historical/racial difference in the discourse of colonialism, is a paradoxical mode of representation: it connotes rigidity and an unchanging order as well as disorder, degeneracy... repetition.<sup>121</sup>

The 'fixity' of the 1951 Convention is symbolic of Derrida's dominant signifier that 'occupies the centre of a discursive structure [that] both makes the structure itself possible and limits its "play," that is the "play" or movement of differences off one another'.<sup>122</sup> This is an interesting way of understanding the centrality and dominance of the 1951 Convention; it determined who is and who is not a refugee, through its restrictive definitional understanding of refuge, and has allowed for a strategic silencing of potential refugees in order to maintain state self-determination, power and control in the face of an ever-expanding refugee population. The 1951

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<sup>120</sup> Fanon, F. cited in Bhabha, H. K. *The Location of Culture*, (London: Routledge, 1994), p.178

<sup>121</sup> Bhabha, H. K. *The Location of Culture*, p.66.

<sup>122</sup> Doty, R. L. *Imperial Encounters*, (London: University of Minnesota Press, 1996), p.33.

Convention retains its prominence within the refugee regime, as the key stone of international refugee law. Accordingly, when reflecting on the 1951 Convention (as well as the UNHCR at large), we need to acknowledge what Roxanne Doty terms the discourses that ‘are embedded in practices and institutions that dominate Western encounters with the “Third World”’.<sup>123</sup> For me, this is the discourse and practice of silence that resides at the heart of the 1951 Convention, silencing potential and future refugees and maintaining an understanding of refuge that is firmly rooted and fixed within a European understanding of persecution.

Through an examination of regional refugee regimes and their language, the 1951 Convention in contrast, appears stunted, restrictive and silent with regard to the needs of contemporary refugee flows, with the regional conventions filling in the silence of 1951. All three of the regional conventions examined within this chapter are similar and lead on from one another. The OAU definition of a refugee as defined in Article 1(2), to reiterate Shacknove, was the first ‘salient challenge’ to how we understood refuge<sup>124</sup>, situating the refugee as a person affected by ‘external aggression, occupation, foreign domination or events seriously disturbing public order’. Within the Cartagena Declaration, I would argue, the second challenge to how we understood refuge emerged. In the same manner as the OAU definition, Cartagena asserted that refugees were those whose ‘lives, safety or freedom have been threatened by generalised violence, foreign domination, aggression, internal conflicts, massive violations of human rights or circumstances which have seriously disturbed the public order’. Cartagena further advanced the understanding of a refugee, broadening the language so as to be more expansive. The Latin American refugee regime emphasised the humanitarianism of refuge, embedding protectionism and violations of human rights at the heart of the refugee instrument. With the Bangkok Principles, I would argue that a third challenge to the traditional refugee definition is presented through Article 1(2), enhancing the original 1951 Convention by enriching the definition with the inclusion of ‘colour, ethnic origin and gender’. In doing so, the drafters of the Principles were developing the traditional legal document for contemporary refugee patterns and shaping the text in order to engage with the contemporary refugee. From the Bangkok Principles we learn that although beset with legal problems, the definition of a refugee need not be static and confined to the

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<sup>123</sup> Doty, R. L. *Imperial Encounters*, p.49.

<sup>124</sup> Shacknove, A. E. ‘Who is a Refugee’, p.275.

original understanding. New life can be brought to the Convention, and it can be adapted to evolve with contemporary refugee realities. Without a doubt, what these three legal texts show is an awareness of contemporary refugee flows and a need to adapt and accommodate their movements. The language of refuge that emerges from the regional regimes, although still based upon the 1951 Convention, challenges the traditional understanding of refuge, and reveals through its breadth of definition, the silences that are inherent within the 1951 Convention. It is only through an analysis and expansion of the language of regional refugee regimes, that we are able to fully observe the ‘rigid and somewhat outdated’, Eurocentric 1951 Convention.<sup>125</sup> Indeed, in developing the international refugee regime, Fanon’s argument for the Third World to look beyond Europe and determine its own path is extremely fitting for understanding the expansion of regional refugee regimes beyond Geneva. Writing on the call to rise beyond Europe, Fanon asserts:

Europe where they were never done talking of Man, and where they never stopped proclaiming that they were only anxious for the welfare of Man; today we know with what suffering humanity has paid for every one of their triumphs of the mind... Let us decide not to imitate Europe; let us combine our muscles and our brains in a new direction. Let us try to create the whole man, whom Europe has been incapable of bringing to triumphant birth.<sup>126</sup>

It is then at this stage that Jane McAdams’ ‘complementary protection’ comes into force. Through an understanding of international refugee law, as Alice Edwards asserts, the 1951 Convention still has much to offer contemporary refugees, for the rights embedded within the convention for refugees would not be replicated within a contemporary one. Yet, even though the various chapters of the 1951 Convention are generous and worth adhering too, this does not distract from the silencing as well as the fixed nature of Article 1. However, if we can take the best parts of the 1951 Convention, such as state responsibilities with regard to the refugee, and then supplement the 1951 Convention with regional definitional understandings that are more pragmatic, responsive and flexible, then we would truly be aiming towards an international refugee regime that functioned with the needs of the refugee at the heart of it. In order to improve the current refugee regime, rather than perceiving the OAU Convention, the Cartagena Declaration and the Bangkok Principles as solely regional regimes, it would be beneficial to

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<sup>125</sup> Cuéllar, et al. ‘Refugee and Related Developments’, p.484.

<sup>126</sup> Fanon, F. *The Wretched of the Earth*, (London: Penguin Books, 1990), p.251-252.

perceive them instead as complementary regimes that should be applied internationally in order to help develop and move beyond the primacy of the 1951 Convention.<sup>127</sup> For it needs to be highlighted that there is unlikely be a call to re-draft the 1951 Convention. Erika Fuller, speaking as the UNHCR's Assistant High Commissioner for Protection in May 2011, asserted that, the 'generosity of 1951 is not there in 2011'.<sup>128</sup> The language of the 1951 Convention definition has never been developed or altered to meet contemporary refugee flows. The language has remained constant since 1951. This is our understanding of refugee, and as Hathaway notes, the 1951 Convention has always operated with the needs of states first, rather than refugees. Hathaway argues that the 1951 Convention is a 'facade of universal humane concern'.<sup>129</sup> And, I would argue that this is done through the employment of language and silence. There is no denying that the chapters enshrined within the 1951 Convention are generous,<sup>130</sup> however, in order to attain them the asylum seeker must meet the silencing criteria of Article 1.

## Conclusion

Chapter Two has sought to situate the 1951 Convention within a postcolonial framework, and examine the significance of language and silence within the refugee regime. As is so often overlooked, the 1951 Convention is a product of colonial history. It was founded and emerged at the height of the colonial engagement, and the impact of this needs to be fully realised in order to understand how the convention is applicable to the refugee. By this, I would suggest that the silences inherent within the 1951 Convention surrounding the notion of persecution are inbuilt in order to secure the nation state against 'hordes' of potential refugees. Originally centred upon

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<sup>127</sup> See: Okoth-Obbo who advances the notion but only towards the OAU definition. I propose that we should advance the argument further, beyond the African refugee convention. Okoth-Obbo, G. 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa', *Refugee Studies Quarterly*, 20(1)(2001):79-138.

<sup>128</sup> Fuller, E. cited in United Nations. *Press Conference on Anniversaries of Convention Relating to Status of Refugees, Convention on Reduction of Statelessness*, Department of Public Information. (19<sup>th</sup> May 2011,) [http://www.un.org/News/briefings/docs/2011/110519\\_Refugees.doc.htm](http://www.un.org/News/briefings/docs/2011/110519_Refugees.doc.htm), [accessed 12/06/2011].

<sup>129</sup> Hathaway, J. C. 'A Reconsideration of the Underlying Premise of Refugee Law', p.180.

<sup>130</sup> The 1951 Convention stipulates in detail the rights of the refugee and includes chapters detailing such rights as the juridical status of the refugee, education, employment and welfare rights of the refugee as well as executive and transitory provisions. The rights bestowed onto the refugee are generous and comprehensive, and although there may be contestations with the Convention, the basic rights affirmed still need to be stressed upon. UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, <http://www.unhcr.org/3b66c2aa10.html>, [accessed 27/03/14].

refugees emanating from Europe prior to 1951, even with the advancement of the 1967 Protocol, only the temporal dimension of the 1951 Convention was altered. The original understanding of refuge, as that founded upon the common European experience of persecution, remained intact. The language of refuge was not broadened to engage with crises in Africa, as waning empires sought to struggle against the tide of anti-colonialism and independence. The colonial impact or, so to speak, the colonial silence of the 1951 Convention, does need to be addressed, and it is through an examination of the regional refugee regimes that the voice of the 'other' can be echoed back to Geneva. Through examining the language of regional refugee regimes, we are then able to highlight how regions have sought to adapt and broaden the traditional understanding of a refugee, in order to move beyond Europe and create a workable refugee regime.

The regional refugee regimes of the OAU, the Cartagena Declaration and the Bangkok Principles allow for a voice that, to an extent was silenced through the proceedings of the 1951 Convention. The regional refugee regimes allow for an alternative understanding of refuge to emerge, one that is founded upon the 1951 Convention, but that has allowed itself to develop beyond the confines of the traditional language. As Shacknove asserts, the OAU was the 'first salient challenge' to how we engaged with the refugee in international refugee law. I would argue that the Cartagena Declaration and the Bangkok Principles, in their own way, provide subsequent challenges to the 1951 Convention, as well as lessons on how to manage contemporary refugee crises. Through the OAU refugee definition, and subsequently, the Cartagena Declaration and the Bangkok Principles, regional refugee regimes broke away from the European focus of persecution, allowing the refugee definition to blossom beyond the traditional confines of what constituted a refugee. From the OAU, we draw upon the language of 'external aggression, occupation, foreign domination or events seriously disturbing public order', whereas Cartagena advances upon this notion of refugee further, asserting that refuge shall also be applicable to those whose 'lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or ... events seriously disturbing public order'. Finally, the Bangkok Principles, as well as employing the OAU definition of a refugee, adapted the 1951 Convention to apply also to those of 'colour, ethnic origin and gender', whilst also teaching us of the need to maintain, update and test with

rigour the regional conventions to make sure that they are befitting of the needs of both states and refugees.

What the regional refugee regimes have highlighted is that since 1951, refugee crises have developed and changed, and whilst it is an overreaction to assert that the 1951 Convention is no longer relevant, the regional regimes have successfully filled in the silences of Geneva and made their regional conventions applicable where necessary. Through this process of development the voice of the regional refugee has been allowed to enter the heavily Europeanised understanding of what constitutes a refugee. The language is encompassing, at times altering the traditional 1951 definition, or else fully moving beyond the classical understanding of refuge, and it is not for nothing that refugee legal scholars such as Schloenhardt, Bond Rankin, Arboleda and Hathaway all make reference to ‘filling in the gaps’ of Geneva, or discussing the silences of 1951.

Overall, Chapter Two has sought to challenge the traditional understanding of a refugee as defined in Geneva, by examining regional approaches to refuge. Examining the language that is employed within the regional refugee conventions reveals terms that are not usually found in international refugee law, especially the 1951 Convention. It is through an examination of the language of the regional regimes, that the apparent restrictiveness and silence of the 1951 Convention emerges. It is because of this, that I perceive the 1951 Convention as a bridge, or at least a stepping stone in the development of international refugee law.

Moreover, with a postcolonial perspective, we are able to view the 1951 Convention as a colonial institution that was developed and established during a time of colonial and independence struggles. In utilising a postcolonial framework, rather than fully examining the refugee regime as a colonial institution, the chapter engages with the practices and behaviours of colonialism that are within the 1951 Convention (as well as the UNHCR itself) to identify how states have retained power and control over the refugee situation, relying upon the silence and the fixity of language to restrict the understanding of refuge. Indeed, the language can be understood to be responding to the emerging crises by being restrictive, narrow and ambiguous in its nature. The 1951 Convention and the definition of refugee could then be viewed not so

much as being silent upon the issues of what constitutes a refugee, but possibly, as having been created as a means of *silencing* potential refugees. Going back to James Hathaway's argument, the 1951 Convention could be argued to be merely a facade that allows (particularly Western) states to adhere to a programme of humanitarian values without the obligation of maintaining actual protection.<sup>131</sup>

Reflecting on the thesis so far, Chapter One engaged with the limitations of language within the 1951 Convention as well as the silences that are in-built to the Convention, and Chapter Two engaged with filling in the gaps of Geneva, through the language of regional refugee regimes, to highlight the silencing effect of 1951. The thesis will now move on to Chapter Three: *British Asylum Policies and the Language of Labelling*. Chapter Three takes the analysis to the state level, focusing on how British asylum policies have framed the figure of the asylum seeker through the notions of language, silence and binaries. I argue that the government has not silenced asylum seekers through its policies, but that the positioning of asylum seekers through the system and language of the policies directed at them has ultimately marginalised them. The focus of the chapter is upon government labelling of the asylum seeker and striving to provide hospitality but under specific terms and conditions, all the while being concerned that the asylum seeker is in fact abusing the system.

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<sup>131</sup> Hathaway, J. C. 'A Reconsideration of the Underlying Premise of Refugee Law', p.180.

## Chapter Three

### *British Asylum Policies and the Language of Labelling*

*The UK has a proud tradition of providing a place of safety for genuine refugees. However, we are determined to refuse protection to those who do not need it, and will take steps to remove those who are found to have made false claims.<sup>1</sup>*

#### **Introduction**

The previous two chapters have engaged with the notion of asylum at the international level and the regional level, examining the language employed within various conventions that has contributed towards building the international refugee regime. Through these chapters, I have drawn upon the notion of language, silence and silencing within the conventions to highlight the position and power of the state in the refugee process. Chapter Three continues in this vein, focusing upon the use of language by drawing the analysis down to the state level, with a detailed focus on the British asylum system.

The figure of the asylum seeker in Britain has occupied a precarious position for some time now. Since the 1980s, consecutive British governments have been caught between positioning the asylum seeker as an economic threat to society and, at the same time, presenting the asylum seeker as a humanitarian figure in need of sanctuary. Governments are open to providing hospitality, but under specific terms and conditions, all the while being concerned that the guest - the asylum seeker - is in fact, abusing their position. Through consecutive governments, the policies that have emerged have adopted the approach of deterrence and increased border controls in the quest to reduce 'abuse' of the asylum system. An idealised *genuine* asylum seeker has been created, who seeks sanctuary within the state, but this is offset by the *bogus* asylum seeker. Through the establishment of the binary of

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<sup>1</sup> Home Office. UK Border Agency, Asylum, <http://www.ukba.homeoffice.gov.uk/asylum/> [accessed 11/11/2013, website not available as of 22/04/2014].



genuine versus bogus, governments have been able to pinpoint through legislation what qualifies as a genuine asylum seeker: an idealised notion of what it takes to be classified as a genuine asylum seeker in need. Those that do not meet the strict criteria are discarded and branded as bogus, failed, illegal asylum seekers, who are abusing the system.

In developing this chapter, I build upon the position adopted by Vicki Squire in her book, *The Exclusionary Politics of Asylum*. In her work, Squire asserts that her research, rather than providing ‘a detailed and comprehensive analysis of asylum policy per se’, instead examines policy developments ‘in terms of the way they shed light on the framing’.<sup>2</sup> In my case, I examine the framing of asylum seekers as a threat to the state. Much has been written on consecutive government policies on asylum, with scholars such as Anne Bloch, Dallal Stevens, Rosemary Sales and Liza Schuster,<sup>3</sup> among others, having published detailed and in-depth research into specific policies. Therefore, rather than discussing material that has already been ploughed over successfully, my own research will re-position the policies and examine how they frame the asylum seeker using the notions of labels and binaries.

The chapter will begin by examining the various ways in which language has been employed to frame (both positively and negatively) the asylum seeker. The chapter engages with the concept of labelling and the work of Roger Zetter, Stuart Hall, Howard Becker and Michel Foucault, and explores how the asylum seeker is constructed and framed through political processes that position, categorise and castigate them as the other that resides between national security and humanitarianism. The chapter will then engage with the notion of the genuine refugee that has been constructed through various governments, drawing upon the language and framing of the refugee in various legislation, White Papers, parliamentary debates (primarily from-1990 onwards)<sup>4</sup> and by discussing how successive governments have

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<sup>2</sup> Squire, V. *The Exclusionary Politics of Asylum*, (Basingstoke: Palgrave Macmillan, 2007), p.15.

<sup>3</sup> For a detailed literature discussion on various government asylum policies, see: Bloch, A. ‘A New Era or More of the Same? Asylum Policy in the UK’, *Journal of Refugee Studies*, 13(1)(2000): 29-42; Stevens, D. *UK Asylum Law and Policy. Historical and Contemporary Perspective*, (London: Sweet and Maxwell, 2004); Sales, R. ‘The Deserving and the Undeserving? Refugees, Asylum Seekers and Welfare in Britain’, *Critical Social Policy*, 22(3)(2002):456-478; and Schuster, L. and Solomos, J. ‘Asylum, Refuge and Public Policy: Current Trends and Future Dilemmas in the UK’, *Sociological Review Online*, 6(1)(2001):1-19.

<sup>4</sup> I am using the start date of 1990 as it was during the Asylum and Immigration Act (1993) that the 1951 Convention was finally incorporated into British legislation for the first time. This is an important factor, and I am using this benchmark as an anchor to position the chapter when looking at British governments and their asylum policies, although, that is not to exclude certain acts that were published during the 1980s, such as the Carrier’s Liabilities Act from entering discussion.

successfully sought to create an idealised notion of what a genuine asylum seeker should be. Having analysed the development of the idealised notion of the genuine asylum seeker, the chapter will then offer a discussion of the logic of binaries and examine how the construction of rigid binaries within the British asylum system has benefited the government immensely; it has been able to adhere to its international responsibility towards refugees, whilst protecting its own interests. The chapter will then engage with the theoretical framework of hospitality, drawing upon the work of Jacques Derrida. By examining his understanding of hospitality, this section will reflect upon how we engage with, and position the stranger when they enter our midst. I argue that the British approach to refuge reflects the notion of conditional hospitality, with hostility underwriting many of the actions within the asylum system.

In undertaking this analysis of the construction of the asylum seeker within the British system, I will continue to use the notion of silence and language, by arguing that the government has not only been able to silence the asylum seeker through policies, but that the positioning of the asylum seeker, through the system and the language and policies directed at them, has marginalised them. Through the positioning of the asylum seeker, I argue that the government has then been able to silence the asylum seeker through the process, rather than the policies per se, thus the chapter continues tracing the discrepancy between the 1951 Convention and the actual implementation of protection. I view the asylum seeker as residing between the language of security and management and the discourse of humanitarianism. It is through this hostile positioning that the asylum seeker is situated and must speak of their personal experiences of flight and persecution.

### **Labelling the Asylum ‘Other’**

In engaging with the construction of the genuine asylum seeker, and examining how the figure of the asylum seeker has been positioned and framed, labelling theory is a useful theoretical framework to employ. By labelling refugees as asylum seekers, and asylum seekers as bogus, politicians are able to steer debates and create suspicion, fear, tension and reduced sympathy. This notion of the purpose of labelling was identified by Lord Jakobovits during a House of Lords debate in March 1993. He commented on the construction of the figure of the asylum seeker, stating, ‘I cannot quite understand why the inelegant and perhaps supercilious term "asylum seeker" should have replaced the simpler word "refugee" which

might evoke more sympathy. Altogether, why use "asylum" with its associated connotation? I prefer "sanctuary".<sup>5</sup> Indeed, Lord Jakobovits highlights the politics that underline asylum. Stephen Moss develops this point, arguing that the term refugee 'evokes immediate sympathy, 'asylum seeker' is a colder, more bureaucratic term [that] is now increasingly favoured'.<sup>6</sup> However, the blurring and misuse of the terms has led to 'confusion over the issue itself', although as Esther Sarago argues, it 'can also strengthen the meaning of association between asylum seeker and undesirables or illegal immigrants'.<sup>7</sup> By utilising the label of asylum seeker, there is a potential to frame the individual as abusive, bogus or failed, something that would not be applicable with the label of refugee. You either are, or are not a refugee, whereas the use of the label (bogus) asylum seeker allows for a wide array of categorisations to emerge. This point was raised by Alistair Darling, MP for Edinburgh Central, who when speaking in a House of Commons debate in November 1991, argued that:

The term "bogus refugee" is referred to time and again by Ministers to justify what they are proposing... What is a bogus refugee? Is it someone who has applied and been rejected? That is an important point, because the Government seem to suggest that, by definition, if one does not receive asylum, one must be bogus. I should have thought that a bogus refugee or a bogus asylum seeker is someone who knew all along that he had no chance and that his application was ill-founded.<sup>8</sup>

In examining this notion of labelling, the following section will identify and examine various approaches to labelling theory by drawing upon the work of Roger Zetter, Stuart Hall, Howard Becker and Michel Foucault. In examining these works, I want to highlight just how strong the notion of labelling is, the negative connotations that can arise from its use, and how pertinent it is for understanding the language employed towards the asylum seeker. I want to highlight that the use of labelling is not occurring in the interest of the asylum seeker, but as a means for politicians and government to control, regulate and monitor asylum flows, successfully marginalising those who are seeking to claim asylum in Britain.

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<sup>5</sup> Lord Jakobovits, Hansard, House of Lords Debates, Asylum and Immigration Appeals Bill 11<sup>th</sup> March 1993, vol 543, cc1145-95

[http://hansard.millbanksystems.com/lords/1993/mar/11/asylum-and-immigration-appeals-bill#S5LV0543P0\\_19930311\\_HOL\\_82](http://hansard.millbanksystems.com/lords/1993/mar/11/asylum-and-immigration-appeals-bill#S5LV0543P0_19930311_HOL_82), cl. 1194, [accessed 3/11/2013].

<sup>6</sup> Moss, S. (2001) 'Mind Your Language, the semantics of asylum', *Forced Migration Review*, 11(2001):39, p.38.

<sup>7</sup> Sarago, E. 'Who Counts as a Refugee: Personal Lives and the Shifting Boundaries of Citizenship', in Lewis, G. *Citizenship: Personal Lives and Social Policy*, (Bristol: The Policy Press, 2004), pp.121-160, p.139.

<sup>8</sup> Darling, A. Hansard, Asylum Bill, House of Commons Debates, 13<sup>th</sup> November 1991, vol. 198, cc1082-181 [http://hansard.millbanksystems.com/commons/1991/nov/13/asylum-bill#S6CV0198P0\\_19911113\\_HOC\\_214](http://hansard.millbanksystems.com/commons/1991/nov/13/asylum-bill#S6CV0198P0_19911113_HOC_214), [accessed 1/11/2013] col.1154.

Roger Zetter, through his influential 1991 paper, 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity', centres his work on the creation of labels, and how when they are applied, 'patterns of social and cultural norms... are mediated, impacted and ultimately controlled and reformulated by institutional agency'.<sup>9</sup> Zetter speaks of the process of labelling and the significance of stereotyping, which he argues 'involves disaggregation, standardization, and the formulation of clear cut categories. In the institutional setting, these characteristics assume considerable power, for labelling simultaneously defines a client group and prescribes an assumed set of needs'.<sup>10</sup> Through the process of labelling, Zetter argues, governments are able to categorise and create labels of identity that can be assumed, adopted and identified.

Zetter argues that the employment of labels results in a 'delinkage' occurring, whereby the individual identity of the person seeking asylum or refugee is substituted for a 'stereotyped identity' with a clear cut understanding of supposed needs. He argues that 'these categories are usually absolute not relative or comparative'.<sup>11</sup> Accordingly, for Zetter, 'labels then reveal 'the political in the apparently non-political' as well as the power displayed through administrative procedure and practice'.<sup>12</sup>

Through his work, Zetter argues that what has defined the current era of refuge is the distinct proliferation of new labels that are, at best, a vague interpretation, or, at worst, a relentless discriminatory term that disconnect individuals from the central characteristics that equate to being a refugee.<sup>13</sup> For example, through the construction of the bogus or abusive asylum seeker labels, individuals are effectively cut-off and marginalised from the genuine asylum seeker, and the ultimate label of refugee. What we see occurring through this process is a 'fractioning' of the original refugee label into ever smaller, inferior labels of sanctuary. Indeed, Zetter argues that labels such as asylum seeker are physical illustrations of governmental policies and programmes, 'in which labels are not only formed but are then

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<sup>9</sup> Zetter, R. 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization', *Journal of Refugee Studies*, 20(2)(2007):172-192, p.173.

<sup>10</sup> Zetter, R. 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity', *Journal of Refugee Studies*, 4(1)(1991):39-62, p.44.

<sup>11</sup> Zetter, R. 'Labelling Refugees', p.44

<sup>12</sup> Wood, G. cited in Zetter, R. 'Labelling Refugees', p.45.

<sup>13</sup> Zetter, R. 'More Labels', p.176.

also transformed by bureaucratic processes which institutionalize and differentiate categories of eligibility and entitlements'.<sup>14</sup> For example, in the case of asylum legislation, the refugee is entitled to X, the genuine asylum seeker is entitled to Y and the bogus asylum seeker is entitled to Z. Accordingly, when examining the British fragmentation of the refugee label into sub-categories of genuine/ bogus asylum seekers, it is easy to see how 'the notion of labelling' allows for the 'political agendas about identity to become incorporated in ostensibly neutral bureaucratic categories, such as 'refugee''.<sup>15</sup>

Zetter argues that the process of labelling and its political connotations is the cause of the creation of ever more labels. Government policies on asylum, such as the Carrier's Liability Act and the Nationality, Immigration and Asylum Act, have effectively criminalised asylum seekers for claiming refuge, which Zetter argues, initiates a 'cause-effect cycle', which leads to the creation of more labels. This occurs because asylum seekers are forced to 'transform or subvert' the labels bestowed upon them. This has resulted in politicians utilising labels such as 'illegal asylum seeker', 'bogus asylum seeker', and 'clandestine'.<sup>16</sup> The emergence of highly politicised labels such as 'bogus' and 'illegal', results in the label of refugee itself being removed from its traditional, 1951 Convention roots, and becoming a 'highly privileged prize', which a minority are worthy of and the majority attain (or seek to attain) unlawfully. The refugee system places the status of refugee on a pedestal, which results in pushing individuals down illegal paths that involve trafficking in order to claim their right to asylum.<sup>17</sup>

It is at this point in the process that Zetter argues that the 'proliferation of new labels designating different kinds of refugee claimants, underpins a deliberately transformative process to create far less preferential categories'.<sup>18</sup> Zetter argues that the language and vocabulary that surrounds the figure of the asylum seeker does vary in its range but is 'singular in its intention – to convey an image of marginality, dishonesty, a threat, unwelcomed...'.<sup>19</sup> It is important to remember that these labels do not emerge naturally

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<sup>14</sup> Zetter, R. 'More Labels', p.180.

<sup>15</sup> Zetter, R. 'More Labels', p.185.

<sup>16</sup> Zetter, R. 'More Labels', p.183.

<sup>17</sup> Zetter, R. 'More Labels', p.183.

<sup>18</sup> Zetter, R. 'More Labels', p.182.

<sup>19</sup> Zetter, R. 'More Labels', p.184.

within the political vacuum on asylum, but are socially and politically constructed. As Zetter seeks to explain:

... in the institutional setting, labels assume a much more powerful significance. They serve as a linguistic shorthand for policies, programmes and bureaucratic requirements - practices which are instrumental in categorizing and differentiating between facets of an identity. Labelled with an identity in one conceptual language, refugees in all these cases have had imposed on them a radically different language. Whether deliberately or in ignorance, this imposition dominates the behaviour of refugee societies.<sup>20</sup>

When examining the use of labelling we can also draw upon the work of Stuart Hall. Drawing upon his 1978 work, *Policing the Crisis*, I want to focus the following analysis on the term ‘mugging’ – a term coined and developed in the United States during the 1950s. In doing so, this analysis will help to illuminate how we engage with the language of asylum within Britain.

Stuart Hall’s detailed analysis of British policing focuses upon the (at the time) new phenomenon of mugging, which, according to the police and media reports, emerged in society in 1972. However, Hall noted that ‘it was extremely difficult to discover exactly what was new in ‘mugging’ - except the label itself’ for the act was well documented as early as the 1900s in Britain. What Hall found, through an investigation into the phenomenon of ‘mugging’, was that the term had become more important than the act itself. As Hall observed, ‘labels are important, especially when applied to dramatic public events. They not only place and identify those events; they assign events to a context’.<sup>21</sup> In the instance of ‘mugging’, Hall argued that eventually the term ‘mugging’ carried more potency than the action itself; or more seriously, that the term eventually became disengaged and removed from its societal roots and origins – society coming to understand merely the label of ‘mugging’, and not the wider societal implications as to why it is happening.

When examining the term ‘mugging’, Hall found that the response to the issue was wildly out of proportion to any possible threat that could be constructed through the erratic statistics regarding the issue. He argued that the response to the social phenomenon of ‘mugging’ was directed more at the ‘*perceived or symbolic threat to society*’ that was engineered by the

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<sup>20</sup> Zetter, R. ‘Labelling Refugees’, p.51.

<sup>21</sup> Hall, S. *Policing the Crisis: Mugging, the State and Law and Order*, (London: Macmillan Press, 1978), p.19.

authorities and the media, than to the actual threat itself. What arises from this disparity in understanding is a discrepancy between what is occurring in reality and what is being perceived by society.<sup>22</sup> For Hall, this resulted in the crime of ‘mugging being cut adrift from its social roots. What’s producing crime, so to speak as a simple and transparent fact – is the label ‘mugging’ itself’; he went on to argue that in order to understand the issue of ‘mugging’, ‘it has to be dismantled in terms of its wider relations to [...] contradictory social forces’.<sup>23</sup> In this instance, the label and fear of the act becomes the focus of attention, rather than an actual understanding of the event itself. It is during this reading of labelling that we can witness the power of the label (as well as the power of labelling) and how it can shape societies’ perceptions of the real and perceived understanding of certain events.

And it is at this point that Hall’s understanding of labelling and ‘mugging’ becomes extremely useful for engaging with the figure of the asylum seeker in Britain. I would argue that this same process of disengagement from its wider societal and historical roots is occurring with the issue of asylum in Britain. The wider ethical, moral and humanitarian considerations of what constitutes an asylum seeker are swept aside, and the term itself becomes the issue rather than it being an individual act of seeking sanctuary.<sup>24</sup> In the instance of the term ‘mugging’, Hall argued that the label had actually caused immense damage, by elevating negative issues such as violence and the potential threat to society into a ‘sensational focus’, whilst obscuring and ‘mystifying’ the underlying causes of ‘mugging’ such as socio-economic factors.<sup>25</sup> It is precisely this deflection that has occurred with the term asylum. Ethical considerations - the human rights plight of the individual (as well as the colonial origins of the system as discussed in Chapters One and Two) - have been replaced (or obscured) with a focus purely upon the label as a collective unit itself: all individuality has been erased. Rather than focusing upon the hardship and suffering of the individual refugee, the focus is upon how they (as a whole) will impact upon society, how they will be catered for and the damage that will be caused to the economy, the welfare state and cultural heritage. As noted, the use of the labels ‘asylum’ and ‘bogus’ elevates negative issues such as

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<sup>22</sup> Hall, S. *Policing the Crisis*, p.29.

<sup>23</sup> Hall, S. *Policing the Crisis*, p.ix.

<sup>24</sup> I think it is useful here to point to the issue of colonialism - of Britain as an ex-colonizer, of the UNHCR and the 1951 Convention as colonial institutes and the disengagement of colonialism from the refugee regime with the two appearing as separate and distinct histories. As chapter One and Two have highlighted, Britain (and the refugee regime at large) has not addressed the historical relationship between colonialism and the refugee regime.

<sup>25</sup> Hall, S. *Policing the Crisis*, p.vii.

abuse and the potential threat to the state into a 'sensational focus', whilst obscuring and 'mystifying' the underlying causes of those claiming asylum within Britain. The term asylum connotes images of powerlessness and vulnerability, as well as issues of risk, harm and threats to the security of the state and the state's cultural identity. The term 'refugee' is entangled with contradictory, negative and false understandings of refuge. There is little evidence of humanitarian undertones or acceptance, with the language of labelling effectively marginalising the figure of the asylum seeker: at the same time not only criminalising the asylum seeker, but effectively removing any trace of individuality from the asylum process.

In focusing further on the notion of labelling as a means to understand how the asylum seeker has been positioned and marginalised by government policies of asylum, Howard Becker's theory of labelling is helpful. In his 1966 work *Outsiders*, he focuses upon the notion of deviance and deviant groups and how they are constructed. Becker argues that:

We must see deviance, and the outsiders who personify the abstract conception as a consequence of a process of interaction between people, some of whom in the service of their own interests make and enforce rules which catch others who, in the service of their own interests, have committed acts which are labelled deviant.<sup>26</sup>

Becker argues that within a society, social groups create rules and attempt to have those rules enforced when necessary. Regarding the issue of deviance, Becker notes that it is not the behaviour itself that is deviant, but rather that it has been labelled deviant by other social groups who have enforced rules regarding the behaviour. Those who are said to have broken the rules of society are framed as deviants: outsiders of the normal social group. As such, for Becker, deviance is actually the response of a particular social group to a particular behaviour that they, themselves, have categorised as deviant. As Becker explains:

[deviance]... in the sense I have been using it, of publicly labelled wrongdoing – is always the result of enterprise. Before any act can be viewed as deviant, and before any class can be labelled and treated as outsiders for committing the act, someone must have made the rule which defined the act as deviant.<sup>27</sup>

Becker argues that some social groups will be far more susceptible to being labelled deviant than others. In a sense, it is the majority dictating what are socially acceptable behavioural

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<sup>26</sup> Becker, H. *Outsiders, Studies in the Sociology of Deviance*, (New York: The Free Press, 1991), p.163.

<sup>27</sup> Becker, H. *Outsiders*, p. 162.



patterns within society, with the labelled being positioned outside the normal social structure.

Similarly, the adoption of the label of asylum seeker exposes a person to a plethora of negative connotations that marginalise their position further, as well as positioning them as a threat. The label asylum seeker, or others such as bogus, illegal, clandestine or abusive asylum seeker, are all socially constructed and have emerged from parliamentary debates and policies and into legislation and regulations. Parliament decided that certain behaviours from would-be refugees would no longer be deemed acceptable (e.g. arriving without passports, visas, via a third country, etc). Such, asylum seekers were then labelled as illegal, abusive, or bogus and the connotation was that they were merely seeking economic benefit rather than genuine sanctuary. The label is applied uniformly, thus obscuring the individual cases that it is meant to apply to. In the end, society views the label first, rather than the individual story behind the label.

Importantly though, as Becker notes, the process of labelling is not infallible<sup>28</sup>; there may be people who end up being labelled deviant, or in my case, bogus, illegal or abusive asylum seekers, who have in fact not broken any rules. And conversely, there may be people who are labelled as genuine asylum seekers who actually are not. Only a small minority are perceived by government to be genuine asylum seekers in need of refuge. The vast majority are presented as bogus, regardless of whether they are or not. In fact, a good example of this is the British public's perception of the percentage of asylum seekers arriving on Britain's shores. The actual percentage of the world's asylum seekers arriving in Britain annually is less than two percent; the UNHCR states that it is as low as 0.27percent.<sup>29</sup> Interestingly though, the British Red Cross Survey of June 2009 reported that over 85 percent of those surveyed thought that Britain was home to 24 percent of the world's asylum population. Nick Scott-Flynn, Head of British Red Cross Refugee Services declared that this massive discrepancy reveals 'a clear gap between perception and reality. The number of refugees coming to the UK is far lower than the vast majority of people think'.<sup>30</sup> The label of asylum

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<sup>28</sup> Becker, H. *Outsiders*, p.9.

<sup>29</sup> UN High Commissioner for Refugees. (UK) *The Facts: UK and Asylum*, <http://www.unhcr.org.uk/about-us/the-uk-and-asylum.html>, [accessed 5/12/2013].

<sup>30</sup> Scott-Fly, N. 'Public massively overestimate numbers seeking refuge in UK, British Red Cross survey, (June 2009), reveals', British Red Cross, <http://www.redcross.org.uk/About-us/Media-centre/Press-releases/2009/June/Public-massively-overestimate-numbers-seeking-refuge-in-UK-British-Red-Cross-survey-reveals>, [accessed 5/12/2013].

becomes more potent, inducing fears and over-blown miscalculations, with the truth being marginalised.

Becker is not alone in his discussion of the labelling effect of delinquents. Michel Foucault writes of the delinquent in *Discipline and Punish*, tracing the emergence of the figure in the prison system. He argues that the prison system fabricated the existence of the delinquent, through the use of 'violent constraints' imposed upon the individual. The prison, for Foucault, is meant to offer a place of correction, education and rehabilitation, but instead, functions 'in the form of an abuse of power'.<sup>31</sup> In this regard, although viewed as a failing of the system, the emergence of the delinquent is actually its greatest product. For the *raison d'être* of the prison is not 'to think of man in society, it is to create an unnatural, useless and dangerous existence'.<sup>32</sup> Indeed, Foucault argues that through the processes and power of the prison system, certain types of behaviours and illegalities are isolated, and formed, within the system:

this form is, strictly speaking, delinquency. One should not see in delinquency the most intense, most harmful form of illegality, the form that the penal apparatus must try to eliminate through imprisonment because of the danger it represents; it is rather an effect of penalty... that makes it possible to differentiate, accommodate and supervise illegalities.<sup>33</sup>

Indeed, Foucault raises the question of what is achieved through the apparent 'failure' of the prison system. The system allows for the continuation of delinquency, the emergence of the 'habitual offender' and for a fraternity of delinquents to accumulate that are quite distinct from more hardened forms of criminals.<sup>34</sup> However for Foucault, it is not just the constraints and abuses experienced within the prison system that are at issue here in creating and maintaining the delinquent. Rather, it is the continuation of the surveillance culture and monitoring of behaviour once the individual has been freed from the system and is within the wider community that reproduces the delinquent behaviour. As Foucault writes:

The conditions to which the free inmates are subjected necessarily condemn them to recidivism: they are under the surveillance of the police; they are assigned to a particular residence, or forbidden others; they leave prison with a passport that

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<sup>31</sup> Foucault, M. *Discipline and Punish: The Birth of the Prison*, (London: Penguin Books, 1991), p.266.

<sup>32</sup> Foucault, M. *Discipline and Punish*, p.266.

<sup>33</sup> Foucault, M. *Discipline and Punish*, p.277.

<sup>34</sup> Foucault, M. *Discipline and Punish*, p.272.

they must show everywhere they go and which mentions the sentence that they have served. Being on the loose, being unable to find work, leading the life of vagabonds are the most frequent factors in recidivism.<sup>35</sup>

Even on leaving the confines of the prison, the individual is denied full entry into the ranks of the citizenry, and is forced to adopt a marginalised position within society with rights such as liberty, employment and freedom being denied. Through their position within the community and the surveillance imposed upon them, the individual is branded. This forces the individual into certain behaviours in order to survive, behaviours that feed back, not into hardened crime, but delinquency, thus perpetuating the prison system cycle. In this regard the prison system and the branding that follows release, are ‘not intended to eliminate offences, but rather to distinguish them, to distribute them, to us them; that it is not so much that they render docile those who are liable to transgress the law, but that they tend to assimilate the transgression of the laws in a general tactics of subjection’.<sup>36</sup> Indeed, Foucault, speaking in his Prison Lecture of 1976, argues that the prison system ‘condemns those it has recruited to a life of crime because of the effects of social alienation and the criminal record’.<sup>37</sup> As William Connolly observed:

It is well known that modern prisons breed hardened criminals. That effect, Foucault insists, is not one of its failures but the sign of its greatest success. Modern penalty depoliticizes crime; it draws attention to the character of the criminal and away from the power of the regime; and it separates the criminal from other disaffected elements of the population.<sup>38</sup>

However, I think a reading of Foucault highlights that the delinquent is separated from the hardened criminal, with a distinction being made between them in the eyes of the law - with delinquent behaviour being accepted, encouraged and viewed as non-political or non-economic in nature.<sup>39</sup> It is here especially that through Foucault’s understanding of the delinquent, and how it is labelled, constructed, monitored and perpetuated within society, that we can draw comparisons with the figure of the asylum seeker. The delinquent is presented as separate from the (criminal) population - an abnormality, or what Foucault terms a ‘strangeness’ from the lower classes of society - and is presented as ‘close by, everywhere

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<sup>35</sup> Foucault, M. *Discipline and Punish*, p.256.

<sup>36</sup> Foucault, M. *Discipline and Punish*, p.272.

<sup>37</sup> Foucault, M. ‘Alternatives to the Prison: Dissemination or Decline of Societal Control’, *Theory, Culture, Society*, 26(12)(2009):12-24, p.19.

<sup>38</sup> Connolly, W. E. ‘Discipline, Politics and Ambiguity’, *Political Theory*, 11(3)(1983):325-341, p.332.

<sup>39</sup> Foucault, M. *Discipline and Punish*, p.272.

present and everywhere to be feared'.<sup>40</sup> The delinquent, just as the asylum seeker, is presented and labelled as 'very close and quite alien, a perpetual threat to everyday life, but extremely distant in its origin and motives, both everyday and exotic in the milieu in which it takes place'.<sup>41</sup> In this regard, the delinquent is also relegated as the 'other' within society, residing at the margins of society. The delinquent, much like the asylum seeker is consumed by the label, with the individuality of their behaviour and actions being lost within the wider societal label of delinquent. Forced to the margins of society, the delinquent like the asylum seeker becomes an object of fear in society.

Through the work of Zetter, Hall, Becker and Foucault, I want to highlight the significance, as well as the power of labelling, both on the labelled and the labeller. By labelling an individual or a group, the labeller is socially demarcating a specific group within society and, in the instance of the (bogus) asylum seeker, removing them from the normal spheres of social engagement (such as employment, benefits, housing, health care). Labelling is a conscious decision by one group to castigate another - shaping and normalising behaviours, whilst fabricating distinctions between individuals, normally to the detriment of the labelled. It is a bureaucratic process, that enables the government to mystify issues such as refuge, with the end result being that the label resonates more with society and instils fear, far more than the real fact of the matter would have. For it has come to be expected that:

The arrival of uninvited people in need can also exacerbate fears of difference and cultural confrontations, a point not lost on politicians in democratic countries. The terrible evil which produces refugees can be insulated from remedy by an indifference that arises from personal insecurity... the common thread then, is fear: fear that gives rise to refuge flight, fear that keeps people from offering haven to those in need. The combinations and permutations of insecurity that emerge in particular situations shape fundamentally the policy response, whether generous or grudging.<sup>42</sup>

Alistair Darling, in a parliamentary debate, highlighted the continual use of the term bogus and asked, '[W]hat is a bogus refugee? Is it someone who has applied and been rejected? That is an important point, because the Government seem to suggest that, by definition, if one

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<sup>40</sup> Foucault, M. *Discipline and Punish*, p.286.

<sup>41</sup> Foucault, M. *Discipline and Punish*, p.286.

<sup>42</sup> Halton, A. C. *The Price of Indifference. Refugee and Humanitarian Action in the New Century*, (Oxford: Oxford University Press, 2003), p.13-16.

does not receive asylum, one must be bogus'.<sup>43</sup> And it is this that makes the notion of labelling so powerful. Labelling is political by nature and through the use of labels, the government has been able to set and define the agenda regarding asylum. Through the continuous use of the term asylum seeker, and then the introduction of the term bogus, the government has successfully fractured the label of refugee. Refugees are no longer here to seek refuge, but asylum, and in doing so many will be found to be bogus. Through the process of labelling, the system of refuge is fractured, providing the government with the opportunity to point to growing abuse of the asylum system and protect the borders from the apparent hordes of asylum seekers intent on abusing the welfare system. Labelling in this regard has provided the government with the power to redefine the notion of asylum and refuge within Britain.

### **The Genuine Asylum Seeker Is?**

... [T]here is genuine problem with asylum in this country... The proper way forward is to do what we are doing: introducing tough new asylum measures that will allow genuine asylum seekers through, but will halt those bogus asylum seekers who do nothing but harm to the cause of proper asylum seekers.<sup>44</sup>

Through consecutive British governments and their various policies and Acts there has emerged a categorisation of the would-be refugee who has been idealised and positioned as the genuine asylum seeker. The end-product has been the emergence of a tangible one-size fits all figure of a genuine asylum seeker. This figure is upheld as honourable, legal and legitimate. The genuine asylum seeker has been presented by various governments as the pinnacle of a refugee; they will have particular experiences, adhere to certain modes of travel and they will be knowledgeable of the national asylum rules. This figure is upheld as the true asylum seeker. Those who are unable to meet the criteria of a genuine asylum seeker are labelled as 'bogus', 'failed' asylum seekers. As Roger Zetter puts it, 'anyone has a right to claim refugee status; but claims to the refugee label are controlled by the draconian mix of

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<sup>43</sup> Darling, A. Hansard, House of Commons Debate, Asylum Bill, 13<sup>th</sup> November 1991, vol. 198, cc1.82-181 [http://hansard.millbanksystems.com/commons/1991/nov/13/asylum-bill#S6CV0198P0\\_19911113\\_HOC\\_214](http://hansard.millbanksystems.com/commons/1991/nov/13/asylum-bill#S6CV0198P0_19911113_HOC_214), col.1154, [accessed 1/11/2013].

<sup>44</sup> Blair, T. Hansard, House of Commons Debate, Asylum and Immigration, 2<sup>nd</sup> February 2000, vol.343, cc1.048-103, [http://hansard.millbanksystems.com/commons/2000/feb/02/asylum-and-immigration#S6CV0343P0\\_20000202\\_HOC\\_124](http://hansard.millbanksystems.com/commons/2000/feb/02/asylum-and-immigration#S6CV0343P0_20000202_HOC_124), cl 979-980, [accessed 13/11/2013].

deterrent measures and in-country policies and regulations'.<sup>45</sup> Indeed, through the creation of labels and categorisations, the government has been able to 'engage in an act of power'.<sup>46</sup>

The first ascribed characteristic of the genuine asylum seeker is that they will need to have arrived through legal means with the correct travel documentation and visas. Those found travelling without the proper documentation will be banned from travelling, or if a carrier such as an airline allows them to travel, that airline can be fined if they are caught at a later date. This demand for asylum seekers to hold the necessary papers and visas began with the Immigration (Carrier Liabilities) Act of 1987. Viewed by the government as an 'important and effective deterrent'<sup>47</sup>, the Act made it illegal for people to arrive through modes of travel such as by plane or boat, without the necessary visa documentation and passports. Failure of carriers to comply with the Act will lead to a £1,000 fine from the government (which was increased to £2,000 by the Immigration and Asylum Act 1999). In my interview with Jeremy Corbyn, MP for Islington North, an inveterate critic of government asylum policy, he asserted that since the government, 'didn't want to, and couldn't get out of the Geneva Convention... they introduced the Carriers Liability Act, so that the airline or shipping agents would be financially responsible for anyone who was not subsequently admitted to the country'.<sup>48</sup> In what Corbyn termed the 'outsourcing of immigration', with the implementation of the Act, carriers are now in the position of border controllers, and those individuals without the necessary documentation will be escorted off the flight.<sup>49</sup> With the creation of this Act, only those with the necessary paper work - (valid) passports, visas and documents - will be eligible to reach Britain. Without this paperwork, entry into Britain through conventional means such as via airlines and ferries, is forbidden, and crucially, illegal. Jack Straw, speaking as Home Secretary in the House of Commons, when introducing the 1998 *White Paper, Fairer, Faster Firmer*, spoke of the continuing need to clamp down on individuals arriving without the proper documentation. He noted:

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<sup>45</sup> Zetter, R. 'More Labels', p.184.

<sup>46</sup> Barnett, M. N. and Finnemore, M. 'The Politics, Power and Pathologies of International Organizations', *International Organization*, 53(4)(1999):699-732, p.711.

<sup>47</sup> Secretary of State for the Home Office, *Fairer, Faster and Firmer- A Modern Approach to Immigration and Asylum*, (London: The Stationary Office, July 1998), (CM4014), p.24.

<sup>48</sup> Corbyn, J. MP for Islington North. Interview conducted on 2<sup>nd</sup> December 2013, London.

<sup>49</sup> Ruff, A. 'The Immigration (Carriers' Liability) Act 1987: It's Implication for Refugees and Airlines', *International Journal of Refugee Law*, 1(4)(1988):481-500.

Many problems and much confusion are caused by passengers arriving in the United Kingdom without the required visas, or in some cases without any passport. We shall adopt a tough approach to deterring and preventing the arrival of such inadequately documented passengers.<sup>50</sup>

What his comment obscured was that arriving without the proper documents does not then mean that the individual is not an asylum seeker - it just means that they are inadequately documented. What the government did through this legislation was to make arriving without the proper papers a criminal matter that automatically makes claiming asylum without papers very difficult; after all, how are you to arrive in the country? Despite this, Straw continued to argue this position in the years to come, asserting in a speech in 2001 at the Institute for Public Policy Research, that the demand for the correct documentation and visas was not impacting on asylum seekers' safety; he stated, 'some may say that the increased use of visas and the imposition of penalties on carriers is the main barriers preventing refugees from reaching safety, and that the answer is therefore to end these policies. I disagree'.<sup>51</sup> However, as early as 1991, Jeremy Corbyn argued in a parliamentary debate that it was now 'impossible for legitimate asylum seekers to leave their own countries' (due to the introduction of the Asylum and Immigration Bill).<sup>52</sup> This position was supported by Mike Watson, MP for Glasgow Central, who lambasted the government for its inability to comprehend the contemporary asylum situation. Speaking in a 1991 debate, Watson said that:

The Government, of course... fail to understand what is involved in fleeing persecution. Clause 7, for example, places restrictions on airline and shipping companies, requiring passengers to provide what is termed "valid travel documentation" at the point of exit. In many cases, that is simply impossible. Companies are to be instructed to reject anyone travelling on false documents. But how else are people fleeing persecution to leave the country in which they are being persecuted? It is hardly likely that they will be issued with a passport and a neat visa stamp, yet the Home Office appears to think that they are in the same position as someone seeking simply to emigrate from the United Kingdom. That is nonsense. By denying genuine political refugees the right to leave their country

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<sup>50</sup> Straw, J. Hansard, House of Commons, Asylum and Immigration, 27<sup>th</sup> July 1998, vol.317, ccl. 35-54, [http://hansard.millbanksystems.com/commons/1998/jul/27/immigration-and-asylum#S6CV0317P0\\_19980727\\_HOC\\_170](http://hansard.millbanksystems.com/commons/1998/jul/27/immigration-and-asylum#S6CV0317P0_19980727_HOC_170), col. 36, [accessed 8/11/2013].

<sup>51</sup> Straw, J. 'An effective protection regime for the twenty-first century', Speech to the Institute for Public Policy Research, (6<sup>th</sup> February 2001), <http://www.theguardian.com/society/2001/feb/06/asylum3>, [accessed 22/04/2014].

<sup>52</sup> Corbyn, J. Hansard, House of Commons Debate, Asylum Bill, 13<sup>th</sup> November 1991, vol. 198, ccl. 1082-181, [http://hansard.millbanksystems.com/commons/1991/nov/13/asylum-bill#S6CV0198P0\\_19911113\\_HOC\\_214](http://hansard.millbanksystems.com/commons/1991/nov/13/asylum-bill#S6CV0198P0_19911113_HOC_214), col. 1151, [accessed 1/11/2013].

to seek asylum, the Government are denying them justice and are thus in breach of the 1951 convention.<sup>53</sup>

Article 31 of the 1951 Convention specifically notes that contracting states shall not impose penalties:

on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.<sup>54</sup>

This leads us to the second ascribed characteristic of the genuine asylum seeker. As well as arriving with the necessary documents, the genuine asylum seeker needs to have travelled directly from their country of origin and not have passed through a safe third country. Although not written into the 1951 Refugee Convention, it has become implicit that asylum seekers should seek protection at the nearest possible location. This aspect of the genuine asylum seeker was cemented within the Dublin Convention on the Determination of the State Responsible for Examining an Asylum Application (1997). The Dublin Convention (replaced in 2003 by the Dublin II Regulations) established state responsibility for asylum seekers within the European Union, with the ‘determination of the existence of a safe third country’ taking place ‘before the determination of state responsibility’.<sup>55</sup> The Convention established that European Union member states would be responsible for asylum applications only within their territory.<sup>56</sup> Significantly, the Convention meant asylum seekers could only lodge one asylum claim within the European Union to prevent the practice of supposed ‘asylum shopping’. Accordingly, the state that the asylum seeker arrives in first needs to be the state where the application is lodged - an asylum seeker cannot then travel across, or between European states.<sup>57</sup>

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<sup>53</sup> Watson, M. Hansard, House of Commons Debate, Asylum Bill, 13<sup>th</sup> November 1991, vol. 198, ccl.1082- 181, [http://hansard.millbanksystems.com/commons/1991/nov/13/asylum-bill#S6CV0198P0\\_19911113\\_HOC\\_214](http://hansard.millbanksystems.com/commons/1991/nov/13/asylum-bill#S6CV0198P0_19911113_HOC_214), col.1132., [accessed 1/11/2013].

<sup>54</sup> UN High Commissioner for Refugees. ‘*Convention and Protocol Relating to the Status of Refugees*’, Article, 31.

<sup>55</sup> Hurwitz, A. ‘The 1990 Dublin Convention: A Comprehensive Assessment’, *International Journal of Refugee Law*, 11(4)(1999):646:677, p.649.

<sup>56</sup> European Union. ‘The Dublin Convention the Determination of the State Responsible for Examining an Asylum Application’, *Official Journal of the European Communities*, (1997) No. C 254/01, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:254:0001:0012:EN:PDF> [accessed 22/11/2013].

<sup>57</sup> Hatton, T. J. ‘*The Rise and Fall of Asylum: What happened and Why?*’, Centre for Economic Policy Research, Discussion Paper Series, No. 6752, (London: Centre for Economic Policy Research, 2008).



Importantly, Acts such as the Nationality, Immigration and Asylum Act (2002) (NIAA) and the Immigration and Asylum Act (1999) (IAA), addressed the issue of safe third countries. Part 4, Section 80 of the NIAA empowered the Secretary of State to remove asylum seekers from Britain to a 'safe third country' (one complying with the 1951 Convention and the European Convention on Human Rights) if it was found that they had travelled through another country on their way to Britain. In adhering to this position, Beverly Hughes, the then Immigration Minister, stressed that due to the rising asylum figures and the presumed abuse of the asylum system, the government was 'determined that protection should only be granted to those who really need it - our asylum system is not a shortcut to work or settlement in the UK'.<sup>58</sup> The New Labour stance was that they had 'no intention of creating a fortress Britain' but they had every right to defend their boundaries from the perceived threat of bogus asylum seekers.<sup>59</sup>

This position was reaffirmed in The Asylum and Immigration (treatment of claimants) Act (AIA), which reasserted that individuals seeking refuge should do so in the first safe country they reach, even though international refugee law makes no such distinction or requirement.<sup>60</sup> New Labour stressed that asylum seekers should not be passing through numerous states without making a claim for refuge. The AIA stipulated that if the individual seeking refuge had not travelled to Britain directly from their country of origin, and had had the opportunity at the border of another country to make an asylum claim and seek protection from another state, then they should be deported to that safe third country in order to seek protection there.<sup>61</sup> This aspect of asylum was well supported within Parliament, with members over the years assuming that through the establishment of the Dublin Convention, as well as safe-third country lists, *abuse* of the system would be cut down. Indeed, as Bowen Wells, MP for Hertford and Stortford affirmed:

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<sup>58</sup> White, M. 'Policy Switch to cut asylum 'abuse'', *The Guardian*, (30<sup>th</sup> November 2002) <http://www.guardian.co.uk/politics/2002/nov/30/immigration.immigrationandpublicservices> [accessed 6/11/2010].

<sup>59</sup> The Guardian, 'The Camp boss knew refugees planned to storm tunnel', (27<sup>th</sup> December 2001), <http://www.guardian.co.uk/society/2001/dec/27/asylum1>, [accessed 8/10/2010].

<sup>60</sup> Legislation.Gov.uk. Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, <http://www.legislation.gov.uk/ukpga/2004/19/section/33>, [accessed 22/04/2014], Sec. 33.

<sup>61</sup> Refugee Council, '*Asylum and Immigration Act 2004: An Update Briefing*', (March 2005), [http://www.refugeecouncil.org.uk/assets/0001/5662/ai\\_act\\_update\\_05](http://www.refugeecouncil.org.uk/assets/0001/5662/ai_act_update_05), (accessed 22/04/2014), p.4.

It is right that we should take away from those seeking asylum the right to come to this country via a third country. If one is a true political refugee, one should seek asylum only in the country next to the one from which one is fleeing. That would demonstrate the necessity of one's cause and the need for asylum. The idea that people can fly from Sri Lanka, as Tamils did the other day, to Malaysia, to India, to Germany and then to this country to seek political asylum is nonsense...<sup>62</sup>

This thought process was still being expressed ten years later, with the release of the 2002 White Paper, *Secure Borders, Safe Haven*. The White Paper spoke of the processes of those arriving in Britain, and argued that there were still a large number of abusive applicants entering the system. It stated:

there is a world of difference between offering sanctuary to those in genuine fear of persecution and allowing asylum seekers to stay simply because the UK is their country of preference. The great majority of those seeking asylum could perfectly reasonably have sought protection at an early stage in their journey.<sup>63</sup>

The White Paper argued that although these individuals may be asylum seekers, many genuine asylum seekers could (and should) be applying for sanctuary far earlier on their journey.

The third criterion applied to distinguish genuine asylum seekers is that they must be fleeing due to a well-founded fear of persecution as specified in the 1951 Convention. Having arrived legitimately in Britain, direct from their country of origin, and with the necessary visas and passports, the genuine asylum seeker will have a classic 1951 Convention reason for fleeing. This means that the asylum seeker will have a claim for refuge based upon a well-founded fear of persecution due to race, religion, nationality, political opinion or membership of a particular social group.<sup>64</sup> The genuine asylum seeker needs to be able to demonstrate that their fear of persecution is well-founded and that they are incapable or

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<sup>62</sup> Wells, B. Hansard, House of Commons Debate, Asylum and Immigration Appeals Bill, 2<sup>nd</sup> November 1992, vol 213, ccl.21-120, [http://hansard.millbanksystems.com/commons/1992/nov/02/asylum-and-immigration-appeals-bill#S6CV0213P0\\_19921102\\_HOC\\_140](http://hansard.millbanksystems.com/commons/1992/nov/02/asylum-and-immigration-appeals-bill#S6CV0213P0_19921102_HOC_140), col.78, [accessed 3/11/2013].

<sup>63</sup> Secretary of State for the Home Department, *Secure Borders Safe Haven: Integration with Diversity in Modern Britain*, (London: The Stationary Office, February 2002), (CM5387), p.48.

<sup>64</sup> UN High Commissioner for Refugees. 'Convention and Protocol Relating to the Status of Refugees', Article 1.A.

reluctant to seek protection from their country of origin.<sup>65</sup> Crucially, the genuine asylum seeker needs to be able to speak of their persecution in a detailed, consistent and coherent manner in order to be viewed as credible.<sup>66</sup> Yet, as Kenneth Baker argued, although the element of persecution is central for seeking refuge, most individuals applying do so with unfounded applications. Speaking at a time when Britain was witnessing increased numbers of asylum applications from Tamils, Nigerians and Yugoslavs, Baker insisted that this increase in numbers was not equated to an increase in state unrest abroad, but was an abuse of the system. The Home Secretary insisted that:

Fear of persecution is no longer the dominant element for many asylum seekers. In only a small minority of cases in the United Kingdom are the applicants shown to have a "well-founded fear of persecution", as required by the terms of the 1951 United Nations convention on refugees. The convention is an instrument of last resort, designed to protect life and liberty from immediate threat. It does not confer an unfettered right to travel the world and settle in the country of one's choice. It does not oblige parties to facilitate, still less to encourage, the arrival of asylum applicants. We cannot allow immigration control to become optional, nor must we let the institution of asylum to be undermined by abuse.<sup>67</sup>

Many of the parliamentary debates occurring from 1990 onwards continued with this line of thought, espoused by Baker, that asylum seekers were not fleeing persecution, but were merely in search of a better life. Ken Clarke argued in a 1992 Commons debate, that 'we must recognise that the growth in asylum applications is in part linked to the fact that anyone who asks for asylum is allowed past the normal immigration controls at our port' with this possibility being a prize in itself to draw people.<sup>68</sup> Michael Howard asserted in 1995 that Britain was perceived as an attractive country for benefits internationally, and argued that the lure of benefits meant that the number of genuine asylum seekers was significantly eclipsed by those seeking economic gain. Defending the government stance, Howard argued that:

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<sup>65</sup> UK Border Agency. 'Considering Asylum Claims and Assessing Credibility', (2011) <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanadecidingtheclaim/guidance/considering-protection-.pdf?view=Binary> [accessed 27/11/2013], p.38.

<sup>66</sup> Home Office, 'Asylum Policy Instruction, Asylum Interviews Version 5.0', (31<sup>st</sup> March 2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/298853/Asylum\\_interview\\_policy\\_guidance\\_v\\_5.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298853/Asylum_interview_policy_guidance_v_5.pdf), [accessed 22/04/2014], Section 5.4, p.14-21.

<sup>67</sup> Barker, K. Hansard, House of Commons Debate, Asylum, 2<sup>nd</sup> July 1991, vol. 194, ccl.165-78, [http://hansard.millbanksystems.com/commons/1991/jul/02/asylum#S6CV0194P0\\_19910702\\_HOC\\_158](http://hansard.millbanksystems.com/commons/1991/jul/02/asylum#S6CV0194P0_19910702_HOC_158), col.165, [accessed 1/11/2013].

<sup>68</sup> Clarke, K. Hansard, House of Commons Debate, Asylum and Immigration Appeals Bill, 2<sup>nd</sup> November 1992, vol. 213, ccl. 21- 120, [http://hansard.millbanksystems.com/commons/1992/nov/02/asylum-and-immigration-appeals-bill#S6CV0213P0\\_19921102\\_HOC\\_140](http://hansard.millbanksystems.com/commons/1992/nov/02/asylum-and-immigration-appeals-bill#S6CV0213P0_19921102_HOC_140), col.25, [accessed 3/11/2013].

For far too many people across the world, this country is far too attractive a destination for bogus asylum seekers and other illegal immigrants. The reason is simple: it is far easier to obtain access to jobs and benefits here than almost anywhere else. That is the problem that these measures are intended to remedy. They are fully compatible with our international obligations, they are fair, and they are very necessary.<sup>69</sup>

Indeed, Mark Wolfson, MP for Sevenoaks, declared that ‘there can be little doubt that one of the reasons for the dramatic rise in applications to enter the UK... is the social security benefits that are available to asylum seekers here’.<sup>70</sup> With this line of logic, the genuine asylum seeker, with their well-founded fear of persecution, should possess all the necessary and relevant documentation pertaining to their persecution, and should be able to articulate their experiences of persecution in a coherent, detailed and timely manner.

It is in these debates that it is possible to see how the vague understanding of the 1951 Convention, as discussed in Chapter One, can be construed and twisted to suit the needs of those implementing the law. The 1951 Convention was established to meet the needs of refugees within a particular era after the Second World, and as a result, it was silent regarding particulars, such as the meaning of refuge and persecution, and how these should be applied by states. It is here though that it is possible to see how the silence of the 1951 Convention has allowed governments to retain a high degree of control. By fragmenting the label of the refugee into genuine versus bogus, consecutive governments have been able to implement policies that strike at the heart of the asylum system by asserting that they are protecting themselves, as well as the genuine asylum seeker from the growing hordes of abusive claimants. This is how the 1951 Convention has been operating in Britain. As Hathaway notes, the 1951 Convention has always operated with the needs of states first, rather than refugees. Hathaway stresses that because of this, the 1951 Convention is a ‘facade of universal humane concern’.<sup>71</sup> I would argue that this takes place through the employment of language - specifically the labelling and categorisation of the refugee into sub-status refugees with decreasing rights being meted out.

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<sup>69</sup> Howard, M. Hansard, House of Commons Debate, Asylum and Immigration, 20<sup>th</sup> November 1995, <http://www.publications.parliament.uk/pa/cm199596/cmhansrd/vo951120/debtext/51120-05.htm>, col.335, [accessed 11/11/2013].

<sup>70</sup> Wolfson, M. Hansard, House of Commons Debates, Asylum and Immigration Bill, 11<sup>th</sup> December 1995, vol. 268, ccl.699- 808, [http://hansard.millbanksystems.com/commons/1995/dec/11/asylum-and-immigration-bill#S6CV0268P0\\_19951211\\_HOC\\_389](http://hansard.millbanksystems.com/commons/1995/dec/11/asylum-and-immigration-bill#S6CV0268P0_19951211_HOC_389), col.773, [accessed 11/11/2013].

<sup>71</sup> Hathaway, J. C, ‘A Reconsideration of the Underlying Premise of Refugee Law’, p.180.

A fourth criterion in defining the genuine asylum seeker is that they should have requested asylum immediately upon arrival in Britain. Failure to declare an application for asylum automatically goes against the asylum seeker; their credibility and integrity are questioned and questions are raised such as, ‘why did you delay if you were in fear?’<sup>72</sup> During both House of Commons and House of Lords debates on asylum, the issue of declaration has been raised time and time again, with many MPs believing that a delay in application is the sign of a bogus asylum claim. Indeed, as Minister for Social Security, Peter Lilley argued, ‘those who are most bewildered reveal their circumstances to the immigration authorities when they arrive’.<sup>73</sup> This same position was argued by Lord Mackay of Ardbrecknish. He argued that it was highly suspect if a genuine asylum seeker did not make their appearance known immediately upon arrival within the country. He stated that:

If people are so traumatised and if they have selected this country to come to; if they have decided that it is a safe country in which they will not be persecuted, I fail to understand, despite all the special pleading I have heard over many hours, why it is unreasonable to expect them to say at the moment of entry: "I am being persecuted in my country of origin and seek asylum". That seems to me a logical position.<sup>74</sup>

This same point was raised by Lord Navnit Dholakia in 2002, with the delay in application raising questions regarding the character and honesty of the asylum seeker. Lord Dholakia argued that it was ‘wholly reasonable to expect that if an individual is genuinely fleeing persecution they ask for protection as soon as they arrive in the United Kingdom. If they do not do so, that can only cast doubt on their credibility and intentions’.<sup>75</sup> Indeed, the notion of a traumatised asylum seeker arriving at the border of Britain and struggling to: a) ask for asylum and be able to speak of their persecution; or b) possibly not even being aware that they have a right to asylum - has been rejected by both Conservative and New Labour governments. As Lord Corbett of Castle Vale declared when speaking on the Nationality,

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<sup>72</sup> Home Office, ‘*Asylum Policy Instruction, Asylum Interviews Version 5.0*’, Section 5.3, p.16.

<sup>73</sup> Lilley, P. Hansard, House of Commons Debates, Asylum Seekers (Benefits), 24<sup>th</sup> June 1996, vol.280, ccl.37-48, [http://hansard.millbanksystems.com/commons/1996/jun/24/asylum-seekers-benefits#S6CV0280P0\\_19960624\\_HOC\\_205](http://hansard.millbanksystems.com/commons/1996/jun/24/asylum-seekers-benefits#S6CV0280P0_19960624_HOC_205), col.46, [accessed 12/11/2013].

<sup>74</sup> Lord Mackay of Ardbrecknish. Hansard, House of Lords Debates, Asylum and Immigration Bill, 2<sup>nd</sup> July 1996, vol. 573, ccl. 1306-79, [http://hansard.millbanksystems.com/lords/1996/jul/02/asylum-and-immigration-bill#S5LV0573P0\\_19960702\\_HOL\\_100](http://hansard.millbanksystems.com/lords/1996/jul/02/asylum-and-immigration-bill#S5LV0573P0_19960702_HOL_100), col.1352, [accessed 12/11/2013].

<sup>75</sup> Dholakia, N. Hansard, House of Lords, Nationality, Immigration and Asylum Bill, 17<sup>th</sup> October 2002, vol 639, ccl.9740-1036, [http://hansard.millbanksystems.com/lords/2002/oct/17/nationality-immigration-and-asylum-bill#S5LV0639P0\\_20021017\\_HOL\\_173](http://hansard.millbanksystems.com/lords/2002/oct/17/nationality-immigration-and-asylum-bill#S5LV0639P0_20021017_HOL_173), col.979, [accessed 14/11/2013].

Immigration and Asylum Bill, asylum seekers should have no fears or worries in approaching border agency staff or the police and applying for asylum. He failed to understand the fear of authoritarian figures that some asylum seekers may have. Indeed, Lord Corbett asserted that:

... if someone, for whatever reason, delays his application for a few days, he could subsequently walk into a police station to ask where he should go in order to make a claim for asylum. I do not doubt that that person would be given a cup of tea and asked to sit down while the Immigration and Nationality Directorate was contacted. In practice, I do not understand the origin of the fears that have been expressed. Underlying those fears is the thought at the back of some noble Lords' minds that there is a whole raft of reasons why people delay making applications for asylum. I have genuine difficulty in that respect.<sup>76</sup>

Moreover, Peter Lilley argued that the notion of trauma would not actually be a factor in requesting asylum, for the individuals did not arrive unplanned overnight. Instead, he argued that the genuine asylum seeker would not arrive without the necessary paperwork and visas, and without their story straight. As Lilley said in 1996:

Asylum Aid... suggests that most refugees have fled imprisonment or the threat of death at a moment's notice, often with only the clothes they stand up in. That is scarcely ever the case. To get to this country, it is usually necessary for people to get a visa in the first place. Hon. Members will know that that is not a speedy or an easy process. It often involves more than one visit to the British entry clearance officer in the country of origin and obtaining information from here before they arrive in this country. To suggest that people are arriving suddenly and unexpectedly, because of a knock on their door in the night, and that they have only the clothes they stand up in is untrue.<sup>77</sup>

This position regarding the unfounded nature of asylum claims within Britain was also argued by former Prime Minister, Tony Blair, in his 2010 autobiography. Reflecting on the issue of asylum, Blair wrote:

The painful stories of refugees fleeing from Hitler and the Nazis and being turned away produced a right and proper revulsion. The presumption was that someone who claimed asylum was persecuted and should be taken in not cast out. It was an entirely understandable emotion in the aftermath of such horror. Unfortunately it

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<sup>76</sup> Corbett, R. Hansard, House of Lords Debates, 17<sup>th</sup> October 2002, Nationality, Immigration and Asylum Bill, vol. 639, ccl.974-1036, [http://hansard.millbanksystems.com/lords/2002/oct/17/nationality-immigration-and-asylum-bill#S5LV0639P0\\_20021017\\_HOL\\_173](http://hansard.millbanksystems.com/lords/2002/oct/17/nationality-immigration-and-asylum-bill#S5LV0639P0_20021017_HOL_173), col. 991, [accessed 14/11/2013].

<sup>77</sup> Lilley, P. Hansard, House of Commons Debates, Asylum Seekers, 23<sup>rd</sup> January 1996, vol.270, ccl.231-57, [http://hansard.millbanksystems.com/commons/1996/jan/23/asylum-seekers-2#S6CV0270P0\\_19960123\\_HOC\\_457](http://hansard.millbanksystems.com/commons/1996/jan/23/asylum-seekers-2#S6CV0270P0_19960123_HOC_457), col.242, [accessed 12/11/2013].

was completely unrealistic in the late twentieth century. The presumption was plainly false: the majority of asylum claims were not genuine.<sup>78</sup>

Members of parliament such as Jeremy Corbyn and Gerald Kaufman have argued in opposition to governmental policies that the nature of asylum seeking does not lend itself easily to speaking. Accordingly, to base the notion of a genuine refugee upon the speed in which the individual applies for a claim appears rather dishonourable to the concept of refuge, and can be construed as a means of state control within a perceived hostile environment. Due to legislation such as the NIAA, the Home Office now has no obligation to provide welfare support (housing or financial) where a claim for refuge has not been made 'as soon as reasonably practicable'.<sup>79</sup> Only those applying for asylum immediately upon arrival are considered to be genuine asylum seekers in need of protection, and are thus rewarded with benefits.

Indeed, this raises a further element in the construction of the genuine asylum seeker - that they are not driven by welfare benefits or economic aspirations, but instead are purely focused upon seeking a safe haven. As noted, many Ministers have expressed doubts on the numbers of asylum seekers arriving on the shores of Britain. They have argued that the increase in asylum claims is connected to economic migrants abusing the asylum system to gain access to the welfare system. Indeed, Michael Howard, speaking in a 1995 debate on the Asylum and Immigration Bill, affirmed that Britain 'must be a haven, not a honey pot'.<sup>80</sup> It was assumed that the genuine asylum seeker would be willing to endure hardship through policies such as reduced benefits in kind (for example, the introduction of vouchers rather than cash<sup>81</sup>), as well as restricted access to welfare whilst waiting to have their claim accepted, for their cause was true and honest.

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<sup>78</sup> Blair, T. *A Journey*. (London, Hutchinson, 2010), p.204-205.

<sup>79</sup> Legislation.Gov.uk. 'Nationality, Immigration and Asylum Act 2002', Part 3 Section 55, [accessed 6/11/2010] <http://www.legislation.gov.uk/ukpga/2002/41/contents> and, Clayton, G. *Text Book on Immigration and Asylum, Third Edition*, (Oxford: Oxford University Press, 2008), p.20.

<sup>80</sup> Howard, M. Hansard. House of Commons Debate, Asylum and Immigration Bill, 11<sup>th</sup> December 1995, vol. 268, ccl.699-808, [http://hansard.millbanksystems.com/commons/1995/dec/11/asylum-and-immigration-bill#S6CV0268P0\\_19951211\\_HOC\\_389](http://hansard.millbanksystems.com/commons/1995/dec/11/asylum-and-immigration-bill#S6CV0268P0_19951211_HOC_389), col.700, [accessed 11/11/2013].

<sup>81</sup> The vouchers were only valued at seventy percent of basic income support and along with the vouchers, asylum seekers through the IAA were entitled to £10 in cash. For Rosemary Sales this resulted in asylum seekers severely limited to basic welfare provisions such as health or legal services, and since the value of the vouchers was set so low, it was completely inadequate to offer a healthy diet particularly for families with children. Sales, R. 'The Deserving and the Undeserving? Refugees, Asylum Seekers and Welfare in Britain', *Critical Social Policy*, 22(3)(2002):456-478, p.465.

This position was highlighted clearly with the implementation of the Immigration and Asylum Act (IAA) 1999. Jack Straw, as Home Secretary, argued at the time that the new legislation was essential so as to be ‘less of an incentive for the bogus people to come here’.<sup>82</sup> Deterrence was central within the IAA, not the protection of refugees. The central objective was to remove any incentives in order to deter presumed economic migrants.<sup>83</sup> Welfare benefits were perceived by New Labour to be a major pull factor for economic migrants to use the refugee route to enter the country rather than through the traditional channels of entry.<sup>84</sup> Certainly, former Minister for State for Asylum and Immigration, Barbara Roach, reflected that due to poor asylum and immigration processes, the British asylum system was overwhelmed with claims for refuge, but stressed that many were unfounded and people were entering merely for economic rather than Convention reasons.<sup>85</sup> Because of this, the genuine asylum seeker was assumed to be able to tolerate further trauma in the quest for sanctuary, unlike their abusive bogus counterparts. The apparent lure of welfare benefits featuring prominently within parliamentary discourse; a prime example is provided by Humfrey Malins, MP for Woking. He spoke of the genuine asylum seeker in a 2003 debate, asserting that, ‘... the genuine asylum seeker arriving here, fleeing persecution, torture and possible death, would, if offered a choice between going back or spending two years in a British prison, opt for prison every time...’.<sup>86</sup> Various governments have presented the genuine asylum seeker as above welfare benefits - as neither interested nor impacted by them. For the genuine asylum seeker, the lure of benefits would not matter; thus, the state reducing benefits and introducing payment in-kind in order to deter would-be abusive claimants, would be of no interest, and not a barrier, to the genuine asylum seeker. This ties in with the previous discussion regarding the speed in applying for asylum. A delay in applying severely undermines the credibility of the applicant, resulting in the denial of benefits, for it is seen as dishonest behaviour. What we see emerging is a dichotomy between the apparent deserving genuine asylum seeker who is worthy of benefits and the scheming bogus asylum seeker who

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<sup>82</sup> PA News Reporters. ‘Straw Unveils Plans to Stem Refugee Applications’, *The Guardian*, (9<sup>th</sup> February 1999), <http://www.guardian.co.uk/uk/1999/feb/09/1> [accessed 31/10/2010].

<sup>83</sup> Fekete, L. ‘The emergence of Xeno-racism’, *Race and Class*, 42(2)(2001):23-40 and Friedman, E. And Klein, R. *Reluctant Refugee: The Story of Asylum in Britain*, (London: British Library Publications, 2008).

<sup>84</sup> Sales, R. ‘The Deserving and the Undeserving?’, p.457.

<sup>85</sup> Roach, B. Minister for State for Asylum and Immigration (July 1999-June 2001). Telephone Interview conducted on 11<sup>th</sup> May 2012.

<sup>86</sup> Malins, H. Hansard, House of Commons Debate, Asylum and Immigration, (Treatment of Claimants, etc.) Bill 17 December 2003, vol.415 cc1.587-620, [http://hansard.millbanksystems.com/commons/2003/dec/17/asylum-and-immigration-treatment-of/#S6CV0415P1\\_20031217\\_HOC\\_145](http://hansard.millbanksystems.com/commons/2003/dec/17/asylum-and-immigration-treatment-of/#S6CV0415P1_20031217_HOC_145), col.1614, [accessed 14/11/2014].



is focused purely on benefits. In the cruel logic of the rhetoric emerging from government, the more deserving the asylum seeker is, the more then, that they should be willing to endure in order to attain safety. This is a logic that operates in the government's favour, with the status of refugee becoming a highly prized, yet exclusive label.

This construction of the genuine asylum seeker as facing a 'real' threat of persecution and being marginalised by abusive, bogus claims is advanced by parliamentary debates whereby the genuine asylum seeker is presented also as a minority figure in the world of 'migrants'. Despite the fact that the number of asylum seekers that actually make it to the shores of Britain is less than 2 percent of the world's asylum population itself,<sup>87</sup> parliamentary debates have constructed the notion that of those arriving, the genuine asylum seeker only accounts for a sub-fraction of that total. Indeed, Andrew Dismore, MP for Hendon, and chairman for the 2007 House of Lords and House of Commons, Joint Committee on Human Rights report, *The Treatment of Asylum Seekers*, argued that:

In recent years, asylum seekers have been demonised. Failed asylum seekers are regarded as little more than criminals, but the overwhelming majority of them, including those whose applications fail, are seeking to escape from countries affected by conflict, violence and human rights abuses. China, Eritrea, Iraq, Iran, Afghanistan, Zimbabwe and Somalia were the main applicant nationalities in the third quarter of this year.<sup>88</sup>

Despite this point being raised time and time again with members of parliament, some still argue that the vast majority of people to this country do so with unfounded claims. For example, Ian Duncan-Smith, MP for Chingford, asserted in a 1992 debate that Britain had always maintained a tolerant attitude towards individuals seeking asylum, but argued that:

many would-be immigrants have seen asylum as another way around the system. The number of those who have a genuine claim to be here, whether on the grounds of asylum or the other immigration rules, has been distorted by the

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<sup>87</sup> UN High Commissioner for Refugees. The Facts: UK and Asylum, <http://www.unhcr.org.uk/about-us/the-uk-and-asylum.html>, [accessed 5/12/2013].

<sup>88</sup> Dismore, A. Hansard, House of Commons Debates, Asylum Seekers, 13<sup>th</sup> December 2007, ccl. 145WH <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm071213/halltext/71213h0001.htm#07121373000016>, col.145-146, [accessed 16/11/2013].

numbers of bogus asylum seekers. It is they who have put such a strain on our traditional tolerance.<sup>89</sup>

Similarly, Michael Howard, speaking in 1995, argued that ‘there are countries that generate large numbers of asylum claims, but few, if any, genuine cases’.<sup>90</sup> This position was adopted by Charles Wardle, MP for Bexhill and Battle. During a reading of the Asylum and Immigration Bill in 1995, he stressed that the problems of the asylum system were nowhere more apparent than in the:

rapidly growing number of bogus asylum seekers with which the Bill deals. Although the number of genuine Geneva convention cases turns out to be fairly constant, and the number of cases with exceptional leave to remain has been constrained, I am pleased to say, since 1993, the total number of applications has rocketed because more and more bogus claimants join the queue, as a way of staying on, courtesy of the British tax payer.<sup>91</sup>

This same line of argument appears in many Parliamentary debates. Genuine asylum seekers are considered to be a minority category, with the vast majority of applicants being charged with abusing the system. In a 1999 debate, the MP for Eastbourne, Nigel Watson, declared that most asylum claims are bogus. He asserted that:

One thing that we know with certainty is that the great majority of applicants will not turn out to be genuine asylum seekers. Any regime must recognise that the great majority of applicants - who, of course, should be treated courteously and humanely while their applications are being processed, which we hope will be done swiftly - will turn out to be making bogus applications.<sup>92</sup>

The idealised notion of the asylum seeker was constructed through various pieces of legislation and government debates in parliament, and this leads to a self-fulfilling prophecy. If you assume that the vast majority of applicants are bogus, and define them as such, then

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<sup>89</sup> Duncan-Smith, I. Hansard, House of Commons Debates, Asylum and Immigration Bill, 2<sup>nd</sup> November 1992, vol. 213, ccl.21-120, [http://hansard.millbanksystems.com/commons/1992/nov/02/asylum-and-immigration-appeals-bill#S6CV0213P0\\_19921102\\_HOC\\_140](http://hansard.millbanksystems.com/commons/1992/nov/02/asylum-and-immigration-appeals-bill#S6CV0213P0_19921102_HOC_140), col.52 and 53, [accessed 3/11/2013].

<sup>90</sup> Howard, M. Hansard. House of Commons Debate, Asylum and Immigration Bill, 11<sup>th</sup> December 1995, vol. 268, ccl.699-808, [http://hansard.millbanksystems.com/commons/1995/dec/11/asylum-and-immigration-bill#S6CV0268P0\\_19951211\\_HOC\\_389](http://hansard.millbanksystems.com/commons/1995/dec/11/asylum-and-immigration-bill#S6CV0268P0_19951211_HOC_389), col.700, [accessed 1/11/2013].

<sup>91</sup> Wardle, C. Hansard, House of Commons Debate, Asylum and Immigration Bill, 11<sup>th</sup> December 1995, vol 268, ccl.699-808, [http://hansard.millbanksystems.com/commons/1995/dec/11/asylum-and-immigration-bill#S6CV0268P0\\_19951211\\_HOC\\_155](http://hansard.millbanksystems.com/commons/1995/dec/11/asylum-and-immigration-bill#S6CV0268P0_19951211_HOC_155), col.747, [accessed 11/11/2013].

<sup>92</sup> Watson, N. Hansard, House of Commons Debates, Immigration and Asylum Bill, 16<sup>th</sup> February 1999, vol, 326, ccl.37-129, [http://hansard.millbanksystems.com/commons/1999/feb/22/immigration-and-asylum-bill#S6CV0326P0\\_19990222\\_HOC\\_181](http://hansard.millbanksystems.com/commons/1999/feb/22/immigration-and-asylum-bill#S6CV0326P0_19990222_HOC_181), col.87, [accessed 13/11/2013].

they will become bogus through the legislation. The legislation itself perpetuates bogus claimants.

Presented as the pinnacle of refuge, the genuine asylum seeker has continuously been presented as having particular experiences, adhering to certain modes of travel and being knowledgeable regarding the national asylum policies. The genuine asylum seeker will have arrived direct from their country of origin, and will not have arrived via a (safe) third country. They will have a classic definition of persecution and be able to articulate their story in a detailed and constructive manner. Those who are unable to meet this specific criterion are castigated as bogus applicants, intent on abusing the generous welfare entitlements of the asylum system. It is this framing of the genuine asylum seeker that has dominated asylum policies over the last twenty years. Jeremy Corbyn, argued that the language employed by the government is ‘deeply dishonest’ because it always carries the assumption that Britain is a wholesome country of asylum, committed to the 1951 Geneva Convention, but at the same time it is erecting ‘huge hurdles in the way’ of individuals seeking asylum.<sup>93</sup> Through government debates and legislation on the construction of either the idealised asylum seeker, or the bogus asylum seeker, Diane Abbot, MP for Hackney, North and Stoke Newington, eloquently noted that ‘too often in the debate, on both sides, we speak about asylum seekers as though they were some sort of inanimate object – the burden, the problem, the flood or the swamp. However, they are people’.<sup>94</sup>

### **The Construction of Binaries: Genuine Versus Bogus**

As the previous discussion has highlighted, through the various policies of consecutive governments, an idealised notion of a genuine asylum seeker has emerged within the discourse. A genuine asylum seeker, who is seeking sanctuary, has arrived with the necessary documents and through the correct means, has applied in a swift manner for asylum, and is able to speak and articulate their story of persecution within a coherent, detailed and comprehensive narrative. This is the construction of the genuine asylum seeker that has emerged, who is worthy of the status of refugee. However, this has occurred at the expense of

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<sup>93</sup> Corbyn, J. MP for Islington North. Interview conducted on 2<sup>nd</sup> December 2013, London.

<sup>94</sup> Abbott, D. Hansard, House of Commons Debate, Asylum Seekers, 12<sup>th</sup> April 2000, vol.348, ccl.426-73, [http://hansard.millbanksystems.com/commons/2000/apr/12/asylum-seekers#S6CV0348P0\\_20000412\\_HOC\\_302](http://hansard.millbanksystems.com/commons/2000/apr/12/asylum-seekers#S6CV0348P0_20000412_HOC_302), col.459, [accessed 13/11/2013].

an opposite emerging one, who is presumed to be abusive and who is using the British asylum system for their own benefit. It is through this binary construction that governments have been able to pinpoint and identify the genuine asylum seeker as the pinnacle of refuge.

Edward Said shows that Orientalism is ‘a style of thought based upon an ontological and epistemological distinction made between “the Orient” and (most of the time) “the Occident”’.<sup>95</sup> he argues that the construction of the Orient only ever occurred in order to reaffirm the position and power of the West, with a binary logic emerging whereby the ‘orientals were rarely seen or looked at; they were seen through, analyzed not as citizens, or even people, but as problems to be solved or confined or - as the colonial powers openly coveted their territory - taken over’.<sup>96</sup> In this instance, the Orient was a ‘thing’ to be studied, examined and ruled over. Orientalism highlights the position and centrality of the West, with the binary of West/East, or Occident/Orient ‘producing the East discursively as the West’s inferior ‘other’, a manoeuvre which strengthens – indeed, even partially constructs - the West’s self-image as a superior civilization’.<sup>97</sup> Said refers to Orientalism as a ‘body of ideas, beliefs and clichés about the Orient’, as well as unchallenged knowledge, regarding the Orient other’s apparent ‘sensuality, its tendency to despotism, its aberrant mentality, its habits of inaccuracy, its backwardness’.<sup>98</sup> The point is that Orientalism is based upon a fixed binary logic that does not provide room for a subtle relationship between the two poles. Nor does it engage with the various ways in which power can operate between the two - it is a fixed hierarchical binary that fails to allow for movement and ambiguities. Said’s Orientalism speaks to Homi Bhabha’s notion of the stereotype, ‘a primary point of subjectification in colonial discourse... a fixated form of representation that, in denying the play of difference... constitutes a problem for the representation of the subject in significations of psychic and social relations’.<sup>99</sup> Through the stereotype which is based upon the notion of the ‘other’, the same fixed representations are churned out, repeating a ‘masking’ of what constitutes the other. As Bhabha writes of the stereotype, ‘the same old stories of the Negro’s animality, the Coolie’s inscrutability or the stupidity of the Irish *must* be told (compulsively) again and

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<sup>95</sup> Said, E. *Orientalism*, (London: Penguin Books, 2003), p.207.

<sup>96</sup> Said, E. *Orientalism*, p.207.

<sup>97</sup> Moore-Gilber, B. *Postcolonial Theory: Contexts, Practice, Politics*, (London: Verso, 1997), p.39.

<sup>98</sup> Said, E. *Orientalism*, p.205.

<sup>99</sup> Bhabha, H. K. *The Location of Culture*, (London: Routledge, 2003), p.75.

afresh, and are differently gratifying and terrifying each time'.<sup>100</sup> It is at this point that the binary logic, of its fixity and repeatability, is akin to the construction of the genuine/bogus discourse that is being perpetuated within the British asylum system. Tracing the establishment of the binary of genuine versus bogus allows us to identify how the asylum seeker has been positioned and utilised in specific ways by consecutive governments, as well as to understand how the government has been able to perpetuate a fixed understanding of refuge. The binary of Said's Orientalism speaks to the fixed categorical understanding of a deserving and undeserving asylum figure that has been perpetuated by consecutive governments. The notion of the genuine asylum seeker speaks to the myths and ideals surrounding the creation of the idealised other, who is positioned in opposition to the bogus asylum seeker who is intent on abusing the hospitality of the British state. The categories are rigid and fixed, and are utilised to account for a whole range of asylum experiences. In this regard, the system has evolved in a binary fashion of elevating one over the other in order to maintain state control. The binary operates as a means of controlling access, and allows the government to pinpoint through legislation those who are eligible for refugee status.

Through the employment of labels and categorisations, the government has been able to create binaries that establish a hierarchical structure of the minority genuine asylum seeker versus the (again assumed) majority bogus asylum seeker. The classifications are rigid and inflexible, and fail to account for the overlapping nature of binaries, failing to recognise that asylum identities can be more than just genuine or bogus, and can straddle the divide between the two. The fixed binary logic that has emerged from the government discourse has, I argue, silenced the plethora of experiences that constitute the asylum process, forcing asylum seekers to adopt one identity or the other, all the while preserving state control and the illusion of hospitality. Bhabha, highlights how when regarding the question of the 'other', 'so much is not in question'. He stresses that what does need to be addressed is the 'mode of representation of otherness'.<sup>101</sup> By examining the government's propensity for labelling, as well as its preference for binaries, it is possible to see how the asylum system operates at the

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<sup>100</sup> Bhabha, H. K. *The Location of Culture*, p.77. Bhabha does provide a critic of Said's Orientalism through his construction of hybridity, as he seeks to deconstruct the binary logic by negotiating a third space that operates between the binary that is 'neither the one thing or the other'. Bhabha through his Third Space stresses that it is this inbetween state of being that 'carries the burden of meaning'- and in a sense, is where the true asylum seeker resides, caught between the binaries of the genuine and the bogus constructs. However, Bhabha in seeking to create the Third Space of hybridity, is still caught between the binary logic, failing himself to transcend beyond its logic.

<sup>101</sup> Bhabha, H. K. *The Location of Culture*, p.68.

expense of the asylum seeker, creating a narrow field of refuge under specific criteria.

### **Hospitality and the Other**

For the final section of this chapter on British asylum policies and the language of labelling, I want to turn the analysis towards the notion of hospitality, and how this notion can be employed to understand the positioning of the asylum seeker. Through engaging with hospitality, particularly through the work of Jacques Derrida, I want to examine the notion of hospitality, and argue how hospitality is not only (and can only be) conditional, but has been marginalised, with hostility towards the asylum seeker becoming the main driving force of government policies and debates. Through conditional hospitality, British policies of asylum I argue, have been able to continuously curtail and bear down upon the policy of asylum, reducing the right to asylum to a select few who are able to meet the government's rigid criteria of refuge.

Through his work *Of Hospitality* and *On Cosmopolitanism and Forgiveness*, Derrida provides the notion of unconditional hospitality. That is, that hospitality should be open to all who seek it, yet at the same time, the notion of unconditional hospitality needs, and can only be, conditional. It is the negotiation and balance between unconditional and conditional hospitality that makes the concept of hospitality political.<sup>102</sup> The concept of unconditional hospitality, which Derrida argues requires us to open our "house" to the stranger, to the 'absolute, unknown anonymous other' and provide them with shelter and sanctuary without asking for anything in return,<sup>103</sup> that at the same time introduces us to the notion of threats, limitations and fear of the stranger. As Christine Goodhall notes, the concept of hospitality requires a recognition and respect for the stranger seeking sanctuary. The notion of hospitality 'implies an understanding that we are not all the same, but that we respect the differences of others, and enables us to retain our own unique differences whilst opening up a space for the 'stranger''.<sup>104</sup> However, as Erik Wilson argues, 'hospitality invites us to

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<sup>102</sup> Critchely, S. and Kearney, R. cited in Derrida, J. *On Cosmopolitanism and Forgiveness*, (London: Routledge, 2001), p.x.

<sup>103</sup> Derrida, J. *Of Hospitality. Anne Dufourmantelle invites Jacques Derrida to respond*, (California: Stanford Press, 2000), p.25.

<sup>104</sup> Goodhall, C. 'The Coming of the Stranger: asylum seekers, trust and hospitality in a British city', UN High Commissioner for Refugees, Research Paper No. 195, (November 2010), <http://www.refworld.org/pdfid/4d0210a92.pdf>, [accessed 22/04/2014], p.6.

consider both those unprotected persons who arrive on our doors seeking assistance', whilst at the same time offering a welcome to 'those far off who have not yet asked for our help... hospitality implies that protection must be offered in the first place unconditionally and to the unnamed, unknown other'.<sup>105</sup> Indeed, hospitality can become international as George Cavallar reminds us, when it is applied to 'members of 'out groups' of different cultures and communities'.<sup>106</sup>

By employing unconditional hospitality, a state must be willing to open its borders to all those who seek sanctuary. Yet, this is where the paradox of hospitality emerges, with conditional hospitality taking place and a limitation of the notion of hospitality taking precedence. For how is a state able to cope with the possibility of accepting all who approach its borders for sanctuary? Crucially though and more important is that in establishing a home for example, one is automatically erecting a border, demarcating what is inside and outside. In creating a home, you create a space with a border that is yours through a process of inclusion and exclusion. Derrida refers to this as the 'gap' between the hospitality of invitations and the hospitality of visitation. He writes:

for there to be hospitality, there must be a door. But if there is a door, there is no longer hospitality. There is no hospitable house. There is no house without doors and windows. But as soon as there are a door and windows, it means that someone has the key to them and consequently controls the conditions of hospitality. There must be a threshold. But if there is a threshold, there is no longer hospitality.<sup>107</sup>

In this regard, Derrida asserts that 'pure unconditional hospitality appears inaccessible' for a border always needs to be crossed in entering into a host's house.<sup>108</sup> As Catherine Brun notes, in order to provide hospitality, '... one has to have control and ownership of a place. It requires the rights to a particular place and it involves power and inequality in the relation between the host and the guest'.<sup>109</sup> Accordingly, conditional hospitality is the inevitable compromise in the claim for unconditional hospitality, and actually as Wilson argues, allows

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<sup>105</sup> Wilson, E. 'Protecting the Unprotected: reconceptualising refugee protection through the notion of hospitality', *Local- Global Journal*, 8(2010):100-122, p-111-116.

<sup>106</sup> Cavallar, G. *The Rights of Strangers: theories of international hospitality, the global community, and political justice since Vitoria*, (Aldershot: Ashgate, 2002), p.71.

<sup>107</sup> Derrida, J. 'Hostipitality', *Angelaki: Journal of Theoretical Humanities*, 5(3)(2000):3-18, p.14.

<sup>108</sup> Derrida, J. *Of Hospitality*, p.149.

<sup>109</sup> Brun, C. 'Hospitality: Becoming 'IDPs' and 'Host' in Protracted Displacements', *Journal of Refugee Studies*, 23(3)(2010):337-355, p.371.

the host to wield a significant amount of power by placing restrictions on the greeting extended to the guest.<sup>110</sup> More pertinently, Derrida raises the question of the abuse of hospitality. How is one to know that the hospitality that is being provided is not being abused by what he terms ‘parasites’. As Derrida notes of the problem between the genuine and parasitical guest:

How can we distinguish between a guest and a parasite? In principle, the difference is straightforward, but for that you need a law, hospitality, reception, the welcome offered has to be submitted to a basic and limiting jurisdiction. Not all new arrivals are received as guests if they don’t have the benefit of the right to hospitality or the right of asylum etc. Without this right, a new arrival can only be introduced “in my home”, in the hosts “at home”, as a parasite, a guest who is wrong, illegitimate, clandestine, liable to expulsion or arrest.<sup>111</sup>

Indeed, the quest to ascertain if one’s guest is genuine or not can place the position of the host on the defensive. Through conditional hospitality, Derrida notes that the act of seeking hospitality begins with the speaking of the stranger, and the utilisation and employment of the host’s language in order to ask for and attain sanctuary.<sup>112</sup> However, in the hunt to detect the genuine guest, hosts can go so far as to become ‘virtually xenophobic’ in the aim to provide sanctuary only to the genuine guest. Thus, hospitality is firmly rooted in conditions, with the host going as far as to protect their right to offer hospitality to only the genuine, by ceasing to partake in the act of hospitality altogether. In order to protect their ‘traditional’ heritage of providing hospitality from abuse, the logical approach is to stop providing hospitality itself. As Derrida explains:

One can become virtually xenophobic in order to protect or claim to protect one’s own hospitality... I want to be master at home... to be able to receive whomever I like there. Anyone who encroaches on my “at home”, on my ipseity, on my power of hospitality, on my sovereignty as host, I start to regard as an undesirable foreigner, and virtually as an enemy. This other becomes a hostile subject, and I risk becoming their hostage.<sup>113</sup>

It is at this stage, as Catherine Brun notes, that conditional hospitality can be identified as the ‘political dimension’.<sup>114</sup> Conditional hospitality places restriction and rules on those who can

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<sup>110</sup> Wilson, E. ‘Protecting the Unprotected’, p.113.

<sup>111</sup> Derrida, J. *Of Hospitality*, p.59.

<sup>112</sup> Derrida, J. *Of Hospitality*, p. 15.

<sup>113</sup> Derrida, J. *Of Hospitality*, p.54-55.

<sup>114</sup> Brun, C. ‘Hospitality: Becoming ‘IDPs’ and ‘Host’ in Protracted Displacements’, p.371.



and cannot attain hospitality, introducing a level of hostility to the process, and as Wilson asserted previously, it creates a level of power for the host, creating an unequal relationship between the host and the guest. As Derrida explains, hospitality, is ‘parasitized by its opposite, “hostility,” the undesirable guest [hôte] which it harbors as the self-contradiction in its own body’.<sup>115</sup>

It is for these reasons that conditional hospitality is so interesting and pertinent for a discussion of British asylum policies and the positioning of the asylum figure. The framework of conditional hospitality allows us to understand the positioning of the asylum seeker and examine the relationships at play between the government (the host) and the asylum seeker (the guest/stranger). The current approach, such as the British position with regard to asylum, operates on the conditional approach to hospitality. Conditional hospitality provides the host with a level of power to wield against the guest, by dictating the terms of hospitality and in extreme cases, due to fear of abuse or the ‘parasite’, by preventing the stranger from accessing hospitality in order to preserve the dignity of the institution. Although Wilson reminds us that hospitality ‘is not simply a legal, technical, dispassionate undertaking but a relationship that requires compassion, understanding and generosity’,<sup>116</sup> Derrida’s discussion on the xenophobia of hospitality and the limitations of conditional hospitality provides a sharp reference to the darker side of what hospitality can provide. Conditional hospitality then as Dan Bulley notes ‘is hostile towards the other who is absolutely excluded, and hostile to the otherness that must become the same to be included’.<sup>117</sup> And it is this understanding of hospitality that I want to draw upon for our understanding of British asylum policies. As the previous analysis has highlighted, I have tried to argue that through British asylum policies, the government has created an idealised notion of what constitutes a genuine asylum seeker. In doing so, it has set limitations and restrictions upon the notion of asylum that is already fairly constrained by the silences within the 1951 Convention nexus reasons for persecution. By adding additional restrictions to asylum, such as travel restrictions for example, British governments have managed to control the field of asylum and narrow the target audience with these extra demands. In doing so, hospitality is positioned firmly within the realm of conditional hospitality, with the

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<sup>115</sup> Derrida, J. ‘Hostipitality’, p.3.

<sup>116</sup> Wilson, E. ‘Protecting the Unprotected’, p.111-116.

<sup>117</sup> Bulley, D. *Ethics as Foreign Policy: Britain, the EU and the Other*, (London: Routledge, 2009), p.72.

government sitting precariously close to the notion of Derrida's xenophobia. The construction of the abusive, bogus, illegal asylum seeker is testament to the fear of the abusive stranger who is intent in exploiting the hospitality of the host state. Portrayed as merely economic migrants, asylum seekers are seen to have abused the hospitality of the asylum system for their own needs, and subsequently they are blamed for creating backlogs and queues, and wasting resources of the state needlessly. As Niklaus Steiner notes, 'no one in Europe is arguing to have asylum abolished';<sup>118</sup> however, asylum policies such as that in Britain reveal the restrictions occurring with regard to the asylum figure and highlight the narrowing of the parameters of asylum seeking within Britain, with the end result being that hospitality has developed certain hostile undertones.

## **Conclusion**

Chapter Three, *British Asylum Policies and the Language of Labelling*, has sought to examine the positioning, and framing of the asylum seeker in British asylum policies since the 1990s. Although Philip Marfleet raised the question as to why yesterday's 'deserving refugee' has become the 'menacing and unwelcome alien' of today,<sup>119</sup> I have tried to argue that actually, today's asylum seeker is the same as yesterday's asylum seeker: unwelcome and viewed with suspicion. Concentrating on the period since 1990, the chapter highlights that although Britain is a signatory to the 1951 Convention, it has at the same time always maintained a precarious relationship with the refugee. Through the discussion of labelling, the genuine asylum seeker, binaries and hospitality, I have analysed how consecutive governments have been open to providing hospitality for the asylum seeker, but under specific terms and conditions, all the while concerned that the asylum seeker is in fact abusing their position. The chapter shows the discrepancy between the 1951 Convention and the protection offered, highlighting how the silence of the convention has allowed states a high degree of flexibility when engaging and upholding their international responsibility towards refugees.

The analysis exploring the labelling theory of Zetter, Hall, Becker and Foucault allows us

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<sup>118</sup> Steiner, N. cited in Bohmer, C. and Shuman, A. *Rejecting Refugees. Political Asylum in the 21<sup>st</sup> Century*, (London: Routledge, 2008), p.266.

<sup>119</sup> Marfleet, P. *Refugees in a Global Era*, (Palgrave: Basingstoke, 2006), p.xii.

to examine the various ways in which the asylum seeker has been framed and understood. The notion of labelling highlights the ways in which the debate has been directed, always to the detriment of the asylum seeker. Labelling becomes a political tool that is able to castigate the other who enters into our society, portraying them as a threat. As Michael Barnett and Martha Finnesmore, as well as Sherene Razack herself, remind us, to label or to classify, is to 'engage in an act of power'.<sup>120</sup> Through the construction of the idealised genuine asylum seeker, we can see how consecutive governments have sought to reposition (and narrow) the parameters of seeking asylum, placing the status of refugee upon a pedestal that many are unlikely to attain due to asylum policy measures that focus more upon border control and deterrence than hospitality. By examining the logic of binaries, the chapter shows how the creation of rigid, hierarchical binaries results in the emergence of an inflexible and constrained understanding of relations, between either the state and the genuine asylum seeker, or the genuine and the bogus asylum seeker; the overlapping and ambiguous nature of these relations is silenced in favour of a structured binary that is repeated and perpetuated by consecutive governments, at the expense of the refugee. The chapter's final discussion on hospitality and the imbalance between conditional and unconditional, frames the chapter's argument. Britain has not sought to remove itself from the 1951 Convention, but it has sought to restrict the access of those apparently seeking sanctuary in Britain. Derrida's work on conditional hospitality and xenophobia towards the 'parasite', provides us with an excellent framework in which to understand the behaviour of the British asylum system - one where hospitality is still occurring but with hostile (and ever increasing) hurdles directed towards the guest. Indeed, as Andrew Dismore, MP for Hendon argued:

The Government seem to start from the assumption that most asylum seekers who arrive here are economic migrants, and not genuinely fleeing persecution. Policies have been designed to deter would-be asylum seekers from coming to the UK, and to make life as tough as possible for those who do get here. The tabloid press add lurid colour by using individual examples to brand all asylum seekers as freeloaders who demand council houses and welfare benefits, to the detriment of the indigenous population. They paint the UK as a soft touch.<sup>121</sup>

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<sup>120</sup> Barnett, M. N. and Finnesmore, M. 'The Politics, Power and Pathologies', p.711 and Razack, S. *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (London: University of Toronto, 2008).

<sup>121</sup> Dismore, A. Hansard, House of Commons Debates, Asylum Seekers, 13 December 2007, ccl. 145WH, col 145-146, [accessed 16/11/2013].

Chapter Three has aimed to highlight how through the construction of the asylum seeker, British governments, since the 1990s, have been able to silence the figure of the asylum seeker, not merely through their policies, but by the positioning of the asylum seeker through these policies. The policies have been able to effectively marginalise the asylum seeker, allowing for silence to consume the figure, with the asylum seeker being forced to adopt a binary position of either genuine or bogus. The asylum system and binary logic provides little room for the voice of the asylum seeker, thus allowing the government to assert and maintain power, whilst upholding their duties of hospitality.

Having presented the British asylum system and the processes of labelling and hospitality, the following chapter continues with a focused discussion on Britain. The chapter *Speaking, Memory and Trauma: Female Asylum Seekers and Barriers to Refuge*, will examine the significance of language, speech and silence within the process of becoming a refugee within Britain. It will also examine what impact enforcing speech has on becoming a refugee.

## Chapter Four

### *Speaking, Memory and Trauma: Seeking Asylum and the Barriers to Refuge*

#### **Introduction**

The Refugee Convention stipulates that, in order to be granted refugee status, the burden of proof resides solely with the asylum seeker. It is the asylum seeker who needs to prove that she has a ‘well-founded fear’ of persecution and that she is unable to seek protection from the necessary authorities within her country of origin. With the burden of proof residing with the asylum seeker, it is essential that she speaks of her personal experience of persecution and provides the necessary details and evidence in order to have her claim verified and granted. Gaining refuge rests upon the telling of a story and having that story believed. In this sense then, language is central to the process of asylum. But it also becomes one of the central barriers to attaining refugee status. An asylum seeker needs to navigate around the language of persecution and trauma, whilst not speaking in her native tongue and, at the same time, she must also engage with cultural and gender barriers.

The previous three chapters have engaged with the significance of language with regard to the 1951 Convention and regional conventions, and then the implementation of language and labelling at the national level using Britain as an example. Through the previous three chapters, the thesis has analysed the gap between the 1951 Convention and the protection actually offered to refugees, focusing on how the language that defines the refugee is understood in the 1951 Convention and pragmatically applied. It has discussed the silences, as well as the silencing, that occur through the utilisation of the narrow and ambiguous refugee definition. The constricted language, I argue, has allowed for a disparity to emerge, or even for disparity to be maintained, in favour of the state rather than the refugee. Indeed, by examining the language employed through regional conventions such as the African Convention, Cartagena and the Bangkok Principles, Chapter Two highlighted the silences as well as the gaps in language present in the 1951 Convention, and illuminated how these other

Conventions have sought to build on and develop the original understanding of refugee through their broader language. Importantly, the silences of the 1951 Convention have allowed states such as Britain to implement and fracture the label of refugee to suit their own needs, whilst at the same time maintaining their responsibility under international refugee law. Indeed, what the previous three chapters have highlighted is an apparent discrepancy between the perceived intentions of the international refugee system and its actual implementation, with elements of protection being lost in the process of state implementation.

This chapter develops further on the discrepancy between the 1951 Convention and state implementation, by again using Britain as an example. Through the notion of language and speech, Chapter Four continues using the lens of postcolonial politics to examine the role of speech and silence in the asylum system. The chapter aims to highlight the overall impact of language within the frontline processes of the asylum system, whereby an asylum seeker must speak of the most personal experiences in order to attain refuge. In undertaking this analysis, I focus in particular on female asylum seekers with rape narratives, for these individuals tend to have less evidential material with regard to their claims and rely mainly upon the telling of their own personal story of persecution. Speech, language and silence are integral to their asylum claims; thus I find that female asylum rape narratives provide an insight into how the asylum seeker is positioned in regards to the state, as well as heard and believed within the asylum system. For how does a female asylum seeker articulate coherently and concisely her personal experiences of persecution in such a manner that she will be granted asylum? The chapter engages with the power relations at play within the asylum system between the host state and the asylum seeker.

To begin with, the chapter provides an overview of the British asylum seeker, and discusses asylum numbers and their countries of origin. It then moves on to examine the position of the female asylum seeker, allowing the discussion to centre upon the statistics of female asylum seekers within Britain, as well as the gendered nature of persecution experienced by female asylum seekers and how this differs from the traditional, classical male understanding of persecution enshrined within the 1951 Convention. The chapter will then centre upon the prevalence of rape narratives within the asylum system before engaging with the various barriers that may arise when an asylum seeker attempts to articulate her personal experience of rape. The first barriers to be examined are trauma and memory, followed by shame, language and silence, with the section finishing with an analysis of disclosure, trust and the

culture of disbelief.

Gaining refuge rests upon the telling of a story and having that story believed. In this sense, language is central to the process of asylum. But it is also becomes one of the central barriers to attaining refugee status. Thus, Chapter Four highlights the significance of language, speech and silence within the process of refuge in Britain, and examines how, if speech is enforced, the impact that then has on becoming a refugee.

### **The British Asylum Seeker**

Before commencing the analysis, I would like to offer a brief note regarding the border agency within Britain. As Franck Düvell rightly puts forth, the British border agency is ‘difficult to follow’.<sup>1</sup> It has evolved, been rebranded and restructured on numerous occasions in a bid to create a centralised and cohesive asylum system that is more streamlined, accountable and transparent. Since 1997, when New Labour inherited the Immigration and Nationality Directorate (IND), we have seen the British Immigration Agency (BIA) established in 2007 and the United Kingdom Border Agency (UKBA) emerge in 2008. Since 2013 though, the UKBA was viewed as having a ‘secretive culture’ by Home Secretary Teresa May, and was split and brought back under the direct remit of the Home Office.<sup>2</sup> This is the fourth restructuring that the border agency has been through in the space of thirteen years. Thus, for the purposes of this chapter (and the thesis at large), I am using the term border agency to refer to any one of these agencies, in order to reduce complication. However, it is interesting to keep in mind the rebranding and structuring occurring within the border agency when engaging with the rest of the chapter.

Over the past twenty years, the number of asylum seekers arriving in Britain first increased and then decreased significantly. In 1994, asylum applications sat at approximately 32,830 per annum. There was a significant rise to 71,160 in 1999, and the number peaked at an all-time high of 84,120 in 2002.<sup>3</sup> Subsequently, asylum applications dwindled to a low of

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<sup>1</sup> Düvell, F. ‘Report from the UK’ in Dommernick, J. and Jandl, M. *Modes of Migration Regulation and Control in Europe*, (Amsterdam: Amsterdam University Press, 2008), pp.187-202, p.187.

<sup>2</sup> May, T. cited in BBC News, ‘UK Border ‘not good enough’ and being scrapped’, (26<sup>th</sup> March 2013), <http://www.bbc.co.uk/news/uk-politics-21941395>, [accessed 6/06/2014].

<sup>3</sup> Hawkins, O. *Parliamentary Briefing: Asylum Statistics*, SN/SG/1403, (22 June 2011), [www.parliament.uk/briefing-papers/SN01403.pdf](http://www.parliament.uk/briefing-papers/SN01403.pdf), [accessed 12/11/2012], p.5.

17,790 in 2010, the lowest since 1989, and are sitting now, as of 2013, at 29,200.<sup>4</sup> The most recent (complete) Government figures show that as of May 2013, 63% had had their application refused, and only 37% had been granted refugee status, temporary protection, or another form of protection at the initial stage.<sup>5</sup> Within that same year, of the 63% who were refused initially and appealed, the Government statistics show that only 26% of these appeals were upheld and a massive 67% were dismissed, with the final 4% being either withdrawn or discarded.<sup>6</sup> The figures for 2013 construct a picture of an asylum system where refusal is the experience for the majority and those attaining refuge are in the minority. It presents a picture where refusal leads to an elongated time spent within the asylum system, seeking an appeal. Even at the appeal stage, refusals and dismissals are still preponderant with roughly 50% of all applications, either at the initial or appeal stage, being denied.

Of those applying for refuge in Britain, UNHCR figures show that the top ten countries of origin are Pakistan, Iran, Sri Lanka, Syria, Albania, Afghanistan, Eritrea, Nigeria, Bangladesh and India.<sup>7</sup> These countries collectively represent states where conflict, violence and abuse of human rights have been well documented, and they are all on the countries of concern list of the Foreign and Commonwealth Offices.<sup>8</sup> However, research by Still Human Still Here, a coalition of British refugee organisations, has revealed that despite the proportion of asylum seekers originating from countries of mass violence and human rights abuse, 55% of refused asylum applicants in 2008 alone originated from countries such as Zimbabwe, Iran, Iraq, Sudan, Afghanistan, Somalia, Eritrea and the Democratic Republic of Congo.<sup>9</sup>

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<sup>4</sup> UN High Commissioner for Refugees. 'Asylum Trends 2013: levels and trends in industrialised countries', (March 2013), <http://www.unhcr.org/5329b15a9.html>, [accessed 23/04/2014], p.12.

<sup>5</sup> Home Office. National Statistics, *Immigration Statistics*, January to March 2013, <https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2013/immigration-statistics-january-to-march-2013#asylum-1>, [accessed 23/04/2014], Section 8. Asylum.

<sup>6</sup> Home Office. National Statistics, *Immigration Statistics*, Section 8.3. Asylum. Appeals. These figures are similar to those presented by Oliver Hawkins in his 2011 report showing a continuation of the appeal trend for dismissal: Hawkins, O. *Parliamentary Briefing: Asylum Statistics*, p.5.

<sup>7</sup> UN High Commissioner for Refugees. *The Facts: Asylum in the UK*, <http://www.unhcr.org/about-us/the-uk-and-asylum.html> (23/04/2014) and UN High Commissioner for Refugees, *Asylum Trends 2013*.

<sup>8</sup> Foreign and Commonwealth Office, 'Human Rights and Democracy Report: the 2011 Foreign and Commonwealth Office Report', <http://fcohrdreport.readandcomment.com/wp-content/uploads/2011/02/Cm-8339.pdf> [accessed 7/1/2013].

Interestingly, of the top 10 countries of origin to Britain, six are ex-colonies (Pakistan, Sri Lanka, Eritrea, Nigeria, Bangladesh and India) and of the other 4, Britain had influence over 2 (Iran and Afghanistan). The other two are Syria (which is an ex-French mandate territory) and Albania, who bucks the colonial trend.

<sup>9</sup> Still Human Still Here, *At the End of the Line. Restoring the Integrity of the UK's Asylum System*, (No date) <http://stillhumanstillhere.files.wordpress.com/2009/01/at-the-end-of-the-line-2010.pdf> [accessed 11/12/2012], p.8.



## The Female Asylum Seekers in Britain

Female asylum seekers in Britain in their own right make up approximately 30% of all claimants.<sup>10</sup> The British Refugee Council's figures reveal that 6,071 women applied for asylum on their own in 2012, compared to 15,772 men; these figures have remained steady since 2003.<sup>11</sup> Accordingly, the number of female asylum seekers applying in Britain is low. It is acknowledged, at least within the realm of refugee organisations such as the Information Centre about Asylum and Refugees (ICAR), Asylum Aid, and Women for Refugee Women, that the experiences of women regarding persecution do differ from those of male asylum seekers and they argue that systems such as the British one discriminate against female asylum seekers.<sup>12</sup> However, it should be noted that from the most recent complete asylum statistics of 2012, women were more likely than men to be granted refugee status, both at the initial and the appeal stage, with 35% being granted refugee status at the initial stage, and 30% being granted asylum at the appeal stage. This is compared to 29% and 25% respectively for men. This still leaves a massive 65% of women being rejected at the initial stage, and a further 70% being rejected at the appeal stage. With the total number of women applying for asylum being only 6,071, then the number of women actually attaining refuge within Britain is very low indeed.<sup>13</sup>

Female asylum seekers do not always fit into the traditional understanding of someone seeking refuge. To reiterate E. Odhiambo-Abuya and B. S. Chimni and the argument made in Chapter Two, the classical understanding of a refugee was tailored to a white politically active male fleeing from persecution in the public sphere from a state actor.<sup>14</sup> However, female asylum seekers (although obviously not all) tend to face (physical and sexual)

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<sup>10</sup> Refugee Council. 'Briefing Report: The Experience of Refugee Women in the UK', (March 2012).

[http://www.refugeecouncil.org.uk/assets/0001/5837/Briefing\\_-\\_experiences\\_of\\_refugee\\_women\\_in\\_the\\_UK.pdf](http://www.refugeecouncil.org.uk/assets/0001/5837/Briefing_-_experiences_of_refugee_women_in_the_UK.pdf), [accessed 23/04/2014], p.1.

<sup>11</sup> Refugee Council, 'Asylum Statistics', (February 2014),

[http://www.refugeecouncil.org.uk/assets/0003/1357/Asylum\\_Statistics\\_Feb\\_2014\\_2\\_.pdf](http://www.refugeecouncil.org.uk/assets/0003/1357/Asylum_Statistics_Feb_2014_2_.pdf),

[accessed 23/04/2014], p.10. The figures for 2013 will not be fully available until late 2014. At the time of writing only full figures for either 2012 and partially for 2013 were available for use and were drawn from Refugee Council. 'Briefing Report: The Experience of Refugee Women in the UK', p.1; and AsylumAid, 'Unsustainable the quality of initial decision-making in women's asylum claims', (January 2011), <http://www.asylumaid.org.uk/data/files/unsustainableweb.pdf>, [accessed 12/11/2012]. p.12.

<sup>12</sup> See: Information Centre about Asylum and Refugees, 'Navigation Guide: Women refugees and asylum seekers in the UK', (November 2004), <http://www.icar.org.uk/navgdwomen.pdf>; Women for Refugee Women. 'Refused: The Experience of Women Denied Asylum in the UK', (May 2012), <http://www.refugeewomen.com/images/refused.pdf> [accessed 10/11/2012]; Asylum Aid, 'Unsustainable: the quality of initial decision-making in women's asylum claims'; and Webber, F. *Borderline Justice: The Fight for Refugee and Migrant Rights*, (London: Pluto Press, 2012).

<sup>13</sup> Refugee Council, 'Asylum Statistics', p.12.

<sup>14</sup> See Chapter Two and the section *Beyond Geneva* for an Eurocentric construction of the refugee figure.

persecution from non-state actors within the private sphere. Women seeking asylum under the Refugee Convention have to be vetted to determine whether, as women, they fall under the 'particular social group' nexus of the 1951 Convention to qualify for gendered persecution. However, due to the persecution generally experienced, the burden of proof for women is problematic. As such, Natasha Walters, the founder of Women for Refugee Women, argues that the exclusion of sex or gender from the Refugee Convention is 'a glaring one'.<sup>15</sup>

In 2012, Women for Refugee Women published *Refused: The Experience of Women Denied Asylum in the UK*, a report that highlighted the extent to which women have experienced some form of sexual violence. Of the 65 participants in the study who disclosed information, 21% revealed that they had been raped by their husband, a family member or someone else, with 32% stating that they had been raped by soldiers, police or prison guards. That is an overall figure of 53% of the participants with a direct experience of rape.<sup>16</sup> The report also revealed that of the participants, a staggering 66% had experienced some form of gender-related persecution in the form of rape, sexual violence, forced prostitution, forced marriage or female genital mutilation.<sup>17</sup> Indeed, joint research published by the Scottish Refugee Council and the London School of Medicine and Hygiene in 2009 revealed a similar finding with regard to the extent of sexual violence experienced (although this was focused solely upon female asylum seekers residing in Scotland). The report, *Asylum-Seeking Women, Violence and Health* found that of their participants, 70% had had direct experience of physical and/or sexual violence within their life-time.<sup>18</sup> Research from other refugee organisations presents similar statistics for female asylum seekers' experiences of rape. The Refugee Council, in a 2012 briefing paper, asserts that, from their work and direct experience, 44% of female asylum seekers have experience of rape.<sup>19</sup> In contrast, the Refugee Council's Vulnerable Women's Project found that out of their pool of 153 participants from 2006-2008, 76% had either experienced rape in their country of origin, or

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<sup>15</sup> Walter, N. cited in Women for Refugee Women. 'Refused: The Experience of Women Denied Asylum in the UK', p.4.

<sup>16</sup> Women for Refugee Women. 'Refused: The Experience of Women Denied Asylum in the UK', p.5.

<sup>17</sup> Women for Refugee Women. 'Refused: The Experience of Women Denied Asylum in the UK', p.5.

<sup>18</sup> London School of Hygiene and Tropical Medicine and Scottish Refugee Council, 'Asylum-Seeking Women, Violence & Health: Results from a Pilot Study in Scotland and Belgium', (2009), <http://genderviolence.lshtm.ac.uk/files/2009/10/Asylum-seeking-Women-Violence-and-Health.pdf>, [accessed 28/04/2014], p.13.

<sup>19</sup> Refugee Council. 'Briefing Report: The Experience of Refugee Women in the UK', p.2.

within the UK.<sup>20</sup> Finally, the 2005 report by Legal Action for Women report, *A Bleak House for our Times: An Investigation into Yarl's Wood Removal Centre*, found that of the women detained within Yarl's Wood detention centre, 70% had fled due to rape.<sup>21</sup>

When the 1951 Convention was established, gender was not built into the traditional understanding of a refugee. It is, as Nancy Kelly asserts, 'gender neutral'<sup>22</sup> with the masculine pronoun 'He' being used throughout the convention text. As discussed in Chapter One, the refugee definition of a well-founded fear of persecution referred to race, religion, nationality, membership of a particular social group or political opinion, and was applicable to both males and females. That is not to say though that sexual violence could not be part of the five aforementioned reasons for persecution; indeed, sexual violence is sometimes referred to merely as a by-product, or 'part and parcel' of the traditional persecution.<sup>23</sup> But, in the 1951 Convention, gendered elements such as rape, trafficking, domestic servitude, honour crimes, female genital mutilation and transgression of social morals were not viewed as persecution in their own right.

As Heaven Crawley, researcher on gender and refugees, notes, there are various forms of harm that are commonly used against women, such as 'marriage-related harm; violence within the family or community; domestic slavery; forced abortion; forced sterilisation; trafficking; female genital mutilation; sexual violence and abuse and rape'.<sup>24</sup> However, it is only in recent years that many forms of gendered violence occurring within the private sphere have been accorded recognition as persecution. For example, forced marriage, honour crimes and female genital mutilation, as well as forced prostitution, trafficking and discrimination on the grounds of sexual orientation, are all now recognised at the international level as

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<sup>20</sup> Refugee Council, 'Vulnerable Women's Project, Refugee and Asylum Seeking Women Affected by Rape or Sexual Violence, Literature Review', (February 2009), [http://www.refugeecouncil.org.uk/assets/0001/7039/RC\\_VWP-report-web.pdf](http://www.refugeecouncil.org.uk/assets/0001/7039/RC_VWP-report-web.pdf), [accessed 2/7/2013], p.9.

<sup>21</sup> Legal Action for Women, 'A Bleak House for our Times', cited in Cleary, T. 'A Dickensian classic set in Bedfordshire', (21 December 2005), Institute of Race Relations, <http://www.irr.org.uk/news/a-dickensian-classic-set-in-bedfordshire/> [accessed 3/7/2013].

<sup>22</sup> Kelly, N. 'Gender-Related Persecution: Assessing the Asylum Claims of Women', *Cornell International Law Journal*, 26(3)(1993):625-674, p.627.

<sup>23</sup> See: Women for Refugee Women. 'Refused: The Experience of Women Denied Asylum in the UK', Webber, F. *Borderline Justice* and Baillot, H., Cowan, S. and Munro, V. E. 'Hearing the Right Gaps': Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process', *Social and Legal Studies*, 21(3)(2012):269-296, p.274.

<sup>24</sup> Crawley, H. 'Gender-Related Persecution and Women's Claims to Asylum', Fahama Refugee legal Aid Network for Social Justice, <http://www.refugeelegalaidinformation.org/content/gender-related-persecution-and-women%E2%80%99s-claims-asylum#GenderPersecution> [accessed 13/11/2012].

persecution rather than private abuse.<sup>25</sup> Nevertheless, Women for Refugee Women and senior barrister, Francis Webber, argue that all too frequently the nature of women's persecution has been 'trivialised'.<sup>26</sup> For example, the rape of a woman while detained by police or soldiers is frequently viewed within the British asylum system as a 'regrettable incident driven by sexual desire' rather than a form of harm and persecution in itself.<sup>27</sup>

However, I do not want to make the claim that certain harms should or should not be included as persecution. That is not my argument here. Rather, I want to stress that women's experiences of rape and sexual violence should not be silenced at the expense of the traditional grounds for refuge. Narratives of rape should be neither sidelined, nor 'trivialised'. As Helen Baillot, Sharon Cowan and Vanessa Munro observe, the asylum system has leant towards a 'silencing of sexual assault narratives'<sup>28</sup> to such an extent, that they make reference to one border agency case owner in their research, who when discussing Somali women with rape narratives asserted that 'in that culture [Somali] it happens so often that now it is just like talking about what happened on any particular day'.<sup>29</sup> This trivialisation of rape narratives and female sexual violence leads to a normalisation of gendered violence, or a hierarchy of violence, that the female asylum seeker then needs to overcome in order to attain refuge. And it is this point in particular that I am taking issue with.

In British law, the case of *Hoxha* in 2002 is a key example of gender specific persecution and its impact upon female asylum seekers. The case revolved around a Kosovo Albanian family who had experienced persecution on the grounds of ethnicity by Serbian police. But the treatment of the mother differed in its nature, as she was raped publicly in front of her family and neighbours. Baroness Hale, one of the senior judges on the *Hoxha* case, noted that sexual violence can have lasting and profound effects on women. She argued that due to cultural backgrounds, a woman can 'suffer almost as much from the attitudes of those around

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<sup>25</sup> Women for Refugee Women. 'Refused: The Experience of Women Denied Asylum in the UK', p.8. SEE: UK Border Agency. 'Gender Issues in the Asylum Claim', <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/gender-issue-in-the-asylum.pdf?view=Binary> [accessed 2/7/2013].

<sup>26</sup> Webber, F. *Borderline Justice*, p.72- 82.

<sup>27</sup> Women for Refugee Women, *Refused: The Experience of Women Denied Asylum in the UK*, p.16 and Webber, F. *Borderline Justice*, p.80.

<sup>28</sup> Baillot, H., Cowan, S. and Munro, V. E. 'Hearing the Right Gaps', p.269.

<sup>29</sup> UKBA Case owner cited in Baillot, H., Cowan, S. and Munro, V. E. 'Hearing the Right Gaps', p.283.

her to the degradation she has suffered as she did from the original assault'.<sup>30</sup> Indeed, in her judgement, Baroness Hale drew upon the work of Heaven Crawley to highlight the situation of women's bodies within conflict and violence and the power struggles that occur over the feminine form in war. In the words of Crawley:

During war, women's bodies become highly symbolic and the physical territory for a broader political struggle in which sexual violence including rape is used as a military strategy to humiliate and demoralise an opponent; women's bodies become the battleground for 'pay-backs', they symbolise the dominance of one group over another... It is important to recognise that sexual violence and rape may be an actual *weapon* or a *strategy* of war itself, rather than just an expression or consequence. In the context of armed conflict or civil war, the rape of women is also about gaining control over other men and the group (national, ethnic, political) of which they are a part.<sup>31</sup>

Baroness Hale was aware that although the family had collectively experienced persecution, the mother had faced persecution individually as she had been targeted differently in the form of rape. This instance highlights what Crawley notes as the difference between gender-related persecution and gender-specific persecution. The mother in *Hoxha* had faced gender-specific persecution, but this was not solely because she was a female, but was connected to issues of ethnicity. As Crawley argues, it is important to remember that not all forms of persecution experienced by women are gender-related persecution connected purely to their gender; they can, and do, take the form of gender-specific persecution that is connected to their racial, national or religious beliefs or membership of a particular social or political group.<sup>32</sup> It is important not to presume that all women face gender-related persecution. They can experience a whole range of harm, as well as gender-specific persecution.<sup>33</sup> Yet, as noted, all too often women's experience of persecution (either gender-related or gender-specific) is trivialised, or viewed as an isolated occurrence. The advances in international law and within case law, which I elaborate below, have not filtered down to the level of the case owner

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<sup>30</sup> Baroness Hale cited in House of Lords. *Opinion of the Lords of Appeal for Judgement in the Cause*, In re B (FC) (Appellant) (2002) Regina v. Special Adjudicator (Respondent) *ex parte* Hoxha (FC) (Appellant) [2005] UKHL 19, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050310/hox.pdf> [accessed 12/11/2012].

<sup>31</sup> Crawley, H. cited by Baroness Hale in House of Lords. *Opinion of the Lords of Appeal for Judgement in the Cause*, In re B (FC) (Appellant) (2002) Regina v. Special Adjudicator (Respondent) *ex parte* Hoxha (FC) (Appellant) [2005] UKHL 19, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050310/hox.pdf> [accessed 12/11/2012].

<sup>32</sup> Crawley, H. 'Gender-Related Persecution and Women's Claims to Asylum'.

<sup>33</sup> Crawley, H. *Gender-Related Persecution and Women's Claims to Asylum*'.

deciding asylum claims.<sup>34</sup> As a result, Frances Webber asks, where else in the field of law, other than in asylum, is ‘lying so readily assumed?’<sup>35</sup>

The fact that women’s asylum claims can frequently contain, or be comprised of sexual elements often results in their cases being far more intricate than cases involving traditional forms of persecution. Asylum Aid, a leading British refugee charity, asserts a case involving gender-related persecution and non-state actors, for example, is likely to require the examination of state protection (both available and effective), as well as possible medical evidence, detailed consideration of membership of a particular social group and expert material, if the country of origin information pertaining to the woman is less than adequate.<sup>36</sup> Accordingly, women in the British asylum system face a ‘double negative’ or ‘double discrimination’<sup>37</sup> - firstly, they are asylum seekers, and secondly, they are women. As Asylum Aid’s Russell Hargrave asserts, there are two cultures in operation in the UK asylum system; they say that ‘asylum seekers are lying, and that women are lying’.<sup>38</sup> This notion of the ‘double negative’ links back to the trivialisation of female narratives as discussed earlier and begins to highlight the potential silencing of female asylum narratives within the system. It also leads to the normalisation, or the hierarchy of sexual violence regarding female asylum claims. This is most apparent in the examination of female asylum seeker rape narratives.

### The Rape Narrative

One of the most radical developments to occur in the understanding of war has been the acknowledgement at the international level that rape is not just a by-product of war, but can in itself be a ‘planned and targeted policy’.<sup>39</sup> The International Criminal Tribunals of Yugoslavia and Rwanda recognised that rape was more than just a by-product of soldiers’ lust, but could be, and frequently was, a targeted and systematic policy in itself.<sup>40</sup> The recognition of rape as a weapon of war and a crime against humanity was acknowledged by the UN Security Council in the form of Resolution 1820 in 2008. The Security Council

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<sup>34</sup> See: Women for Refugee Women, *Refused: The Experience of Women Denied Asylum in the UK* and AsylumAid. ‘*Unsustainable: the quality of initial decision-making in women’s asylum claims*’.

<sup>35</sup> Webber, F. *Borderline Justice*, p.8.

<sup>36</sup> AsylumAid. ‘*Unsustainable: the quality of initial decision-making in women’s asylum claims*’, p.66.

<sup>37</sup> Hargrave, R. Policy Adviser, Asylum Aid. Interview conducted on 26<sup>th</sup> October 2012, London.

<sup>38</sup> Hargrave, R. Policy Adviser, Asylum Aid. Interview conducted on 26<sup>th</sup> October 2012, London.

<sup>39</sup> See: United Nations. *Security Council Resolution 1820*, (S/Res/1820/2008), [http://www.un.org/Docs/sc/unscl\\_resolutions08.htm](http://www.un.org/Docs/sc/unscl_resolutions08.htm), [accessed 2/7/2013], Buss, D. ‘Rethinking Rape as a Weapon of War’, *Feminist Legal Studies*, 12(2009): 145-163, p.145; and Henry, N. *War and Rape: Law, Memory and Justice*, (Oxon: Routledge, 2011), p.89.

<sup>40</sup> Buss, D. ‘Rethinking Rape as a Weapon of War’, p.145.

declared that ‘women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group’.<sup>41</sup>

Despite the recognition of rape as a weapon of war, Doris Buss, Binaifer Nowrojee and Nicola Henry write of a paradox that has emerged within the International Criminal Tribunals. Although there is a tough and recurring recognition of rape as a widespread and instrumental policy of war, there has been an unusually low conviction rate in both the tribunals.<sup>42</sup> This pattern follows that of rape statistics within Britain that portray the same story, whereby rape, statistically is silent with an exceptionally low conviction rate.

The Home Office and the Office for National Statistics’ recent report on *Sexual offending in England and Wales*, found that of the 85,000 sexual offences committed over a twelve month period, 28% of rape victims never reveal to anyone what has happened. Only 15% of all victims actually report the incident to the police.<sup>43</sup> Interestingly, the Home Office report found that of those who do report to the police and press charges, the conviction rate at Crown Court is 61.6%.<sup>44</sup> In numbers though, that means that in 2011, only 1,085 offenders were found guilty of rape - out of a national average of 85,000 offences per annum. These numbers are similar to those in the Stern Review, *A Report by Baroness Vivien Stern of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales*. Published in 2010, the Stern Review found that for the period of 2008/2009, only 11% of all rapes were reported to the police, and that in the same period there was a 58% conviction rate.<sup>45</sup> Again, it should be noted that the conviction rate is obviously only for those rapes that were reported to the police in the first instance (11% in the Stern Review). In both reports, it appears clear that the reporting of rape in Britain is low,

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<sup>41</sup> United Nations. *Security Council Resolution 1820* (S/Res/1820/2008), p.1. UN High Commissioner for Human Rights. *Rape: Weapon of War*, <http://www.ohchr.org/en/newsevents/pages/rapeweaponwar.aspx> [accessed 18/11/2012].

<sup>42</sup> See: Buss, D. ‘Rethinking Rape’, p.147. Henry, N. *War and Rape: Law, Memory and Justice*, p.91; and Nowrojee, B. ‘Your Justice is Too Slow: will the ICTR fail Rwanda’s rape victims?’, *United Nations Research Institute for Social Development* (UNRISD) Occasional Paper, No. 10 (November 2005).

<sup>43</sup> Office for National Statistics, ‘*An Overview of Sexual Offending in England & Wales*’, Statistics Bulletin, (10 January 2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/143910/sexual-offending-overview-jan-2013.pdf.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/143910/sexual-offending-overview-jan-2013.pdf.pdf), [accessed 2/07/2013], p.33.

<sup>44</sup> Office for National Statistics, ‘*An Overview of Sexual Offending in England & Wales*’, p.34.

<sup>45</sup> Home Office, ‘*A Report by Baroness Vivien Stern of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales*’, (2010) [http://webarchive.nationalarchives.gov.uk/20100418065537/http://equalities.gov.uk/PDF/Stern\\_Review\\_acc\\_FI\\_NAL.pdf](http://webarchive.nationalarchives.gov.uk/20100418065537/http://equalities.gov.uk/PDF/Stern_Review_acc_FI_NAL.pdf), [accessed 2/07/2013], p.10-12.

and that a successful conviction is extremely rare. Rape in Britain is viewed negatively, especially in the media, and to an extent the courts, with senior prosecutor Alison Saunders arguing that there is an unhealthy focus upon the victim proving that she was a victim, with her sexual past, sexual experience and behaviour being more of the focus than necessarily the behaviour of the rapist and the event itself.<sup>46</sup> A history of sexual promiscuity or drinking, as well as flirtatious behaviour will all stand against the woman. The coverage of rape and the representation of women led prosecutor Alison Saunders to argue strenuously that this has led to the ‘almost demonization’ of women.<sup>47</sup>

As noted previously, women, rather than men, generally (although not exclusively) experience sexual violence or rape, either connected to the traditional public forms of persecution (national, ethnic, social, religious and political group) or as part of a persecution that can occur within the private sphere of life: by a partner or family member. Many women seeking asylum do not fit the traditional refugee ‘template’, for what they have experienced does not always amount to persecution as defined by the 1951 Convention.<sup>48</sup> As Francis Webber highlights, there is an assumption that the experience of those who are fleeing rape or sexual violence does not amount to persecution, but instead was merely due to ‘dreadful lust’, or was ‘a one off’ or ‘an isolated criminal act’.<sup>49</sup> Moreover, there is rarely documentary or corroborating evidence to support their claims, for they are often a private experience.<sup>50</sup> Although there might be physical evidence that can be obtained from a doctor, in many cases the only evidence the applicant will have is her personal story of persecution. This means that when attempting to attain refugee status, her disclosure of sensitive information regarding the traumatic sexual violence in a detailed, coherent and consistent manner is essential from the start of the asylum process. Yet, in the words of Webber, ‘there is still a huge gulf between women asylum seekers’ needs and a decision-making process driven by the imperatives of speed and efficient throughput.’<sup>51</sup>

Drawing upon statistics from organisations such as Women for Refugee Women, the

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<sup>46</sup> Saunders, S. cited in Dustin, H. *The Guardian*, ‘Time for revolution in the way we deal with rape’, (Friday 17<sup>th</sup> February, 2012), <http://www.guardian.co.uk/commentisfree/2012/feb/17/revolution-deal-with-rape> [accessed 04/12/2012].

<sup>47</sup> Saunders, S. cited in Dustin, H. *The Guardian*, ‘Time for revolution in the way we deal with rape’.

<sup>48</sup> Webber, F. *Borderline Justice*, p.72

<sup>49</sup> Webber, F. *Borderline Justice*, p.72.

<sup>50</sup> Murray, N. Scottish Refugee Council, Women’s Policy Development Office. Interview conducted on 7<sup>th</sup> November 2012, Glasgow.

<sup>51</sup> Webber, F. *Borderline Justice*, p.81.



Scottish Refugee Council and the London School of Medicine and Hygiene, as well as the Refugee Council and Legal Action for Women regarding the experience of rape for female asylum seekers, I deduce that a minimum of roughly 62.6% of female asylum seekers have experienced rape or sexual violence. Jamie Spurway, a trainee officer at the Scottish Refugee Council, asserts that when a female asylum seeker arrives at their doors they assume it to be the case that rape or sexual violence has occurred.<sup>52</sup> With these figures in mind, the disclosure of rape narratives is then quite prominent within the British asylum system. However, despite the high number of female asylum seekers who have experienced rape, the suffering of many victims does not end once they have reached Britain. Chief Executive of the Refugee Council, Donna Covey, highlighted that:

What is truly shocking is that women continue to suffer when they come to the UK. They struggle to tell their stories, many have their claims for asylum rejected, and many end up sleeping rough or forced to rely on others. As a result, some women end up experiencing sexual violence here, the place they thought they would be safe, either by entering into sexually abusive relationships to get food and shelter, or by ending up in such precarious situations that they are acutely vulnerable to rape and sexual assault.<sup>53</sup>

The Women for Refugee Women's 2012 report, *Refused*, revealed that of their female participants, 93% had been refused refugee status initially as their claim had been rejected,<sup>54</sup> whereas similar research by Asylum Aid published in 2011 found that in their experience, 87% were initially refused.<sup>55</sup> However, the 2012 figures from the Refugee Council highlight that 58% of women are rejected at the initial stage.<sup>56</sup> With such a high percentage of women experiencing rape and only a minimum actually receiving protection, there appears to be a prejudice in the asylum system against women's stories and narratives and questions need to be asked as to why they are not experiencing more positive outcomes initially (and at the appeal stage) from the decision making bodies in the Home Office. The high percentage of refusals is leading to more women remaining within the asylum system as they seek a second decision at the asylum tribunal. This in turn leads to increased levels of poverty, ill-health,

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<sup>52</sup> Spurway, J. Scottish Refugee Council, *Workshop on Working with Asylum Seekers and Refugees*, (September 20<sup>th</sup> 2012), Cadagon Square, Glasgow.

<sup>53</sup> Covey, D. cited in Refugee Council, *Vulnerable Women's Project* (Policy and research, 2009), [http://www.refugeecouncil.org.uk/policy/position/2009/vulnerable\\_women](http://www.refugeecouncil.org.uk/policy/position/2009/vulnerable_women) [accessed 20th September 2012].

<sup>54</sup> Women for Refugee Women, '*Refused: The Experience of Women Denied Asylum in the UK*', p.11.

<sup>55</sup> Asylum Aid. '*Unsustainable the quality of initial decision-making in women's asylum claims*', p.5.

<sup>56</sup> Refugee Council. '*Asylum Statistics*', [http://www.refugeecouncil.org.uk/assets/0003/1357/Asylum\\_Statistics\\_Feb\\_2014\\_2\\_.pdf](http://www.refugeecouncil.org.uk/assets/0003/1357/Asylum_Statistics_Feb_2014_2_.pdf) [accessed 23/04/20104], p.12.

depression, self harm and sadly, suicide.<sup>57</sup> With a minimum of 75% of all female asylum seekers being denied at the first stage of the asylum process, this percentage of refusals raises questions regarding the barriers that women are facing in order to articulate their stories of persecution, particularly rape narratives. It is to this issue that the following section of the chapter will now turn.

## **Barriers to Asylum**

The Secretary of State considers that, had the alleged rape [sic] and abuse in your later account occurred as claimed, it was reasonable to expect that you would have mentioned it when you were first interviewed. The Secretary of State considers that your failure to do so seriously damages your personal credibility and the veracity of your claim.<sup>58</sup>

The high level of rejection of female asylum seekers raises questions regarding the initial decision making process. Why is it that women are experiencing such massive rejection rates? What barriers are they facing that are preventing so many from receiving refugee status, and leading to so many being kept within the asylum process for long periods of time? The following discussion is an analysis of the various barriers to the articulation of a ‘coherent and consistent’ story in the British asylum system, which I argue could be impacting upon the success of female asylum seekers. The section will be split into three parts, each addressing different barriers. The first part addresses the barriers of trauma and memory. The second addresses the impact of shame, language and silence in the articulation of rape narratives. The final section finishes by looking at the barriers of disclosure, trust and the culture of disbelief. It not only looks at barriers within the system but also at the system itself by analysing the culture of disbelief and the impact that that then has upon the development of persecution narratives.

### Trauma and Memory

When disclosing an asylum account, the applicant must be able to do so with as much detail as possible and be accurate and consistent in their presentation of the information. Any

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<sup>57</sup> London School of Hygiene and Tropical Medicine and Scottish Refugee Council, *‘Asylum-Seeking Women, Violence & Health’*.

<sup>58</sup> AsylumAid. *‘Still No Reason at All: Home Office Decisions on Asylum Claims’*, (May 1999), [http://www.asylumaid.org.uk/wp-content/uploads/2013/02/Still No Reason At All.pdf](http://www.asylumaid.org.uk/wp-content/uploads/2013/02/Still_No_Reason_At_All.pdf), [accessed 6/06/2014], p.64.

discrepancies, whether large or small, will be held against the applicant and could result in the individual being deemed unreliable and lacking in credibility.<sup>59</sup> The nature of trauma though, and the way that memory is constructed, go against the demands of the asylum system. In fact, this goes straight to the heart of the Refugee Convention itself, for the burden of proof resides solely with the asylum seeker. The UNHCR Handbook stipulates the ‘general legal principle that the burden of proof lies on the person submitting a claim’<sup>60</sup>, and as such, she needs to overcome her trauma and articulate her experiences in a credible fashion. As noted, unlike in other areas of law, where the applicant can draw upon witnesses, documents or corroborating evidence, these are not normally available for the female asylum seeker and the applicant must rely on her personal account to claim asylum. The very foundation of the asylum claim is based upon an assumption that an individual can ‘reliably, consistently and accurately recall autobiographical memories’.<sup>61</sup> In other words, they have to tell a consistent, detailed and convincing story. Yet, Asylum Aid’s 2011 report, *Unsustainable: The Quality of Initial Decision-Making in Women’s Asylum Claims*, found that no mention of the effect of trauma on memory was mentioned within their body of participants.<sup>62</sup> There appears to be an assumption within the border agency that an experience of severe violence or rape will be so monumental that it will be committed to memory indefinitely, with any discrepancies being perceived as fanciful inventions of the mind.<sup>63</sup> However, traumatic events do not necessarily produce detailed or even chronological memories.

Psychologists Jane Herlihy and Stuart Turner, from the Centre of the Study of Emotion and Law, write that traumatic memories are very different from normal, chronological autobiographical memories (of day-to-day experiences) where the event is ‘verbal, sequenced (having a beginning, middle, and end) recognised as being in the past, and may be recalled voluntarily’. In contrast, a traumatic memory will (normally) contain partial autobiographical memories and will comprise of ‘snapshots (a smell, the sound of screaming, the image of a face), which are experienced in the present (reliving experiences) and are often triggered by

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<sup>59</sup> UK Border Agency. ‘*The Asylum Interview*’.

<sup>60</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992), <http://www.unhcr.org/3d58e13b4.html>, [accessed 18 November 2011], p.196.

<sup>61</sup> Herlihy, J., Jobson, L. and Turner, S.W. ‘‘Just Tell us What Happened to You’ Autobiographical Memory and Seeking Asylum’, *Applied Cognitive Psychology*, 26(2012):661-676, p.662.

<sup>62</sup> Asylum Aid, ‘*Unsustainable: the quality of initial decision-making in women’s asylum claims*’, p.44.

<sup>63</sup> Herlihy, J., and Turner, S. W. ‘Asylum claims and memory of trauma: sharing our knowledge’, *British Journal of Psychiatry*, 191(2007):3-4, p.3.

external or internal cues (the sound of a firework, or a feeling of guilt) rather than being subject to conscious recall'.<sup>64</sup> Due to the nature of these memories, the individual would be likely to adopt techniques that would minimise and avoid them.

Herlihy, Jacobson and Turner argue that in the asylum system there is the false assumption that emotional arousal will aid memory. Due to the severity of the event, a victim of rape is apparently meant to remember both the large and small details pertaining to it. They argue that in fact the opposite is true: heightened emotional arousal can actually inhibit memory.<sup>65</sup> Lucia De Haere, Hans Grietens and Karine Verschuere point out that even individuals who *have* been granted refugee status experience heightened distress levels when retelling their narratives of persecution after the asylum process.<sup>66</sup> Thus, for women having to speak their stories during the asylum process, their levels of stress and anxiety must be exceptionally high, and this must impact severely on memory recall and their narrative construction. Hence, the incorrect judgement passed by an immigration judge, who deemed an applicant unreliable as '[G]iven that rape is such a serious thing to happen to any woman, I would have expected a raped person to know when they were raped. This is not the type of event which I would expect a person to forget about or confuse',<sup>67</sup> did not allow for the fact that the event may have been so traumatic that the woman had created blocks within her mind in order to protect herself, or that discussing the event could lead to 'vivid re-experiencing', or that the woman had sought to deliberately avoid the memory.<sup>68</sup> As Jenny Edkins argues, the event could have been so traumatic in itself, that the person was unable to create an interpretation or establish meaning. The mind was not able to understand what had happened.<sup>69</sup> This notion of the fragility of memory is highlighted by lawyer Kylie McGrath, who has worked in both the British and Australian asylum systems. She notes that memory is central within the process:

The [asylum] story might make sense in the client's mind but then, as a lawyer, it's your job to look over it and then you say, 'ok, but you say you left by car...?' You can see some inconsistency, and when you put that inconsistency to them... it

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<sup>64</sup> Herlihy, J and Turner, S. W. 'Asylum claims and memory of trauma', p.3.

<sup>65</sup> Herlihy, J., Jacobson, L. and Turner, S. W. 'Just Tell Us What Happened to You', p.663.

<sup>66</sup> Haere, L., Grietens, H. and Verschuere, K. 'Holding Harm: Narrative Methods in Mental Health Research on Refugee Trauma', *Qualitative Health Research*, 20(12)(2010):1664-1676, p.1665.

<sup>67</sup> Cited in Herlihy, J., Gleeson, K. and Turner, S. W. 'What Assumption About Human Behaviour Underlie Asylum Judgements', *International Journal of Refugee Law*, 22(3)(2010):351-366, p.363.

<sup>68</sup> Herlihy, J., Jacobson, L. and Turner, S. W. 'Just Tell Us What Happened to You', p.665.

<sup>69</sup> Edkins, J. *Trauma and the Memory of Politics*, (Cambridge: Cambridge University Press, 2003). p.37.

really challenges them, for they have formed some kind of narrative and it's actually inaccurate and you need to unravel it to work out what's gone wrong where, to make things make sense.<sup>70</sup>

Indeed, Mary McCormack, trustee for Refugee Action Leeds and a member of End Child Detention Now, spoke of her experience working with asylum seekers within the Leeds area. She herself noted the barrier of memory:

So often we get people whose cases are just in an awful mess. So often this is due to the fact that no one has ever got from them some kind of chronology or story that makes sense. A lot of it is, people often say something when they first arrive, don't they, when they first present and I guess it is maybe their perception, right. This is what I need to say, or these are the questions asked, and this is what I am going to say.<sup>71</sup>

Yet, this all flies in the face of the essence of the asylum interview, where the onus is solely upon the asylum seeker to provide a reliable, detailed and credible retelling of the traumatic events of their persecution. The research by Herlihy and Turner highlights that memories do change over time, particularly traumatic memories, as the mind tries to protect itself. Memories may interact differently, or they will have been (and continue to be) frequently modified and reclassified and this will impact on how a person articulates their story. Meena Alexander captures the fluctuations of memory within her book *The Shock of Arrival*, in which she charts her own experiences of moving (as an immigrant, thus without the experience of traumatic flight) to another country. She writes poetically that 'the shock of arrival is multifold - what was born in the mind is jarred, tossed into new shapes, I kept puzzling over the borders shifting inside me – languages, gestures, memories of places'.<sup>72</sup> Thus, the account of a traumatic memory is not likely to be 'exact and consistent'. However, that is not proof that an asylum seeker is falsifying their story; it is merely evidence of how their memory is choosing to verbally recall the event.<sup>73</sup> However, I do not want to generalise here on the impact of trauma, for the depth of human experience and the ability to handle trauma is individualistic, due to factors such as personality, family support and

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<sup>70</sup> McGrath, K. Lawyer. Interview conducted on 22<sup>nd</sup> April 2013, Aberystwyth.

<sup>71</sup> McCormack, M. Trustee for Refugee Action Leeds and member of End Child Detention Now. Skype interview conducted on 24<sup>th</sup> January 2014.

<sup>72</sup> Alexander, M. *The Shock of Arrival: Reflections on Postcolonial Experience*, (Boston: South End Press, 1996), p.63.

<sup>73</sup> Herlihy, J., Jacobson, L. and Turner, S. W. 'Just Tell Us What Happened to You', p.663.

religious beliefs for instance.<sup>74</sup> Indeed, Helen Baillot, speaking on trauma and memory highlights that often:

Women and men's willingness to disclose any type of abuse, but particularly sexual abuse was also linked to their own politicization and perception of themselves as political beings... people, men and women alike might tell you the whole story straight off the back in a lot of detail, more detail than you would maybe expect, because they had processed that themselves, this part of their narrative and I know exactly what I am doing.<sup>75</sup>

### Shame, Language and Silence

The disclosure of a personal experience of persecution such as rape can be fraught with various difficulties that female asylum seekers must confront in order to attain refugee status. For many, the shame that rape represents is a massive barrier that impacts on the disclosure of such acts not only to family members, but also to friends and community members. For female asylum seekers who have experienced rape or sexual violence, shame is a major barrier to disclosure. Rape in many cultures is viewed as an act of defilement; the woman is viewed as dirty and impure, even though she was not compliant in the act. And although there will be empathy towards what the woman has suffered, Amani el Jack stresses that for many societies she is perceived as 'damaged goods'.<sup>76</sup> This is especially true in cultures where the protection of virginity or moral dignity is the cultural norm, with Crawley noting that female asylum seekers who have suffered rape or sexual violence are unwilling to disclose the nature of the attack for fear of ostracism.<sup>77</sup> Hence, the presence of a male case worker or a male translator in the asylum interview could seriously impair the act of disclosure, preventing the woman from speaking. Even the presence of a female translator from the same ethnic or cultural group could impact on disclosure, with the asylum seeker fearing gossip within the wider ethnic community. For instance in Sri Lanka (which is one of the top ten countries of

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<sup>74</sup> It is important to note that traumatic memory is heavily contested with debates focusing on the traumatic memory argument and the trauma superiority argument that argues that trauma can actually create 'vivid, coherent recollections' Stephen Porter and Angela Birt argue that their research shows that traumatic memories, whilst special, were 'rich, coherent, intrusive and detailed rather than impaired'. Porter, S. and Birt, A. L. 'Is Traumatic Memory Special? A Comparison of Traumatic Memory Characteristics with Memory for Other Emotional Life Experiences', *Applied Cognitive Psychology*, 15(2001):101-117.

<sup>75</sup> Baillot, H. Independent Researcher, Formerly researcher/case worker for Scottish Refugee Council. Skype Interview conducted on 15<sup>th</sup> July 2013.

<sup>76</sup> El Jack, A. 'Gender and Armed Conflict. Overview Report, Bridge, Development and Gender Studies', (2003), <http://www.bridge.ids.ac.uk/reports/CEP-Conflict-Report.pdf>, [accessed 11/12/2012], p.17.

<sup>77</sup> Crawley, H. 'Engendering the State in Refugee Women's Claims for Asylum'. in Jacobs, S., Jacobson, R. and Marchbank, J. *States of Conflict. Gender, Violence and Resistance*, (London: Zed Books, 2000), pp.87-102, p.93.

origin for asylum seekers coming to Britain), the stigma attached to rape is so extreme that suicide is perceived as an ‘honourable’ way for a woman to redeem herself. Hence Rani, an asylum seeker from Sri Lanka, who was raped by soldiers and whose husband was murdered, noted that, ‘I was happy with a lady interviewer but not a male translator... Because he was a man I felt ashamed. If it was a woman I would have said more’.<sup>78</sup> This same issue with regard to disclosure is apparent in the following account of Participant 10 in the research conducted by Diana Bogner, Chris Brewin and Jane Herlihy in 2010. This account highlights just how physical the barrier of shame can be, severely impacting upon the participant’s ability to disclose her experience of rape. She asserted that:

It was hard to speak to men that were not related to me. I just can’t explain how hard it was. And I did not explain everything because I could not. I never talked about what happened to me in my whole life, not even to my mom. So suddenly I had to talk to three men I did not know. It was so hard. I just could not say what I wanted to say.<sup>79</sup>

Within the asylum system, every woman has the right to ask for a male or female caseworker and an interpreter. The applicant is not always made aware of this right though, and many, due to the nature of the system and because they feel intimidated and isolated, may be unwilling to ask for fear of causing trouble.<sup>80</sup> Asylum Aid found in their *Unsustainable* report, that even when women are asked if they would like a female caseworker or interpreter, they normally do not understand the full implications of the request and want at all costs to resist being seen as ‘difficult’ or ‘picky’ within the asylum process, even to the detriment of their own claim.<sup>81</sup> Many asylum seekers may come from patriarchal (or authoritarian) cultures that do not allow them to speak out or openly challenge authoritative figures or voices. This can put the female asylum seeker at a massive, and silent, disadvantage within the asylum process.<sup>82</sup> As one asylum seeker noted within the *Refused* report, by Women for Refugee Women: ‘You will never challenge them- imagine how you

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<sup>78</sup> Rani cited in Singer, D. ‘We need a gender-sensitive asylum system’, *The Guardian*, (Monday 30<sup>th</sup> November 2009), <http://www.theguardian.com/commentisfree/libertycentral/2009/nov/30/gender-women-asylum> [accessed 28/04/2014].

<sup>79</sup> Participant 10 cited in Bogner, D., Brewin, C. and Herlihy, J. ‘Refugees’ Experiences of Home Office Interviews- A Qualitative Study Focusing on the Disclosure of Sensitive Personal Information’, *Journal of Ethnic and Migration Studies*, 36(3)(2010):519-533.

<sup>80</sup> Female Asylum Seeker cited in Women for Refugee Women, ‘*Refused: The Experience of Women Denied Asylum in the UK*’, p.23.

<sup>81</sup> Asylum Aid, ‘*Unsustainable the quality of initial decision-making in women’s asylum claims*’, p.35.

<sup>82</sup> Norman, J. Barrister for Gray’s Inn. Interview conducted on 25<sup>th</sup> October 2012, London.

worry about making them cross'.<sup>83</sup>

The cultural background of the female asylum seeker can seriously impact on their body language. Many cultures outside the West perceive making eye contact with authoritative figures as disrespectful. The lowering of the eyes, particularly for a woman, is viewed as socially respectful. Yet, within the (Western) asylum system, this can be perceived as a sign of lying, for eye contact is a central feature of trust in British culture. As such, lowering the eyes can be construed as a sign of evasiveness and disengagement with the asylum process. Julian Norman, a London based barrister, points out that if you were to have an assertive woman who 'sits up straight and looks you in the eye', she would be viewed as aggressive, domineering and not the image of a passive victim.<sup>84</sup> Morag Gillespie, policy researcher at the Scottish Poverty Information Unit, also highlights this position, asserting that if you are too confident and open, and present your story as a story, then it is assumed that it is fabricated. But, if you are too compliant, 'taking your role, not making eye contact, then you're lying'.<sup>85</sup> In a sense, the body language of the female asylum seeker is a no-win game. If you are meek and passive it is because you are lying and covering the truth up, but if you are assertive then you are not necessarily in need of protection.

In viewing the significance of shame for the female asylum seeker, Sara Ahmed's work on emotion is extremely informative. She writes that when an individual experiences shame, the body is consumed, and to an extent, burned with perceived thoughts of the individual to be a sign of their own failure. With feelings of shame, the individual will try to hide from others by avoiding eye contact, dropping their head or physically turning their bodies away 'in a sensation more acute and intense than embarrassment'. For Ahmed, shame is as much connected with 'cover and concealment, as it is with exposure, vulnerability'. The feeling of shame can be painful, physically and mentally, with an amplification not only upon the surface of the body, but also as Ahmed writes, on 'the subject's relations to itself, or its sense of itself as self'.<sup>86</sup> W. Ray Crozier maintains a similar understanding of shame, writing that shame engages with an 'othered' position with regard to the self, establishing a 'dual role' of

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<sup>83</sup> Female Asylum Seeker cited in Women for Refugee Women, *Refused: The Experience of Women Denied Asylum in the UK*, p.23.

<sup>84</sup> Norman, J. Barrister for Gray's Inn. Interview conducted on 25<sup>th</sup> October 2012, London.

<sup>85</sup> Gillespie, M. Policy Researcher and Lecturer, Scottish Poverty Information Unit. Interview conducted on 9<sup>th</sup> November 2012, Glasgow.

<sup>86</sup> Ahmed, S. *The Cultural Politics of Emotion*, (Edinburgh: Edinburgh University Press, 2004), p.103.



self-reflection as the individual both at once, 'self-evaluates and is the object of evaluation'.<sup>87</sup> Indeed, Jean-Paul Sartre writes that shame is the 'recognition of the fact that I am indeed the object which the other is looking at and judging'.<sup>88</sup> In the asylum interview, the case worker is observing (and judging) the asylum seeker (who is aware of their gaze) as she speaks of her persecution; in this regard the asylum seeker needs to present themselves as an object.

For women who have experienced rape and sexual violence, and who come from cultures where sexual morality and virginity are revered, shame is an acute barrier within the asylum process that is extremely difficult to overcome. Indeed, as Kauser Ilhali, an interpreter working within the system observed:

It's just... saying those words carries a lot of weight within it, there's a lot of baggage, it's a loaded term. It can mean that you are soiled for ever... that's one way of looking at it... you're defiled you know, some other person has done this to you... you must have... the usual things...<sup>89</sup>

Although there are practices in place for women to have only female caseworkers, sometimes, in the case of an uncommon dialect, there may only be male interpreters available. Due to a lack of resources such as this, a woman may then feel too ashamed and intimidated to accurately and confidently disclose her account of persecution in a manner that will be deemed credible. For example, Crawley writes of a Pathan woman who was too intimidated to disclose her experience of sexual violence during her interview because a male Muslim was present. Her appeal was subsequently dismissed. As the Secretary of State asserted:

We reject that contestation as it appears to us that the appellant is an educated and sophisticated woman. She was not a rural agricultural worker from a remote village and we do not believe that had she anything to say she would not have done so simply because there was a male Muslim present. Accordingly, in our view, our findings must reflect adversely on the credibility of the appellant.<sup>90</sup>

Interestingly, Herlihy, Jacobson and Turner reflect on the use of language and the impact culture has had, not only on language, but also on memory. Individualistic or collectivist

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<sup>87</sup> Crozier, W. R. 'Self-Consciousness in Shame: The Role of the 'Other'', *Journal for the Theory of Social Behaviour*, 28(3)(1998):273-286, p.273-274.

<sup>88</sup> Sartre, J. P. *Being and Nothingness: An essay on phenomenological ontology*, (London: Routledge, 2003), p.285.

<sup>89</sup> Ilhali, K. Interpreter for Scottish Refugee Council and NHS Scotland. Interview conducted on 9<sup>th</sup> July 2013, Glasgow.

<sup>90</sup> Crawley, H. 'Engendering the State', p.94.

cultures have a massive impact on how an individual shapes and forms their memories, and thus speaks of their memories. Individualistic cultures, like Britain, view memory as a critical source for authenticating self-identity. In comparison, in collectivist cultures, memory is formed more around the notion of relationships and hierarchy, and is less focused upon the self.<sup>91</sup> When a person from an individual culture is reminiscing, there is more of a focus upon details, dates and the self. In collectivist cultures, Herlihy, Jacobson and Turner note that the root of memory is formed around social interactions, everyday habits and emotionally neutral events. Herlihy, Jacobson and Turner take this analysis one step further by arguing that even speaking in an individualistic language (such as English) creates a more individualistic account of a memory, than recalling a memory from a language from a collectivist culture, such as Russian for example.<sup>92</sup> The language in which the applicant is required to recall the memory is likely to influence the content, affect and organisation of memory. This creates a massive linguistic barrier to asylum, if when detailing trauma and persecution, someone's cultural and linguistic background means they are inherently inclined to recall more collectivist and general reflections of events, rather than detailed, specific personal accounts. Herlihy, Jacobsen and Turner argue that this 'goes to the core of the assumption underpinning our current asylum process - that asylum seekers can be required to present a detailed, specific, description of an experienced event, in such a way that conforms with the norms of the host culture'.<sup>93</sup> Indeed, lawyer Kylie McGrath observed this specifically with her Sri Lankan Tamil clients. She noted that language is a massive issue within the asylum process, for language is surrounded by myriad cultural assumptions. When speaking with her Sri Lankan Tamil clients, they had a tendency to utilise collective nouns and to speak in more general terms. For example, she noted that when asking about their experiences of persecution:

The Sri Lankan clients will often say 'we did this' and 'they did this'. So I need to say to my client, [with] the difference in language, difference in culture... when you talk about something happening to someone, I need you to break it down for me. Who is *they*, does *they* include *you*?<sup>94</sup>

The barrier of language is a massive hurdle to overcome: the act of giving testimony is severely challenging. For an asylum seeker to tell their story, they have to interpret their traumatic experience in a verbal format during the asylum interview. But in doing so, Edkins

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<sup>91</sup> Herlihy, J., Jacobson, L. and Turner, S. 'Just Tell Us What Happened to You', p.669.

<sup>92</sup> Herlihy, J., Jacobson, L. and Turner, S. 'Just Tell Us What Happened to You', p.669.

<sup>93</sup> Herlihy, J., Jacobson, L. and Turner, S. 'Just Tell Us What Happened to You', p.669.

<sup>94</sup> McGrath, K. Lawyer. Interview conducted on 22d April 2013, Aberystwyth.

argues that ‘it loses the immediacy of the traumatic recall... it loses the force of its affront to understanding’. Speaking of the traumatic event is merely an interpretation of something that was so shocking and out of the ordinary. Trying to speak of the event produces an interpretation that does not necessarily convey the full extent of what happened. To a certain extent, the experience is inconceivable yet it *must* be conceivable in order for the asylum seeker to tackle the asylum system. Language is central to the asylum system and the female asylum seeker must speak and be heard in an accurate and detailed manner. Yet, how are you able to speak the unspeakable, when language (and memory) seems to fail (especially in the eyes of the border agency)? As Edkins argues, one of the central problems with speaking of trauma, is that sometimes ‘there are no words’ to articulate accurately what the individual has experienced.<sup>95</sup> Indeed, Elaine Scarry in her work writes that when discussing pain (rather than trauma), pain does not merely resist language but actually destroys it. Scarry writes that when speaking of pain, it is on the one hand undeniable but on the other non-confirmable, for ‘whatever pain achieves, it achieves in part through its unsharability and it ensures this unsharability through its resistance to language’.<sup>96</sup> A traumatic event, as De Haere, Grietens, and Verschueren note, can essentially ‘deprive language of its capacity to construct meaning and coherence’.<sup>97</sup> For Scarry, pain is a feeling that is not apparent upon the surface of the body but resides within the ‘invisible geography’ of the body.<sup>98</sup> Again, this takes us back to one of the major issues with the asylum system, in that the female asylum seeker who has experienced rape or sexual violence, with little to no discernible or corroborating proof, has to speak and retell her story in such a manner in order to attain refugee status. It is only through her articulation of the trauma, of the pain and violence that she has experienced, that she will be able to attain refugee status<sup>99</sup>. In having to overcome the barriers of English and speaking through an interpreter, as well as finding the words to convey the unimaginable, the significance of language becomes a central barrier for asylum seekers. Speaking is central

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<sup>95</sup> Edkins, J. *Trauma and the Memory of Politics*, p.189.

<sup>96</sup> Scarry, E. *The Body in Pain. The Making and Unmaking of the World*, (Oxford: Oxford University Press, 1985), p.5.

<sup>97</sup> De Haere, L., Grietens, H. and Verschueren, K. ‘Holding Harm’, p.1669.

<sup>98</sup> Scarry, E. *The Body in Pain*, p.3.

<sup>99</sup> Importantly, it must be remembered that at all times, the asylum seeker is consumed by the labelling process that was discussed within Chapter Three. She is being perceived within a certain light and is being examined to establish if she is genuine. This is the ‘master narrative’ that resides at the heart of the asylum system that is reproducing ‘structures of power...some stories are privileged over others’. Crucially, as has been mentioned, the 1951 Convention has been written with the male pronoun; the dominant discourse of the convention is male which means as Marjorie DeVault that ‘women who want to talk of their experiences must translate, either saying things that are not quite right, or working at using the language in non-standard ways’. DeVault, M. Cited in McKenzie-Mohr, S. and LaFrance, M. N. ‘Telling Stories without words: ‘Tightrope talk’ in women’s accounts of coming to live well after rape or depression’, *Feminism and Psychology*, 21(1)(2010):49-73, p.50.

within the asylum system; yet the art of speaking of a traumatic event such as rape or sexual violence places a heavy burden of proof, as well as potentially re-traumatising the female asylum seeker.

Interestingly, in her 2011 research into truth telling within the border agency, Olga Jubany discusses the importance of demeanour, language and articulation. In her research, she engaged with female case workers within the border agency, who, due to their own expectations/perceptions of rape, asserted that in re-telling the horror of the narrative, certain emotions, demeanours and language needed to be used by the individual. She quotes one female case worker who went through a period of 'not believing' Kenyan asylum seekers' narratives. She notes that:

girls would say they'd been raped, and I didn't believe it. Looking at it from a woman's point of view, some - thing like that must be so terrible that maybe people cope with things differently but I'm sure however they cope with it, they will be able to convey the horror because, because it will be a lasting horror to them. And these girls just used to say it as, almost as if it was "oh and by the way, I was raped, and then I was raped by six men" or whatever, you know? Please, I don't believe them.<sup>100</sup>

As Herlihy, Gleeson and Turner note, throughout the asylum system, assumptions about human behaviour and demeanour are made in order to verify the truth of the asylum claimant's narrative.<sup>101</sup> Kylie McGrath spoke of her own experiences of demeanour within the asylum process. She noted that, for her clients, anxiety and nerves could manifest themselves within the asylum process, with giggling or other behaviour that would appear strange in the context, but which occurred due to the extreme stress of the environment. She highlighted that:

Things I have had to speak to my clients about is when they are smiling, because they are nervous. They don't want to talk about it, so they are quiet, like deferential and smiling, and giggling nervously whilst talking about sexual abuse. That's something that has me really worried.<sup>102</sup>

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<sup>100</sup> Jubany, O. 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within', *International Sociology*, 26(1)(2011):74-94, p.85.

<sup>101</sup> Herlihy, J., Gleeson, K. and Turner, S. W. 'What Assumption about Human Behaviour Underlie Asylum Judgements', *International Journal of Refugee Law*, 22(3)(2010):351-366p.354.

<sup>102</sup> McGrath, K. Lawyer. Interview conducted on 22<sup>nd</sup> April 2013, Aberystwyth.

Indeed, Baillot herself makes reference to the expected mannerisms of the asylum seeker, highlighting that within the system ‘there are many expectations of what you should be as a genuine asylum seeker - men and women - and I think that has to be that you have to have some level of vulnerability and victimhood’.<sup>103</sup> Linda Alcoff and Laura Gray speak of this expectation as well, noting that there is an obligation for survivors, specifically of sexual assault, to be ‘intensely and explicitly emotional’.<sup>104</sup>

I argue that it is within this struggle to speak of trauma that the silence of trauma can bridge the gap between what is speakable and what is unspeakable. So far within this thesis, I have spoken of the use of silence, as well as the practice of silencing as a means for states to retain control within the asylum process; through ill-defined definitions or labelling, states such as Britain have been able to retain a modicum of freedom to implement the 1951 Convention in a manner that allows them to adhere to international law whilst retaining a high degree of autonomy. However here, I am referring to the use of silence as a means for the asylum seeker to retain a level of power and control, within a system that is built against them. Toni Johnson writes that the asylum process is the one arena in which the ‘unspeakable’ events of persecution have to be articulated.<sup>105</sup> Yet, silence is perceived generally within the asylum system as a sign of evasiveness and unresponsiveness and is ‘subject to the imposition of unsolicited meaning’.<sup>106</sup> De Haere, Grietens and Verschuereen found that due to asylum seekers failing to coherently comprehend the extent of the trauma experienced, sometimes language was not always able to convey the depth of the trauma. To quote Stuart Henderson:

The nakedness of silence is not always pleasing to the ear. It can be stark, uncomfortable, excruciating. The hushed disturbance of a person trying to prevent themselves emotionally unravelling... allowing oneself to speak in the language of ghosts, especially when recalling the unimaginable...<sup>107</sup>

As no words were able to articulate their grief, they found that conversations would be impregnated with silences that were ‘long and heavily burdened’. But, De Haere, Grietens and Verschuereen found that rather than this distracting from the narrative and flow of the

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<sup>103</sup> Baillot, H. Independent Researcher, Formerly researcher/case worker for Scottish Refugee Council. Skype Interview on 15<sup>th</sup> July 2013.

<sup>104</sup> Alcoff, L. and Gray, L. cited in Razack, S. *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (London: University of Toronto, 2008), p.109.

<sup>105</sup> Johnson, T. A. M. ‘On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings’, *Social and Legal Studies*, 20(1)(2011): 57-78, p.67.

<sup>106</sup> Johnson, T. A. M. ‘On Silence, Sexuality and Skeletons’, p.57.

<sup>107</sup> Henderson, S. Broadcasting House, BBC Radio Four, <http://www.bbc.co.uk/programmes/b01r50yt> (10th May 2013), [accessed 10th March 2013].

conversation, in fact, by allowing the silence and by staying close to the ‘lived experience of pain’, these silences became a ‘strong way to speak’.

Containing their silences offered a space for the untold within the telling of stories, and provided some understanding for those experiences which words were unable to express - contrary to causing rupture in storytelling, these silent fragments functioned as an integral part of the story itself.<sup>108</sup>

Silences within a testimony can actually be sites of knowledge in themselves, providing substance to a story. The stumbling pregnant pauses, as well as gaps in a narrative, can refer to unspeakable events. To quote the American philosopher and poet, Henry David Thoreau, ‘In human intercourse, the tragedy begins not when there is misunderstanding about words but when silence is not understood’.<sup>109</sup> It is not just what is said that is of concern, as Ilhali stressed, ‘it’s what’s unsaid, it’s what’s left untold... you just can’t even imagine’.<sup>110</sup> Johnson notes that silent pauses can refer to traumatic events, but the space of the interview room and the court room ‘does not induce individuals to be open about their experiences’<sup>111</sup>, even though it is that openness that may well assist in the granting of asylum’.<sup>112</sup> Indeed, Avery Gordon describes the silences within asylum testimonies as ‘haunting’, and highlights the ways in which these pauses and silences make themselves visible within the process. He argues that ‘the apparition is one form by which something lost, or barely visible, or seemingly not there to our supposedly well-trained eyes, makes itself known or apparent to us, in its own way’.<sup>113</sup> These silent pauses can be so heavy and laden that they are almost tangible. Wendy Brown, writing on silence, notes that ‘speech harbours silences; silences harbour meaning... when speech ends the ensuing silence carries meaning that can only be metaphorized by speech, thus producing the conviction that silence speaks’.<sup>114</sup> In a sense, the words not spoken appear, although inaudible, with the weight of the silence bringing meaning and context to the pregnant pauses of a testimony. The playwright Harold Pinter engaged with the power of a silence when he observed that, ‘when true silence falls, we are still left

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<sup>108</sup> De Haere, L., Grietens, H. and Verschuere, K. ‘Holding Harm’, p.1671.

<sup>109</sup> Thoreau, H. D. cited in Broadcasting House, BBC Radio Four, <http://www.bbc.co.uk/programmes/b01r50yt> [accessed 10th March 2013].

<sup>110</sup> Ilhali, K. Interpreter for Scottish Refugee Council and NHS Scotland. Interview conducted on 9<sup>th</sup> July 2013, Glasgow.

<sup>111</sup> Helen Baillot speaks of the courtroom as a place where speech is offered, but it is not an invitation to the asylum seeker, but rather to the professionals, the lawyers and the Judge. She speaks of the courtroom as a performance, with certain roles needing to be fulfilled, even by the asylum seeker. Baillot, H cited at Translation and Asylum Claims: Matters of Law, Language and Silence. Workshop 3: Miscommunication and Silence: Problems and Potential Solutions, 14<sup>th</sup> June 2013, University of Glasgow.

<sup>112</sup> Johnson, T, A, M. ‘On Silence, Sexuality and Skeletons’, p.67.

<sup>113</sup> Gordon, A. cited in Johnson, T. A. M. ‘On Silence, Sexuality and Skeletons’, p.58.

<sup>114</sup> Brown, W. cited in Johnson, T. A. M. ‘On Silence, Sexuality and Skeletons’, p.67.

with echo but are nearer nakedness. One way of looking at speech is to say that it is a constant stratagem to cover nakedness'.<sup>115</sup> Silences should be allowed weight and not merely viewed as pauses in a fabricated story. A silence is far more powerful and speaks of the unspeakable events of trauma that the mind is still grappling to comprehend. For as Trinh Minh-Ha reminds us, silence can provide us with a means to language for 'it is a voice, a mode of uttering and a response in its own right'.<sup>116</sup>

In engaging further with the barrier of silence, Elaine Chase offers an alternative position on the silent pauses in a testimony in the asylum process. Focusing specifically on young adults, she argues that silence here is utilised in order for the youths to retain a level of agency within a system and process that is generally out of their control. In particular, for youths who end up in the social care system, as well as the asylum process, it can be a period in their life of intense scrutiny, invasiveness and uncertainty. Thus, silence here is not used necessarily because of events that are unspeakable, but as a means of gaining agency within a larger process.<sup>117</sup> 'Elected mutism'<sup>118</sup> can be viewed as a coping strategy, allowing the youth to 'look forward (rather than back) and to retain a modicum of control over their lives'.<sup>119</sup> In this instance, as in the example above, the utilisation of silence is not due to the applicant not engaging with the asylum system, or being deceptive, but rather is connected to control and agency within an extremely unsettling and insecure system. In this sense, silence can be a form of empowerment for the individual - allowing them to retain a level of discretion and privacy, in a system designed to make them reveal everything. Either way, silence deserves to have a place within the asylum system that does not merely adversely impact upon the asylum seeker's application. Silence needs to be identified as a location of (potential) empowerment for the asylum seeker, and not just assumed to be a site of deception.<sup>120</sup> As Aime Rowee and Sheena Malhotra assert, silence is a space of possibility.<sup>121</sup>

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<sup>115</sup> Pinter, H. 'Speech to the National Student Drama Festival in Bristol: The Echoing Silence' (1962), *The Guardian*, <http://www.guardian.co.uk/culture/2008/dec/31/harold-pinter-early-essay-writing>, [accessed 10th March 2013].

<sup>116</sup> Minh-Ha, T. 'Difference: A Special Third World Issue', *Feminist Review*, 25(1987):5-22, p.8.

<sup>117</sup> Chase, E. 'Agency and Silence: Young People Seeking Asylum in the UK', *British Journal of Social Work*, 40(2010):2050-2068, p.2052 and 2065.

<sup>118</sup> Muqit, P. Senior Legal Officer for Freedom from Torture. Telephone Interview conducted on 1<sup>st</sup> November 2012.

<sup>119</sup> Chase, E. 'Agency and Silence', p.2065.

<sup>120</sup> Johnson, T. A. M. 'On Silence, Sexuality and Skeletons'.

<sup>121</sup> Rowe, A. C. and Malhotra, S. 'Still the Silence: Feminist Reflections at the Edges of Sound', in Rowe, A. and Malhotra, *Silence, Feminism, Power: Reflections at the Edges of Sound*, (London: Palgrave Macmillan, 2013), pp. 1-24, p.2.

### Disclosure, Trust and the Culture of Disbelief

Trauma does not lend itself to being disclosed quickly. Such disclosure is a laboured process that takes immense time, patience and trust in order for a victim to reveal the details of what is an intensely private, personal and harrowing experience. The asylum system demands that all information pertaining to the case is divulged at the earliest possible moment. Yet, as Asylum Aid remarks, sometimes the questions asked of asylum seekers require ‘feats of memory that would normally demand a scrupulously maintained diary’.<sup>122</sup> Indeed, Mary McCormack refers to the problems associated with the narrative construction within the asylum process:

Particularly when a lot is about dates... very different expectations. I don’t remember what I was doing last October. And that’s me, my perfectly humdrum life. If you’ve been separated, or traumatized... also, there is the expectation that you’ll tell a stranger everything the first time you meet them and if you don’t, then you’re lying or untrustworthy.<sup>123</sup>

A female asylum seeker, who, for various reasons, such as being traumatised, intimidated by male staff or grappling with shame, does not report an incident of rape or sexual violence as soon as possible, will find her whole asylum application undermined and her credibility dented. The following example highlights the impact that a delay in disclosure can have on an application. The Home Office argued in one refusal letter that:

The Secretary of State is prepared to accept in general that a person might seek to avoid mentioning being raped because of the immense distress and shame, but given that you have offered no credible explanation for the other discrepancies in your statements, and why your memory is apparently clearer now, some two years after you left [place name], he is not prepared to accept that you were raped as claimed.<sup>124</sup>

The border agency’s gender guidelines state that late disclosure of gender-based violence should not be held against the applicant’s credibility, for there are various reasons as to why she may have been reluctant to disclose the information, such as ‘feelings of guilt, shame, and

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<sup>122</sup>Asylum Aid. ‘*Still No Reason at All*’, p.28.

<sup>123</sup> McCormack, M. Trustee for Refugee Action Leeds and member of End Child Detention Now. Skype Interview conducted on 24<sup>th</sup> January 2014.

<sup>124</sup> Home Office cited in ‘Asylum Aid, *Still No Reason at All*’, p.28.



concerns about family honour, or fear of traffickers or having been conditioned or threatened by them'.<sup>125</sup> Indeed, the Immigration Appellate Authority<sup>126</sup> also states this. It stresses:

delay in claiming asylum or revealing full details of an asylum claim will not necessarily be due to lack of credibility of a particular asylum claim or claimant. Torture, sexual violence and other persecutory treatment produce feelings of profound shame. This 'shame response' is a major obstacle to disclosure. Many victims will never speak about sexual violence or will remain silent about it for many years.<sup>127</sup>

Silence is often viewed as a negative part of the process, as the asylum seeker is perceived as choosing not to engage with the system. But, as detailed above, silence can be used as a means of referring to unspeakable events or as a way of maintaining control within an extremely unstable and insecure environment. Within the asylum system, many women end up choosing to remain silent due to the nature of their trauma, or as a means to preserve their personal dignity or family honour. Syd Bolton, a solicitor for the Migrant Children's Project, states that in particular, women who are mothers, will seek to protect their children before themselves, and thus they may not disclose key personal events. They may not mention certain incidents in order to defend other people's positions, or maintain family integrity, to the disadvantage of their own asylum claim.<sup>128</sup> For as Ilhali highlighted:

Even talking to a stranger about things in your family is considered a bad thing to do... even at the smaller level of what will people think, if a women was a victim of a forced marriage, domestic violence, or something, then it would be why are you telling everybody else? Everybody knows about our situations, so this is the family... you're bringing shame on the family, dishonour on the family... it's her fault somehow for discussing this, in the wider community you're bringing shame on the men somehow.<sup>129</sup>

The asylum system operates in a fast paced manner. As New Labour sought to drive down numbers, thus inevitably the process was quickened: the government wanted to reduce the duration of an asylum application to six months. Yet, this time period is far too short to

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<sup>125</sup> UK Border Agency. 'Gender Issues in the Asylum Claim', [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257386/gender-issue-in-the-asylum.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf) [accessed 6/06/2014], p.17.

<sup>126</sup> An independent judicial body established by the Immigration Act 1971 to monitor the British refugee system. It was superseded in 2005 by the Asylum and Immigration Tribunal.

<sup>127</sup> Berkowitz, N. and Jarvis, C. *Asylum Gender Guidelines* (Immigration Appellate Authority, 2005), p.51.

<sup>128</sup> Bolton, S. Solicitor for Migrant Children's Project, Coram Children's Legal Centre. Interview conducted on 16<sup>th</sup> November 2012, London.

<sup>129</sup> Ilhali, K. Interpreter for Scottish Refugee Council and NHS Scotland. Interview conducted on 9<sup>th</sup> July 2013, Glasgow.

engage with the nature of some asylum claims. For women who have faced sexual violence and rape, it is not feasible to expect them to disclose the nature of their persecution in such a manner that they will be granted refuge within the time available. Disclosure requires trust and time, and is not a process that, I argue, can be expedited without consequences occurring for the asylum seeker. Women Against Rape reported that rape survivors often struggle to articulate their experiences without having been through a considerable period of healing with a specialist.<sup>130</sup> Psychotherapist Jacky Roberts argues that it is due to the inability and fast-paced, detail orientated asylum system that many women are denied. Roberts stresses that:

Some people just find it impossible to talk and then if they do talk, it is often quite jumbled or confused and that's because they feel so much pressure that they are not able to think straight; they're not able to think of dates or what happened exactly when... In the nature of trauma, everything gets quite confused. I think that's partly why people get refused, especially women because they're not able to think clearly and calmly on the spot about what happened to them.<sup>131</sup>

Certainly, McCormack spoke of an incident with a female asylum seeker who had never revealed to anyone apart from her husband what had happened to her, for that was how the family unit operated. The woman argued that she could not speak about the rape because if she did she could not function on a daily basis.<sup>132</sup> Nina Murray, Women's Policy Development Officer for the Scottish Refugee Council, argues that it may take years before an asylum seeker discloses their story of sexual violence.<sup>133</sup> Murray argues that to expect someone to disclose within a couple of weeks of it actually happening is severely problematic. Even worse, if a woman is streamed in the Fast-Track system, then she must disclose her story within days of entering Britain. Asylum Aid found that many of their female participants noted that the pace of their cases was progressing so quickly that they were not able to acquire the necessary evidence from either medical/specialist reports or their country of origin.<sup>134</sup>

Establishing a narrative of rape from an asylum seeker is supposed to be done in such a way

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<sup>130</sup> Women Against Rape, cited in Webber, F. *Borderline Justice*, p.40.

<sup>131</sup> Roberts, J. cited in Deutsche Welles, 'Tough times for female asylum seekers in the UK', <http://www.dw.de/about-dw/who-we-are/s-3325>, [accessed 28/08/2012].

<sup>132</sup> McCormack, M. Trustee for Refugee Action Leeds and member of End Child Detention Now. Skype Interview conducted on 24<sup>th</sup> January 2014.

<sup>133</sup> Murray, N. Scottish Refugee Council, Women's Policy Development Office. Interview conducted on November 7<sup>th</sup> 2012, Glasgow.

<sup>134</sup> Asylum Aid. '*Unsustainable the quality of initial decision-making in women's asylum claims*', p.41.

that re-traumatisation of the individual is minimised. The border agency case worker is supposed to handle the applicant sensitively and extract the details of her story in a safe and consistent manner. But this all takes time. It involves a long process of building trust with the applicant in order for them to divulge intimate and harrowing details in a manner that is coherent. Within the New Asylum Model<sup>135</sup>, every asylum seeker should be allocated a case owner who is responsible for all aspects of their application - the so-called end-to-end case management system. This was viewed as a means of standardising the system but also as a means of building trust - the asylum seeker would engage and speak with only this one person. However, Asylum Aid noted that out of their pool of participants, the majority had engaged with more than one case owner. Strikingly, Asylum Aid found that in 33% of their cases, the case owner who drafted the decision letter was not the same case owner who conducted the interview.<sup>136</sup> Worryingly though, many asylum seekers, during this significant period of interviewing, did not know what was expected of them and did not necessarily know what information they should be disclosing for their asylum claim.<sup>137</sup> More importantly, due to the norms within the host culture, the case worker expects the asylum applicant to disclose information in a specific manner that is alien to the asylum seeker.<sup>138</sup>

When it comes to asylum seekers - and I speak here especially of female asylum seekers - what is needed in order for disclosure to occur, is a significant period of time where the woman can work out what is required of her, build trust with the case owner (who should remain the same) and slowly start to develop the narrative of her persecution, possibly with the aid of specialist help from a psychiatrist. It does not appear as if this is an experience that can be rushed or quickened without seriously impacting on the quality of the final decision. Storytelling, as Erin Power highlights 'is the primary and most important evidence' that an asylum seeker possesses.<sup>139</sup> As such, it should be allocated the time and significance it deserves in order for an asylum seeker to have a chance at presenting their case in as just a manner as possible.

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<sup>135</sup> The New Asylum Model was brought in by New Labour in 2005 and 'designed to prevent the kind of bottlenecks and delays that occur when responsibility for asylum cases is distributed across a complex bureaucracy', Gibney, M. J. 'Asylum and the Expansion of Deportation in Britain', *Government and Opposition*, 43(2)(2008):146-167, p.161.

<sup>136</sup> AsylumAid. '*Unsustainable the quality of initial decision-making in women's asylum claims*', p.34.

<sup>137</sup> Women for Refugee Women. '*Refused: The Experience of Women Denied Asylum in the UK*', p.23.

<sup>138</sup> Herlihy, J., Jacobson, L. and Turner, S. W. 'Just Tell Us What Happened to You', p.669

<sup>139</sup> Power, E. 'In My Own Words: Erin Power', The Testimony Project, <http://www.testimonyproject.org/testimonyprojectuk>, [accessed 25/09/2012].

The final barrier that I would like to engage with in this discussion is a central one that goes to the heart of the asylum system. It impacts on how the asylum seeker is presented, whether or not they will end up in the Fast-Track system, and whether they will be granted refugee status. The culture of disbelief is a massive barrier that impacts upon the whole asylum system and a huge hurdle for asylum seekers to negotiate. It also goes to the heart of what the Refugee Convention stands for. As the border agency notes, it has a long tradition of offering protection to *genuine* refugees. Those who are deemed disingenuous are in their eyes, not genuine. The issue at stake here is the culture of disbelief. The culture of disbelief feeds into the many barriers discussed above. It underpins the barriers of shame, trauma, memory recall, language and silence, as well as body language. Any problems negotiating these barriers are perceived as discrepancies or fallacies, resulting in the asylum seeker not being believed. However, the culture of disbelief begins from the very start of the asylum process. The border agency states that, Britain has a ‘proud tradition of providing a place of safety for *genuine* refugees. However, we are determined to refuse protection to those who do not need it, and will take steps to remove those who are found to have made false claims’.<sup>140</sup> Thus, all those individuals who fail to qualify for protection are not genuine asylum seekers. It is implicit in the language that the border agency uses to describe its actions that there is a clear-cut distinction between genuine asylum claims and invalid claims.

As Debora Singer notes, the culture of disbelief is a ‘huge problem’ within the asylum system, but is an issue for women in particular.<sup>141</sup> Certainly, Russell Hargrave was quick to stress that women as a category are disbelieved all too often and are regarded with such an inbuilt sense of disbelief within the British asylum system<sup>142</sup> that this leads to what Women for Refugee Women describe as ‘perverse and unjust decisions’.<sup>143</sup> It has happened more than once that the British asylum system has accused a female asylum seeker of fabricating her story, asserting that ‘the Appellant invented [her abuse]... during the course of cross-examination to seek to pull the wool over the eyes of the tribunal’.<sup>144</sup>

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<sup>140</sup> UK Border Agency. *Asylum*, <http://www.ukba.homeoffice.gov.uk/asylum/>, [accessed 20/09/2012].

<sup>141</sup> Singer, D. ‘We need a gender-sensitive asylum system’, *The Guardian*, (Monday 30<sup>th</sup> November 2009), <http://www.theguardian.com/commentisfree/libertycentral/2009/nov/30/gender-women-asylum> [accessed 28/04/2014].

<sup>142</sup> Hargrave, R. Policy Adviser, Asylum Aid. Interview conducted on 26<sup>th</sup> October 2012, London.

<sup>143</sup> Women for Refugee Women. ‘*Refused: The Experience of Women Denied Asylum in the UK*’, p.22.

<sup>144</sup> Cited in Human Rights Watch. ‘*Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK*’, (2010), <http://www.hrw.org/sites/default/files/reports/uk0210webwcover.pdf>, [accessed 28/04/2014], p.42.

The culture of disbelief, as Mike Lewis, former Chief Executive Officer for the Welsh Refugee Council asserts, is based upon ‘myth, fantasy and opinion’,<sup>145</sup> resulting in too many individuals being denied a fair, just and honest asylum process. Amnesty International found that the border agency was basing asylum decisions upon ‘unreasonable and unjustifiable assertions’.<sup>146</sup> As one refugee noted of the asylum system:

I was in shock, weak, but I should have told the man who told me I was lying, that if I would get my mother and sisters back I would happily leave... I loved my old life; people came to my country [Sierra Leone] in the past you know... I am a fighter, I am used to fighting to live, but to be told ‘you faked your life’ is a little like death.<sup>147</sup>

Indeed, Ilhali, reflecting on her experience within the asylum system noted that:

... there might be some people at the Home Office who think she’s putting that on a bit... but, you think to yourself, even if only part of that is true, to me that is shocking enough and that shouldn’t happen. No matter what fraction of that is true, that’s enough.<sup>148</sup>

The culture of disbelief impacts upon the barriers already mentioned. A female asylum seeker is unlikely to stand up and assert her position for fear of being too forthright towards figures of authority. She is unlikely to speak back and maybe too traumatised and ashamed to articulate her story, and this will impact on her body language as well. As the discussion above highlights, this is not necessarily a sign that she is being evasive, but that she is personally (mentally) struggling with the trauma and her fear of the asylum system. Yet, it has been argued that the border agency view this sort of behaviour unfavourably - perceiving the female asylum seeker to be uncooperative, disengaged and lying. As Gareth Mulvey, Researcher for the Scottish Refugee Council notes, for the border agency, ‘their starting point is that the claim is wrong, it’s false, it’s bogus and the onus is on the individuals to prove otherwise’.<sup>149</sup> Indeed, Asylum Aid found that caseworkers within the border agency appeared to not be considering the issues at the centre of gender-related persecution, noting that there appeared to be a ‘striking failure’ to recognise the type of persecution that many

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<sup>145</sup> Lewis, M. Former Chief Executive Officer for the Welsh Refugee Council. Telephone Interview conducted on 6<sup>th</sup> December 2012.

<sup>146</sup> Amnesty International cited in Asylum Aid. ‘*Unsustainable the quality of initial decision-making in women’s asylum claims*’, p.18.

<sup>147</sup> Laura cited in Human Rights Watch. ‘*Fast-Tracked Unfairness*’, p.42.

<sup>148</sup> Ilhali, K. Interpreter for Scottish Refugee Council and NHS Scotland. Interview conducted on 9<sup>th</sup> July 2013, Glasgow.

<sup>149</sup> Mulvey, G. Scottish Refugee Council, Research Office. Interview conducted on 7<sup>th</sup> November 2012, Glasgow.

women were fleeing from.<sup>150</sup> Recent research by Helen Baillot, Sharon Cowan and Vanessa Munro found that a number of case owners perceived rape narratives as ‘fabricated’ stories and viewed female asylum seekers’ testimonies with a large amount of scepticism. Baillot, Cowan and Munro found that border agency caseworkers were more disposed to believing male asylum seekers’ rape narratives than women’s rape narratives, on the assumption that rape and sexual violence were far more shameful for a male to disclose than for a female.<sup>151</sup> A male would be less likely to make up such an accusation than a woman. This highlights not only the apparent lack of engagement with asylum narratives but also the apparent normalisation of sexual violence for women: it has become the norm and is not a reason to seek asylum. A final point made by Baillot is that:

It’s almost contrary of, I suppose what you might see as a... you know if you were a journalist looking into human rights somewhere - and twenty separate people told you the same story. I think as a journalist you’d have the contrary response of ooh, definitely something is going on... it denies the confirmatory potential of the fact that you have seen twenty Somalia women and they’ve all told you they’ve been gang raped despite coming from different villages and different regions. The conclusion I would have thought logical is that, ‘wow, in Somalia women get raped a lot’.<sup>152</sup>

Indeed, research by Asylum Aid reveals a shocking lack of knowledge and awareness with regard to female related persecution, with a case worker referring to an arranged marriage rather than a forced marriage, another stating that they had never heard of female circumcision, and a case owner deciding that since an asylum seeker’s husband had only tried to hit her once this did not constitute domestic violence.<sup>153</sup> Women for Refugee Women argue that the border agency, rather than being a place of humanitarianism, gives the impression that their function is to ‘catch asylum seekers out... they seem to work from the premise that most asylum seekers are opportunistic liars’.<sup>154</sup> Protection as a concept does not appear to factor highly within the border agency system. The asylum seeker must tell her story of persecution and trauma, but with little corroborating evidence the culture of disbelief

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<sup>150</sup> Asylum Aid. ‘*Unsustainable the quality of initial decision-making in women’s asylum claims*’, p.6.

<sup>151</sup> Baillot, H., Cowan, S. and Munro, V. E. “‘Just a Story?’: rape narratives and credibility assessments of women seeking asylum’ in AsylumAid’s Women’s Asylum News: Women’s Project, (June 2012, Issue: 111) [http://www.nuffieldfoundation.org/sites/default/files/files/WAN\\_June\\_2012.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/WAN_June_2012.pdf) [accessed 28/04/2014], p.4.

<sup>152</sup> Baillot, H. Independent Researcher, Formerly researcher/case worker for Scottish Refugee Council. Skype Interview on 15<sup>th</sup> July 2013.

<sup>153</sup> AsylumAid. ‘*Unsustainable the quality of initial decision-making in women’s asylum claims*’, p.34.

<sup>154</sup> Webber, F. ‘As a woman I have no country: the denial of asylum to women fleeing gender-related persecution’, Women for Refugee Women, <http://www.refugeewomen.com/images/Pdfs/asawoman.pdf> [10/11/2012], p.14.

at the heart of the system puts the asylum seeker immediately on the back foot.

Interestingly, the culture of disbelief, and the notion that the asylum seeker is lying, is connected to the fact that the border agency case owners are engaged at the front line, day-in-day-out. And, it should be stressed that this is not applicable to all case owners. As many of the interviewees for this research noted, it is a lottery as to whether or not you will get a lawyer, a case owner (and a Judge) who will take the time to understand and open up all the potential doors of enquiry in order to get to the heart of the asylum claim before them.<sup>155</sup> There are reports of case owners and lawyers allowing asylum seekers flexibility and, crucially, the time to acquire the necessary evidence - medical or specialist reports - to help their case.<sup>156</sup> Certainly, Simon Russell, a Judge for the First Tier Asylum Tribunal as well as a Senior Protection Officer in the UNHCR, was keen to stress that:

A lot of money goes into the system, a lot of money, and I think you feel that when you go to places like Afghanistan and Sudan and really the money that's available for the work is tens of dollars per person. Whereas in the UK asylum system we are spending billions. I don't think people understand quite how privileged a position they are in. Particularly in terms of legal representation; you know, you sit on the Tribunal and lawyers will say that they haven't had time to do something, whatever, and actually, they have had time, they've got money, resources and they don't use them properly which is very frustrating and they don't represent properly.<sup>157</sup>

Yet, although there are a considerable number of good case owners doing their job diligently, this does not detract from the fact that the culture of disbelief is still prevalent within the British asylum system. There appears to be a severe lack of consistency in the approach to asylum cases.

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<sup>155</sup> Baillot, H., Cowan, S. and Munro, V. E. "Just a story?": rape narratives and credibility assessments of women seeking asylum', p.3.

<sup>156</sup> AsylumAid. '*Unsustainable the quality of initial decision-making in women's asylum claims*', p.41.

<sup>157</sup> Russell, S. Judge for the First Tier Asylum Tribunal and Senior Protection Officer for the UN High Commissioner for Refugees. Interview conducted on 26<sup>th</sup> October 2011, Geneva. Yet, Russell's comment on the money being injected into the system was challenged by several lawyers that I spoke to. The average asylum case for a lawyer takes between 40-60 hours. Yet, in 2007 New Labour introduced a graduated fee system, instead of an hourly rate for lawyers, meaning that rather than getting paid hourly, they would be paid by case blocks. Piya Muqit argues that the current government funding structure does not enable lawyers to build 40-60 hours of work, stressing that the quality of representation is being severely affected and noting that 'the pressure is just to get through volume, rather than on quality'. The change in fee structure led to the closure of one of Britain's largest not-for-profit providers of asylum advice and representation, Refugee and Migrant Justice. With the continual reduction in legal aid, Julian Norman argues that navigating the asylum system 'is impossible. If you are an asylum seeker you need a lawyer who does legal aid and these are becoming rare'. Muqit, P. Senior Legal Officer for Freedom from Torture. Telephone Interview conducted on 1<sup>st</sup> November 2012 and Norman, J. Barrister for Gray's Inn. Interview conducted on 25<sup>th</sup> October 2012, London.

Could it be that they are case hardened, having heard too many stories of trauma? Could it be that in order to protect themselves from stories of trauma they are perceiving asylum applications, as ‘just a story’. Is this resulting in asylum narratives becoming ‘routine and mundane over time... the applicants involved becoming increasingly interchangeable and with it becoming more difficult to avoid creating hierarchies of suffering that demand ever higher levels of abuse in order to incite their sympathy’?<sup>158</sup> Ilhali noted that when involved in interpreting an asylum interview, she felt as though she was implicit in re-traumatising the individual. She noted that, ‘The other thing that always bothers me is this person may have stored it away [the memory] in some part of the brain where we try to deal with things, and then all this is being brought up again, and I am part of that instrument... you feel ashamed and bad yourself’.<sup>159</sup> Herlihy, Jobson and Turner argue that the case owners [and the interpreters] have a stressful job;<sup>160</sup> they are on the frontline listening to harrowing accounts with little to no corroborating evidence to support the stories.<sup>161</sup> Significantly, when hearing stories of trauma, it is exceptionally difficult for the listener to empathise with the victim. How are you able to relate to something that is unimaginable and incomprehensible? Susan Brison notes that the person bearing witness to a traumatic story has an ‘active fear of identifying with those whose terrifying fate forces us to acknowledge that we are not in control of our own’ - it could easily happen to us. Brison writes that the one bearing witness wants to protect themselves and will try not to picture the victim’s traumatised life, in order to maintain control and security over their own life.<sup>162</sup> For the world in which this violence happened to the victim is also the witness’s world; it is our world. Nina Murray expresses this point well, arguing that within our world there exist systems of persecution that are just not understood by those making the decisions, especially gender persecution. Some of the stories that asylum seekers articulate are beyond the reality of the border agency case owner, making them impossible to understand and comprehend. She highlights starkly that the

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<sup>158</sup> Baillot, H., Cowan, S. and Munro, V. E. “Just a story”, p.4.

<sup>159</sup> Ilhali, K. Interpreter for Scottish Refugee Council and NHS Scotland. Interview conducted on 9<sup>th</sup> July 2013, Glasgow.

<sup>160</sup> Herlihy, J, Jobson, L, and Turner, S. ‘Just tell us what happened’, p.673.

<sup>161</sup> Interestingly, when speaking with Isabelle Findlay, who worked as an ESOL teacher in Gravesend, Kent. Obviously, she was far removed from the interview processes, but she herself highlighted the impact of working with asylum seekers, discussing the ‘real horror stories’ that would sometimes emerge when getting to know her students, stating that “there is only so much that you can take”. Even in this capacity, Findlay was affected by the asylum narrative, so how much then can we assume that the case workers and lawyers are affected by being directly engaged in the asylum process? Findlay, I. Former English as Secondary Language (ESOL) Teacher. Telephone interview conducted on 27<sup>th</sup> January 2014.

<sup>162</sup> Brison, S. J. *Aftermath: Violence and the Remaking of a Self*, (Oxford: Princeton University Press, 2002), p.3.



decision maker is not going to struggle or try to understand what the asylum seeker is saying.<sup>163</sup> It will be viewed as lacking in credibility.

The asylum process is inhabited by a culture of disbelief; yet to argue that this is merely due to disbelief of the story is too simple. That the case owners could be protecting themselves by viewing the asylum narrative as ‘just a story’, is an issue that goes some way to explaining the large rejection rate of female asylum seekers. As one asylum seeker put it:

The HO officials are strangers and carry out a routine. Therefore you can tell them many heartbreaking stories and it does not affect them. And because they don't show any emotions or sympathy it is very hard to feel relaxed and open. Maybe if I was encouraged to talk more about and if they understood me better and I saw that they showed any sympathy, maybe I would have said more. The HO official I had was very cold. I felt she did a job, following a routine, asking questions.<sup>164</sup>

## **Conclusion**

The analysis in this chapter of the barriers to asylum has aimed to highlight the hurdles, both structural and psychological, that face female asylum seekers in attaining refugee status. From the perspective of the border agency, many of these barriers are ignored, or the asylum seeker is perceived to be disruptive and evasive. But the analysis highlights that in fact, rather than being viewed as merely cooperating, or not cooperating, many of these barriers, through no fault of asylum seeker, are connected to the trauma that they have experienced or are due to the asylum seeker engaging with a system that is situated within a different culture. Importantly, the asylum seeker must speak in a system where there is a strong assumption as to what a genuine asylum seeker should or should not be. For the onus of the system is on the asylum seeker, to speak of unspeakable events, normally with little to no evidence, and in turn, to have that story believed. This is how an asylum seeker gains their international right to refugee protection. Yet, the essence of ‘becoming’ a refugee flies in the face of what it takes to become a refugee in the first place. The experience of trauma and the impact on memory, as well as memory recall can severely challenge the act of speaking. Add on top of

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<sup>163</sup> Murray, N. Scottish Refugee Council, Women's Policy Development Office. Interview conducted on November 7<sup>th</sup> 2012, Glasgow.

<sup>164</sup> Participant 9 cited in Bogner, D., Brewin, C. and Herlihy, J. ‘Refugee's Experiences of Home office Interviews’.

that cultural and gender clashes of culture, issues of shame and body language, as well as the withdrawal of the voice through elected mutism, the asylum system seems a harsh place for a woman who has no evidence to prove that she was raped, other than a story that *must* be told. The focus is all on the woman; can she prove alongside the case owner and her solicitor (if she has one) that her story is *genuine* and that she is in fact a *genuine* refugee? Within the British system, and connected to the culture of disbelief is the denial of victimhood. The asylum seekers who arrive and who are being processed are not viewed as victims; they must be identified and interviewed, they must tell and re-tell their story, collate evidence if possible, be cross examined and then, judged. When this is all over they might then be awarded refuge.

What the chapter has attempted to highlight is the significance of language and speech within the process of refuge. Language is both the key and the barrier to refuge. The demanding of speech confronts the asylum seeker with barriers of traumatic memory recall, shame, silences and body language, as well as the demanding fast process of the British asylum system. The British system, I argue, demands too much too soon from asylum seekers, and I speak here specifically of female asylum seekers. As Erin Powers, Group Manager for the UK Lesbian & Gay Immigration Group (UKLGIG) stresses, storytelling ‘is the primary and most important evidence’ that an asylum seeker possesses.<sup>165</sup> The asylum system needs time and space and the asylum narrative should be allowed to develop. In order to attain refuge, but significantly, to overcome traumatic memories, speech is essential; the telling of a story can help bring perspective and clarity to unimaginable events. Yet, our system does not allow the space for the trauma to emerge in a way that can reflect positively upon the asylum seeker.

Chapter Four has continued the discussion on the relevance and significance of language and silence. Chapter One focused on the use of silence and silencing within the 1951 Convention, which has allowed states a high degree of control when implementing it. Chapter Two examined regional conventions in order to reflect and fill in the silences in the traditional understanding of refuge. Chapter Three brought the analysis down to the state level, focusing on the British refugee system and examining how, through the various policies enacted, consecutive governments have framed and marginalised the figure of the

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<sup>165</sup> Power, E. ‘In My Own Words: Erin Power’.

asylum seeker in such a way that allows the government to retain a high degree of control and power, whilst ensuring their commitment to international refugee law. Chapter Four has allowed the discussion on language and silence to deepen. It has taken the analysis down to the individual level and engaged with speech, language and silence within the British asylum system, highlighting the tensions and power relations at play in the refugee regime along the way.

The thesis in developing the themes of silence and language highlights the various ways in which they manifest themselves in the asylum system and examines the impact that they have on becoming a refugee. In developing upon the notion of silence and language within the refugee system, Chapter Five will extend this analysis further, providing an alternative means of 'becoming' that is diametrically opposed to that of the British system. Rather than emphasising speech, the emphasis here will be on silence and the body, with those in authority having the power of speech. In doing so, Chapter Five continues with the discussion on the discrepancies between the 1951 Convention and the practical implementation of the operation of the protection regime.

## Chapter Five

### *An Alternative Way of Becoming: Speech, Silence and Language Beyond Britain*

#### **An Alternative Way: Refugees, the body and ‘Silent Emissaries’**

Within Britain, in order to attain refugee status, the female asylum seeker must first speak of her persecution, and articulate memories that may be unspeakable and incomprehensible, in order to secure safety. She needs to articulate her trauma in the form of a coherent and detailed narrative that will be accepted by the border agency as credible. The onus is upon the asylum seeker to speak and to be believed. This is how the asylum system operates for many parts of the Western world - only by engaging and speaking within the system is a person able to become a refugee. As noted in Chapter Four, language, speech, silence, and silencing, are all central to the process of becoming a refugee within the British asylum system. In this chapter I want to extend the analysis beyond Britain to engage with how one becomes a *prima facie* refugee in an African context. How does one become a refugee during a mass movement (humanitarian crisis) and what impact does this then have on the speech, language (and the silencing) of the refugee? What I want to highlight within the following analysis is an alternative means of ‘becoming’, which is diametrically opposed to that of the British system, yet in which there are still discrepancies between the refugee regime and protection. Here the emphasis is upon the silenced other and their body, rather than on speech, with those in a position of authority having the power of speech (as well as an audience to hear them). My focus is on the notion of homogenisation and clinical humanitarianism, as well as the bureaucratisation of knowledge and how unequal power relations are established with the refugees, which results not only in the loss of the individual, but significantly, in the silencing of the refugee voice.

The chapter focuses upon the role of the aid agencies - particularly the UN High Commissioner for Refugees (UNHCR) - and their dominance in the humanitarian discourse during emergencies. The chapter engages with the UNHCR’s bureaucratic nature within

refugee crises, as well as the depolitical, and dehistoricised nature of the 'clinical' refugee camps that emerge in response to the highly charged humanitarian environment. The chapter provides a detailed engagement with the Dadaab refugee camps of Kenya, in order to highlight in practice, the positioning of the prima facie refugee and how, through the processes of humanitarianism, the refugees are rendered as a collective whole.

It should be noted that the emphasis here is not on the 1951 Convention but on the mandate of the UNHCR. However, the arguments of language and silence presented in relation to the 1951 Convention can be made towards the UNHCR mandate. For I argue that practices of language, silence and silencing are being employed via the UNHCR mandate towards the refugee. Significantly, through a postcolonial politics lens, I have tried to highlight the impact that this then has upon the language and voice of the refugee, when they are positioned permanently as a victim. I examine the relations at play between the aid agencies and the refugees, and how is the refugee positioned through the practices of aid.

Chapter Five will begin by discussing the construction of the refugee other in mass movements of refugees in an African context, focusing on the identity construction of prima facie refugees. By examining the loss of individuality and the objectification of the refugee, the chapter examines the relationship between aid agencies such as the UNHCR and the refugee, focussing on othering, labelling and silence. Examining the processes of clinical humanitarianism and the bureaucratisation of knowledge, the chapter discusses how organisations such as the UNHCR establish and create knowledge of the crises in which they operate, and how they produce reports and statistics, and ultimately, have a voice within the crisis. The aid agencies dominate the crises at the expense of the refugees who are effectively silenced - although not silent. I argue that refugees do have a voice, although they are denied an audience with which to interact. The chapter concludes by providing a reflexive examination of the Dadaab refugee camp in Kenya as an example to highlight the relations at play between the aid agencies and the refugees, identifying practices of labelling, silencing and othering within the camp that perpetuate the unequal power relationship.

Chapter Five continues to build upon the tensions between the refugee regime and the refugee figure through a postcolonial framework, highlighting the unequal power relations at play, as well as the processes of othering and silencing in the refugee regime at large. The purpose of the chapter is to provide a reflective examination of the wider processes of refuge,

and take the African example of *prima facie en masse* refugees, as an exercise to highlight the importance and value of language and speech within the refugee system (be it within the British system, or the Kenyan system under the management of the UNHCR). In undertaking this research, I want to present an alternative way in which refugees are portrayed, one where language is removed and the position of the refugee is placed within a fixed space of the vulnerable, silent and homogenous other. The chapter aims to highlight how the refugee regime engages with the other - on the one hand from afar and on the other hand when they are in our presence - and examine how that then impacts, not only upon the language and silence of the individual asylum seeker in need, but also on the construction of their identity as the refugee other.

### **Construction of the Refugee ‘Other’**

In 1969 the African Union adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa. As noted in Chapter Two, the Convention was heavily influenced by the 1951 Convention; however, it was tailored to engage with and handle the refugee flows that were unique to the African continent. Unlike the 1951 Convention, the OAU Convention differed by including a number of distinctive specifications within its refugee definition. Article 1 of the Convention stipulated that the term ‘refugee’ would be applicable to all individuals who had fled their country of origin owing to external aggression, occupation, foreign domination, or events seriously disturbing the public order.<sup>1</sup> In contrast to the 1951 Convention, individuals under the OAU Convention could then obtain *prima facie* refugee status. They would not be processed on an individual case basis and they did not need to provide specific evidence of their persecution. As refugee flows were larger within the African context, the individualistic nature of the 1951 Convention was viewed as inappropriate and too narrow to engage with African demands.<sup>2</sup> In the context of the OAU Convention, an individual who had had to cross an international border due to internal or external aggression, occupation or foreign domination, would be granted *prima facie* refugee status. The refugee would not need to present her story or offer corroborating evidence - the fact that she had moved geographically was proof that she was a refugee.

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<sup>1</sup> UN High Commissioner for Refugees. *Convention and Protocol Relating to the Status of Refugees*, (Geneva: Media Relations and Public Information Service, 2006), p.7.

<sup>2</sup> See: Awuku, E. O. ‘Refugee Movements in Africa and the OAU Convention on Refugees’, *Journal of African Law*, 39(1)(1995):79-86 and Arboleda, E. ‘Refugee Definition in Africa and Latin America: The Lessons of Pragmatism’, *International Journal of Refugee Law*, 3(2)(1991):186-207.

It should be noted however, that the UNHCR itself still operates within the African continent, for many states are signatories of both the UNHCR and the OAU Convention (plus, a few are signatories of the Bangkok Principle). Therefore, as well as the mandate of the OAU, states and refugees also have the mandate of the UNHCR, as well as the 1951 Convention, to draw upon for assistance (and where appropriate, the Bangkok Principles). The UNHCR Handbook makes specific reference to the need for prima facie refugee status, noting:

While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called “group determination” of refugee status, whereby each member of the group is regarded prima facie (i.e. in the absence of evidence to the contrary) as a refugee.<sup>3</sup>

As mentioned previously, the UNHCR is perceived as the ‘guardian’ of the international refugee regime and, as Gil Loescher and James Milner have noted, due to the continuing refugee crisis, specifically in continents such as Africa, host states have almost ‘universally abdicated’ their responsibility for refugees to the UNHCR.<sup>4</sup> It is because of this that the UNHCR has established a ‘primary role’ in the facilitation and development of support and assistance for refugees. As Amy Slaughter and Jeff Crisp, (Head of Policy and Evaluation Unit, UNHCR) assert, the concept of state responsibility towards refugee management has eroded over the years, which has led the UNHCR to undertake a variety of long term duties with regard to refugees, even within states that are signatories of the 1951 Convention and the 1967 Protocol.<sup>5</sup> Hence, the UNHCR has primary responsibility for many of the refugee camps situated throughout the continent of Africa.

It is during mass movements of people, when they fall under the umbrella of the

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<sup>3</sup> UN High Commissioner for Refugees. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992), <http://www.unhcr.org/3d58e13b4.html>, [accessed 18 November 2011].

<sup>44</sup> Loescher, G. and Milner, J. ‘The Long Road Home: Protracted Refugee Situations in Africa’, *Survival: Global Politics and Strategy*, 47(2)(2005):153-174, p.153.

<sup>5</sup> Slaughter, A. and Crisp, J. ‘A Surrogate State? The Role of the UNHCR in Protracted Refugee Situations’, UNHCR, *New Issues in Refugee Research*, (168)(January 2009), <http://www.unhcr.org/4981cb432.html>, [accessed 16/08/2013].

humanitarian refugee regime, that refugees lose some elements of what constitutes a refugee within the British system. In contrast to what happens in Britain, where individuals seeking refuge are dealt with on a case-by-case basis, through the granting of prima facie status and group determination, refugees lose their individuality and are fused together within a collective refugee process. In constructing the image of the refugee, Lisa Malkki observes in her paper, 'Speechless Emissaries', that they are depicted as a 'spectacle of raw, bare humanity'.<sup>6</sup> It is during these mass movements of people, Malkki asserts, that the semantic terms of 'floods', 'waves', 'swarms' and 'rivers' of refugees come into existence.<sup>7</sup> Nevzat Soguk develops the same arguments, asserting that it is not enough that the movements of refugees are depicted as 'a mass of humanity' but that it must be characterised as a 'dangerous mass of humanity, "flowing", "flooding" and posing difficulties to the international community'.<sup>8</sup> The individual nature of the crisis is overlooked, swept aside by the scale of the event. The emphasis is not upon what drove the individual people from their homes, or their stories and experiences. Instead a collective narrative of flight emerges, whereby the experience is generalised or lost within the scale of the movement of people; they become what Michel Agier terms 'nameless individuals'.<sup>9</sup> As Soguk argues, the individual is perceived 'not so much in terms of human beings in need of relief and comfort, as in terms of refugees who constitute a problematic category of people'.<sup>10</sup> This construction of the refugee as homogenous, problematic and dangerous is similar to the depiction of the third world subject. Arturo Escobar noted how the third world subject is continuously portrayed as underdeveloped, and laden with negative characteristics such as 'powerlessness, passivity, poverty, and ignorance, usually dark and lacking in historical agency'.<sup>11</sup> In both instances, individuality is lost and instead, the refugees are perceived as a homogenous,

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<sup>6</sup> Malkki, L. 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization', *Cultural Anthropology*, 11(3)(1996):377-404, p.386.

<sup>7</sup> Interestingly, recent reports on the movement of refugees from the violence in Syria to Iraq has produced headlines following this manner from news agencies such as the BBC. An August 2013 report on people fleeing to safety into Iraq had the headline, *Syrian Refugees Pour into Iraqi Kurdistan in their Thousands*. The article went on to use the descriptive term 'wave' and 'pour' throughout the rest of the article in reference to the refugee movement.. The individuality of the people that the report was referring to was lost completely within the construction of the homogenous group of 'refugee'. BBC, 'Syrian Refugee Pour into Iraqi Kurdistan in their Thousands', (18<sup>th</sup> August 2013), <http://www.bbc.co.uk/news/world-middle-east-23745201>, [accessed 18/08/2013].

<sup>8</sup> Soguk, N. *States and Strangers. Refugee and Displacement of Statecraft*, (London: University of Minnesota Press, 1999), p. 198.

<sup>9</sup> Agier, M. *Managing the Undesirable: Refugee Camps and Humanitarian Government*, (Cambridge: Polity Press, 2011), p.138.

<sup>10</sup> Soguk, N. *States and Strangers*, p.194.

<sup>11</sup> Escobar, A. *Encountering Development. The Making and Unmaking of the Third World*, (New Jersey: Princeton University Press, 1995), p.8.



collective group and labelled as a refugee other. However, compared with the British asylum system, what is confirmed is that these people are victims. Through their collective movement and shared experience, they are labelled as victims.<sup>12</sup> They have fled conflict, persecution and terror in their country of origin and they are refugees. This much we do know.

### **The Loss of the Individual and the Rise of the Homogenous ‘Victim’**

This lack of individuality imposed by the OAU Refugee Convention definition, is however, reinforced by the humanitarian agencies. When there is a crisis and a mass movement of people, humanitarian agencies such as the UNHCR offer aid and assistance to those in need. Through processes of registration in the established camps, vulnerable individuals and families are identified, provided with ration cards and physically counted, in a process that is repeated continuously throughout the emergency. The UNHCR argues that the process of registration and counting is essential for an ‘efficient and cost-effective operation’ and accordingly, is the core of the agency’s protection mandate.<sup>13</sup> The protection of the refugees becomes a consuming process that needs to be managed and organised. And, rather than perceiving the individual refugee as a person who has gone through great turmoil and hardship in their life, there is a tendency to view the refugees as a whole and engage with the problems of the camp collectively, rather than on an individual basis, even though this goes against the principles of the UNHCR’s Code of Conduct. Established in 2004, the Code of Conduct stipulates that UNHCR staff should:

see people we serve as human beings rather than ‘individual cases’, ‘populations’ or ‘caseloads’. Impersonal, bureaucratic terms breed a bureaucratic approach. As humanitarian staff we need to empathize with the people we serve and understand their situation. Direct conversations with people, individuals or in small groups, can help us ‘put a human face’ on complex problems.<sup>14</sup>

Yet, despite the Code of Conduct’s focus on the personal, External Consultant to the UNHCR Barb Wigley, in her 2005 assessment of the UNHCR’s organisational culture, revealed that UNHCR field staff felt that:

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<sup>12</sup> Johnston, H. ‘Click to Donate: Visual Images, Constructing Victims and Imagining the Female Refugee’, *Third World Quarterly*, 32(6)(2011):1015- 1037.

<sup>13</sup> UN High Commissioner for Refugees. *Handbook for Emergencies, 3<sup>rd</sup> Edition*, (February 2007), <http://www.unhcr.org/472af2972.html>, [accessed 05/05/2014].

<sup>14</sup> UN High Commissioner for Refugees. ‘*Code of Conduct and Explanatory Notes*’, (2004), [www.unhcr.org/422dbc89a.html](http://www.unhcr.org/422dbc89a.html), [accessed 19/08/2013].

People lost the idea that refugees are people and not a huge group en masse. They lost sight of the individual, lost sight of the fact their whole lives were screwed up, that they were people of consequence and all their plans and dreams were destroyed. We don't talk about that so much. Sometimes we get overwhelmed by the numbers, it becomes like a factory because it needs to be efficient. It's hard to find a balance with the human side of things.<sup>15</sup>

Through the processes of protectionism and humanitarianism, UNHCR staff have noted that it is too easy to view the refugees as a collective unit, losing the individual in the drive to continue the operation. Through the camp processes, Rose Jaji asserts that refugees are consumed by a uniformity, which results in an 'impersonalisation' of the individual and instead, a focus upon the general.<sup>16</sup> The construction of the victimised, homogenous refugee, Cindy Horst argues, actually benefits the humanitarian organisations. The construction of a passive figure (individual or collective), is in their interest.<sup>17</sup> As Michel Agier stresses, 'it is because these people are 'victims' that the humanitarians are here'.<sup>18</sup> It is the *raison d'être* of the whole humanitarian process. Humanitarian agencies require a 'victim' for their operation to exist. Thus, the refugees, although needing assistance, are constructed as passive victims: the beneficiaries of international aid. The provision of aid, from this stance, can be viewed then as a top-down approach, with the actions of the UNHCR justified on the assumption that the refugees' 'lives will be changed for the better'.<sup>19</sup> It is at this point that the figure of the refugee, whether the individual or collective figure, is portrayed not as the subject of the international humanitarian aid process, but instead as the object within a relationship of power. This (unequal) relationship of power has been highlighted well by Michael Barnett, who stated that:

The contemporary discourse of humanitarianism produces two kinds of actors: those who are subjects, who are good, who are expected to prevent suffering, and who have the tools of emancipation; and those who are objects, whose humanity is to be secured or restored and who are judged incapable of helping themselves.<sup>20</sup>

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<sup>15</sup> Wigley, B. 'The State of UNHCR's Organization Culture, UN High Commissioner for Refugees', Evaluation and Policy Analysis Unit, (May 2005), EPAU/2005/08, <http://www.unhcr.org/428db1d62.pdf>, [accessed 05/05/2014], p.33.

<sup>16</sup> Jaji, R. 'Social Technology and Refugee Encampment in Kenya', *Journal of Refugee Studies*, 25(2)(2011):221-238, p.231.

<sup>17</sup> Horst, C. *Transnational Nomads. How Somalis cope with Refugee Life in the Dadaab Camps of Kenya*, Studies in Forced Migration (19), (Oxford: Berghahn Books, 2006), p.15.

<sup>18</sup> Agier, M. *Managing the Undesirable*, p.90.

<sup>19</sup> Ngo, B. and Hansen, S. 'Constructing Identities in UN Refugee Camps: The Politics of Language, Culture and Humanitarian Assistance', *Critical Inquiry in Language Studies*, 10(2)(2013):97-120, p.116.

<sup>20</sup> Barnett, M. 'Humanitarianism, Paternalism and the UNHCR', in Betts, A. and Loescher, G. *Refugees in International Relations*, (Oxford: Oxford University Press, 2011), pp.105-132, p.112.

Barbara Harrell-Bond follows this line of argument, asserting that humanitarian workers are conditioned to perceive refugees as ‘pathological, medicalised and labelled as helpless and vulnerable’.<sup>21</sup> This comes back to the victimisation of the refugee. In order for aid agencies such as the UNHCR to function, a victim figure is required before the relationship can commence. Harrell-Bond asserts that it is through this labelling of the ‘victim’ that the refugee becomes ‘symbolically disempowered’.<sup>22</sup> They function within an asymmetrical power relationship of ‘us’/‘them’, whereby the refugee ‘other’ has their subjectivity removed and is perceived as merely an object in relation to the humanitarians, who are the subjects.<sup>23</sup> Through their lack of ‘belonging’ and citizenship of a state, the figure of the refugee becomes invisible as a potential political actor, and becomes an object of Western knowledge.<sup>24</sup> Erik Wilson argues, firstly, that the language utilised by the liberal, universalist discourse (such as the discourse of the UNHCR) constructs the figure of the refugee as ‘abstract, formal, equal and in that sense, interchangeable’. The refugee is removed from their history, and their past experiences, skills and talents are all marginalised within the discourse of refuge. This, Wilson argues, results in an ‘abstract, legal construction of the human being’.<sup>25</sup> Importantly, Wilson argues that the construction of the refugee not only creates a figure that is denied individuality, as well as being dehistoricised and depoliticised, but also leads to the establishment and reinforcement of binaries such as ‘us’ and ‘them’, ‘strangers’ and ‘friends’, and ‘insider’ and ‘outsider’.<sup>26</sup> These binaries and differentiations all help in establishing a differentiation (as well as a hierarchy of rights) between the citizen of the state, and the rogue refugee ‘other’, rather than taking the figure of the refugee as a human in need itself. It is through this process of labelling and objectification of the refugee, as discussed in Chapter Three, that the individual is silenced. Their personal experiences, histories and politics are subsequently consumed within the confines of the larger humanitarian crisis. The labelling and binary construction that occurs is always at the expense of the asylum seeker.

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<sup>21</sup> Harrell-Bond, B. ‘Can Humanitarian Work with Refugees be Humane?’, *Human Rights Quarterly*, 24(1)(2002):51-85, p.57.

<sup>22</sup> Harrell-Bond, B. ‘Can Humanitarian Work with Refugees be Humane?’, p.53.

<sup>23</sup> SEE: Hyndman, J. ‘Refugee Camps as Conflict Zone: The Politics of Gender’, in Giles, W. and Hyndman, J. *Site of Violence, Gender and Conflict Zones*, (London: University of California Press, 2004), p.193-215, p.204. and Horst, C. *Transnational Nomads*.

<sup>24</sup> Fair, J.E. and Parks, L. ‘Africa on Camera: Televisions News Coverage and Aerial Imagining of Rwandan Refugees’, *Africa Today*, 48(2)(2001):35-57, p.40.

<sup>25</sup> Wilson, E. ‘Protecting the Unprotected: reconceptualising refugee protection through the notion of hospitality’, *Local-Global Journal*, 8(2010):100-122. p.110.

<sup>26</sup> Tascón, S. ‘Refugees and the Coloniality of Power: border-crossers of postcolonial whiteness’, in Robinson, A. *Whitening Races: Essays in Social and Cultural Criticism*, (Canberra: Aboriginal Studies Press, 2004), pp.239-253, p.241.

In a humanitarian crisis, the aid agencies are positioned as the authoritative figures. This is despite the UNHCR's Good Practice Policies (2007), which uphold a community-based approach to refugees that aims to encourage persons of concern to participate. The UNHCR's Good Practice Policy asserts that 'the role of the UNHCR is to build, rebuild, or strengthen the communities' capacities to respond to protection risks and to make decisions over access to and use of resources'.<sup>27</sup> In the eyes of humanitarian agencies such as the UNHCR, the field staff possess subjectivity, with the refugees being merely objects to be 'watched, counted, categorized and tracked'.<sup>28</sup> And, although the UNHCR's Code of Conduct recognises that the organisation's work often results in field staff being thrust into positions of power in relation to their clients, it asserts that staff have a responsibility not to abuse this position.<sup>29</sup>

Field staff are automatically situated within an asymmetrical relationship with the refugees - geographically, spatially, and through the holding of resources and aid. Even the construction of the camps themselves is fundamentally skewed. The physical location of the camp is not normally 'visible in their everyday life, since they are generally in out-of-the-way locations'<sup>30</sup> where access is restricted and difficult due to a lack of basic infrastructure. Jennifer Hyndman describes how in Kenya, refugee camps are constructed with the safety and convenience of the aid workers in mind. All amenities are situated at the front of the camp, close to the road, with the staff compound situated apart and secured from the main camp structure.<sup>31</sup> Jaji argues that the social distance constructed within the camps between the aid agencies and the refugees reinforces the social hierarchy at play. She asserts that the physical and social geography of the camps means that the 'staff are simultaneously available and conspicuous but inaccessible, physically near but socially distant'.<sup>32</sup> This reinforces the significance of the power relations that are central within the construction of the camps. Manuel Herz goes as far as to say that a politics of segregation based on fear and mistrust

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<sup>27</sup> UN High Commissioner for Refugees. 'Operational Protection in Camps and Settlements. A Reference Guide of Good Practice in the Protection of Refugees and Other Persons of Concern', (June 2006), <http://www.refworld.org/docid/44b381994.html>, [accessed 15/07/2013], p.13-16.

<sup>28</sup> Fair, J. E. and Parks, L. 'Africa on Camera', p.50.

<sup>29</sup> UN High Commissioner for Refugees. *Code of Conduct and Explanatory Notes*.

<sup>30</sup> Agiers, M. *Managing the Undesirables*, p.53.

<sup>31</sup> Hyndman, J. *Managing Displacement: Refugees and the Politics of Humanitarianism*, (London: University of Minnesota Press, 2000), p.94-100.

<sup>32</sup> Jaji, R. 'Social Technology and Refugee Encampment in Kenya', p.229.

operates within refugee camps - hence the spatial separation.<sup>33</sup>

### **The Bureaucratisation of Knowledge**

This construction of an asymmetrical relationship of power impacts upon the knowledge construction emanating from the camps. It determines who has a voice, and who is able to speak of the refugee crisis. Speech in this sense is skewed in favour of the aid agencies. As Fair and Parks describe, 'as objects of the spectacle, refugees' voices are most often silenced and accounts of their lived experiences ignored in favour of knowledge produced from the outside by observers'.<sup>34</sup> The result, as Prem Kumar Rajaram notes, is that 'the pronoun 'I'' is being used by aid workers and field staff, while the refugee voice is 'made to reflect a collective, 'we''.<sup>35</sup>

What emerges from this then, as Lisa Malkki argues, is that aid agencies such as the UNHCR speak the language of 'refugee relief... policy science... and development'.<sup>36</sup> The testimony that emerges is not from the personal accounts of the refugees, but instead from humanitarian workers who provide accounts and offer testimonies of the situation themselves. Prem Kumar Rajaram argues that because of this the narrative of the refugee crisis 'becomes the prerogative of Western experts'.<sup>37</sup> The humanitarian workers are perceived as the 'refugee experts' and are provided with a platform in which to speak of the refugee crisis, but they speak of the crisis as a clinical site. In Malkki's paper, '*Speechless Emissaries*', she argues that humanitarian workers speak and utilise the language of statistics and logistics, with the focus being upon 'numbers, diseases, nutritional needs, crops and their birth and mortality rates' in what she terms clinical humanitarianism.<sup>38</sup> The construction of the Western 'expert', who develops knowledge of the refugee camps, reflects what Arturo Escobar calls the 'bureaucratization of knowledge through documentary practices'. Escobar argues that through various bureaucratic processes, the focus of the (refugee) crisis is on:

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<sup>33</sup> Herz, M. *Refugee camps in Chad: planning strategies and the architect's involvement in the humanitarian dilemma*, UN High Commissioner for Refugees, Evaluation and Policy Analysis Unit, Working Paper, Working Paper No. 147, (December 2007), <http://www.refworld.org/docid/4c2472ec0.html>, [accessed 22 /08/2013], p.5.

<sup>34</sup> Fair, J. E. and Parks, L. 'Africa on Camera', p.51.

<sup>35</sup> Rajaram, P. K. 'Humanitarianism and Representation of the Refugee', *Journal of Refugee Studies*, 15(3)(2002):247-264, p.262.

<sup>36</sup> Malkki, L. 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization', *Cultural Anthropology*, 11(3)(1996):377-404, p.386.

<sup>37</sup> Rajaram, P. K. 'Humanitarianism and Representation of the Refugee', p.247.

<sup>38</sup> Malkki, L. 'Speechless Emissaries', p.390.

the elaboration of programme descriptions, evaluation reports, research reports, meeting documents, scholarly papers and so on – that ceaselessly take place in a process that is largely self-referential to the extent that these documents are written not to illuminate a given problem but to ensure their insertion into the ongoing flow of organisational texts.<sup>39</sup>

Hyndman, when speaking of her time within the Dadaab refugee camps in Kenya, spoke of the relentless processes of producing reports and carrying out organisational tasks, which were solely for the UNHCR's benefit. She noted the continuous monitoring, through 'the production of maps, stats, and assessments' by staff of the UNHCR', which, although carried out for the benefit of the refugee, occurred within an environment that was devoid of historical or political context. She argued that the processes of reporting and producing documentation were acts, not just of management, but also of surveillance, and she stressed that 'standardization is crucial to the integrity of the information gathering process, but it occurs at the expense of accounting for local historical contexts'.<sup>40</sup> Hyndman, through her experiences of the Dadaab refugee camps, argued that 'weekly information reports filed by UNHCR (sitreps) are compiled in a single summary and sent to Geneva... they at once simulate and assimilate particular experiences at very different refugee camps in a variety of locations into a more universal narrative'.<sup>41</sup> What this highlights firstly, is the power and reach of the UNHCR's narrative of crises, and secondly, that the experiences, not only of the refugees but also of the camps, become a generalised and collective process, with the individual characteristics specific to each camp/individual being overlooked and replaced by a general summary of the situation. The agencies are not providing knowledge of the crisis or observing the political situation; rather, they are providing statistical data from the camp. What is missing is a historical or political understanding of the crisis. The 'bureaucratisation of knowledge' collates the experiences of refugees (and refugee camps) and condenses the myriad experiences into an overarching analysis of protection needs in 'the field'. UNHCR's Head of Evaluation and Policy Analysis Unit, Jeff Crisp, argued that the organisation's expanding preference for documentation had resulted in field staff spending more time in front of their computers producing reports for Geneva, away from the camps. He argues that, 'ironically, the new emphasis on accountability in the humanitarian sector has thus distanced

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<sup>39</sup> Escobar, A. *Encountering Development*, p.112.

<sup>40</sup> Hyndman, J. *Managing Displacement*, p.121.

<sup>41</sup> Hyndman, J. *Managing Displacement*, p.132.

UNHCR from the very people it was supposed to protect'.<sup>42</sup> This position was illuminated upon clearly by Barb Wigley. She reported in her findings that there appears to be a culture of 'self-perpetuation, with a preoccupation with becoming and remaining 'organised'' within the UNHCR. Wigley asserted within her independent report for the UNHCR, that although the primary task of the UNHCR was to protect the rights and well-being of refugees, the organisation had a tendency to behave more as if its central task was to create 'reports, arrange staff movements and to keep itself funded, rather than that these are all activities that occur only as a background and a support to the achievement of the actually primary purpose of protecting and assisting refugees'.<sup>43</sup> This point was also made clear by the 2008 Peer Review Steering Committee for Humanitarian Response. They found, through their examination of the UNHCR, that the organisation's excess of tools and guidelines was both an asset and a hindrance. The Steering Committee reported that UNHCR staff had criticised the level of paperwork and constraints imposed by the organisation's bureaucracy.<sup>44</sup>

This behaviour of bureaucratisation could be understood by the fact that the UNHCR has no permanent source of funding, and is not able to calculate the finances that are available to it. Alexander Betts, Gil Loescher and James Milner argue that the UNHCR dedicates substantial time and paper to fundraising, donor relations<sup>45</sup> and accountability. Indeed, John Prendergast insists that humanitarian agencies such as the UNHCR are under enormous pressure to secure and retain funds, and to document how the funds have been allocated to the necessary target populations. Alexander Betts, Director of the Humanitarian Innovation Project at Oxford, states that the conventional model of refugee protection is donor-funded and puts the emphasis on keeping people alive.<sup>46</sup> He argues that there is a 'lack of willingness of donors to firmly commit to significant additional development assistance' within refugee protection programmes.<sup>47</sup> For this reason, the UNHCR's Code of Conduct states explicitly that '... we must be able to account for every penny spent on UNHCR's

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<sup>42</sup> Crisp, J. 'Why do we know so little about refugees? How can we learn more?', *Forced Migration Review*, (18)(2003):55, p.55.

<sup>43</sup> Wigley, B. 'The State of UNHCR's Organization Culture, UN High Commissioner for Refugees', p.18.

<sup>44</sup> Steering Committee for Humanitarian Response cited Turk, V. and Eyster, E. 'Strengthening Accountability in the UNHCR', *International Journal of Refugee Law*, 22(2)(2010):159-172, p.167.

<sup>45</sup> Betts, A., Loescher, G. and Milner, J. *UNHCR: The Politics and Practice of Refugee Protection*, (Oxon: Routledge, 2008), p.97.

<sup>46</sup> Betts, A. 'Put Innovation at the Heart of Refugee Protection', *The Guardian*, (4<sup>th</sup> January 2013), <http://www.theguardian.com/global-development-professionals-network/2013/jan/04/refugees-camp-innovation-creativity>, [accessed 4/01/2013].

<sup>47</sup> Betts, A. 'Development and Assistance: Towards a North-South Grand Bargain?', *Forced Migration Policy Briefing 2*, Refugee Studies Centre, (June 2009), <http://www.rsc.ox.ac.uk/publications/policy-briefings/RSCP2-DevelopmentAssistance.pdf>, p.5.

behalf and every decision we take, be this in human resources or in financial matters'.<sup>48</sup> As such, the UNHCR has to prove how the money is helping in the protection of and assistance to the targeted refugee populations.

This continuous quest for funding takes its toll upon the UNHCR staff. Kilan Kleinschmidt notes within the UNHCR Magazine, *Refugee*, how most field staff work in forgotten corners of the emergency world, where funding is constrained and staff are engaged in struggles of 'how to explain... to refugees that the food ration has been reduced yet again to a few hundred calories because of budgetary problems, why children cannot go to secondary school and why there are no funds for treatment of chronic diseases'.<sup>49</sup> Barbara Harrell-Bond argues that due to the pressure of funding, 'humanitarians, who control the distribution of aid view themselves as accountable to the donors rather than the beneficiaries'.<sup>50</sup> As a result, regional offices of the UNHCR are required to fight and bargain for every 'scarce dollar available' in an aggressive annual process.<sup>51</sup> Yet, Prendergast notes that this has had the adverse reaction of logistical targets, and statistics becoming a priority and means in themselves. As such:

'1,000 metric tons delivered, 1,000 lives saved and so on' becomes the essence and drive of the humanitarian process. The focus is upon the statistics, the numbers and the logistics of the humanitarian project, rather than upon the recipients of the aid - the human element becomes lost in statistics. The focus is on the receiving of the aid and not necessarily on how the refugees are coping, and surviving with the new life within the camp, or on ways to empower and enhance their environment.<sup>52</sup>

As Hyndman argues, donor states are interested in assessing the UNHCR with regard to their ability to provide emergency assistance, rather than their capacity to 'empower marginalised populations and to bring a degree of dignity to their lives'.<sup>53</sup> Drawing upon the bureaucratisation of knowledge and the securing of funds through donors, leads us to what Gayatri Spivak terms 'western intellectual production', whereby no knowledge is ever neutral or innocent, for it is 'in many ways, complicit with Western international economic

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<sup>48</sup> UN High Commissioner for Refugees. 'Code of Conduct and Explanatory Note'.

<sup>49</sup> Kleinschmidt, K. 'A Time for Reflection', *UNHCR Refugees*, 4(121)(2000):1-31, p.13.

<sup>50</sup> Harrell-Bond, B. 'Can Humanitarian Work with Refugees be Humane?', p.69.

<sup>51</sup> Kleinschmidt, K. 'A Time for Reflection', p.21.

<sup>52</sup> Prendergast, J. *Frontline Diplomacy. Humanitarian Aid and Conflict in Africa*, (London: Lynne Rienner Publishers, 1996), p.3.

<sup>53</sup> Hyndman, J. 'Refugee Camps as Conflict Zone: The Politics of Gender', p.204.



interests'.<sup>54</sup> The emphasis on the bureaucratisation of knowledge, funding and donors results in the UNHCR being involved in the perpetual circle of (western) knowledge production and report writing in order to be accountable, transparent and knowledgeable regarding the refugee crisis, particularly with regard to the donors. Moreover, this notion of the bureaucracy of knowledge can account for the strong position of the humanitarian voice within the crisis, at the expense of the individual refugee voice. The dominance of the humanitarian voice, such as that of the UNHCR, is essential for the organisation to retain a profile, highlight its expenditure and showcase its activity within the field and with the target audience. However, amongst the report writing and statistical analysis, the individual refugee becomes silent and lost, repositioned in favour of the scramble for resources. The voice emanating from the refugee crisis, as well as the knowledge of the situation, is derived from the Western experts. As discussed previously, humanitarian responses are essentially a 'top down' process. However, as Alistair Hallam asserts, it can lead to gaps emerging in the protection process with 'humanitarian agencies... often poor at consulting or involving members of the affected population and beneficiaries of their assistance'.<sup>55</sup> Thus the operational process of the UNHCR can be said to have a silencing effect on the refugee.

### **Denial of Speech/ Denial of an Audience:**

'Clinical humanitarianism', combined with the 'bureaucratisation of knowledge', results in the focus of the humanitarianism being upon helping the helpless, the victims; on helping the pure body of the refugee. Objective bodily facts, as Ann Szörényi notes, end up having more evidential clout than the testimonies of the actual refugees themselves.<sup>56</sup> The focus for the humanitarian agencies is purely on the here and now, the temporary. The refugees in the camps are denied historical and political agency. Through the granting of prima facie refugee status, the refugees are not interviewed or questioned on their personal accounts of trauma. They need not provide documentary evidence or be forced and coerced to speak of unspeakable events. They do not have to grapple with memory recall and they are not quizzed

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<sup>54</sup> Spivak, G. C. 'Can the Subaltern Speak?' in Williams, P. and Chrisman, K. L. *Colonial Discourse and Post-Colonial Theory: A Reader*, (New York: Harvester, 1994), pp.66-111, p.66.

<sup>55</sup> Kaiser, T. 'Participatory and beneficiary-based approaches to the evaluation of humanitarian programmes', UN High Commissioner for Refugees, Evaluation and Policy Analysis Unit, Working Paper No. 51, (February 2002), <http://www.refworld.org/docid/4ff553e92.html>, [accessed 19/08/2013], p.2.

<sup>56</sup> Szörényi, A. 'The Face of Suffering in Afghanistan: Identity, Authenticity and Technology in the Search for the Representative Refugee', *Australian Feminist Law Journal*, 21(1)(2004):1-21, p.1.

on discrepancies within their testimonies. At the most, in instances of crisis, the UNHCR Emergency Handbook (2007) states that the interview processes for registration will be limited to ‘the names of the head of family, family size, age and sex breakdown of the family members and the number of temporary family cards, with an indication of any immediately visible vulnerable family members.’<sup>57</sup> All individuality and history is erased, for as Szörényi pointedly notes ‘the one thing that refugees rarely are... is one’.<sup>58</sup> Malkki argues that due to this homogenisation, historical and political accounts are marginalised and not considered pressing; clinical humanitarianism is central.

This denial of political and historical agency, has been defended from the UNHCR’s position. Rony Brauman, founding member of *Medicins Sans Frontiers (MSF)*, has stressed that the onus of humanitarian action ‘- both constituting its main strength and settings its structural limits - is to try to combat suffering directly, irrespective of its political roots or historical context’.<sup>59</sup> Organisations such as the UNHCR and MSF are operating in environments that are ‘highly politicized situations’.<sup>60</sup> Manuel Herz argues that traditionally, emergency responses to crises have operated in a conservative manner, so as to ‘keep a distance from politics and the causes of conflict’. Herz asserts that aid agencies operating within refugee crises deliberately avoid engaging with the root causes of the conflict and instead focus upon ‘alleviating the symptoms’.<sup>61</sup> For the emergency arena, Brauman argues, needs to be viewed as purely a ‘humanitarian space’ – a space of independence and neutrality - in order to function. It needs to be viewed as a space ‘for humanitarian action’ where aid agencies are ‘free to evaluate needs, free to monitor the delivery and use of assistance, free to have a dialogue with the people’.<sup>62</sup> But, with the average length of stay within a refugee camp being over 5 years,<sup>63</sup> and the average stay in protracted situations reaching seventeen

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<sup>57</sup> UN High Commissioner for Refugees. *Handbook for Emergencies*, p.164.

<sup>58</sup> Szörényi, A. ‘The Face of Suffering in Afghanistan’, p.5.

<sup>59</sup> Brauman, R. ‘Refugee Camps, Population Transfers and NGO’s’, in Moores, J. *Hard Choices. Moral Dilemma’s in Humanitarian Intervention*, (Oxford: Rowman and Littlefield Publishers, 1998), pp.177-194, p. 192.

<sup>60</sup> Tennant, V., Doyle, B. and Mazou, R. ‘Safeguarding Humanitarian Spaces: Review of Key Challenges for UNHCR’, UN High Commissioner for Refugees, Evaluation and Policy Analysis Unit, Working Paper, (February 2010), PDES/2010.01, <http://www.unhcr.org/4b68042d9.html>, [accessed 1/08/2013], p.13.

<sup>61</sup> Herz, M. ‘*Refugee camps in Chad*’, p.5.

<sup>62</sup> Tennant, V., Doyle, B. and Mazou, R. ‘Safeguarding Humanitarian Spaces: Review of Key Challenges for UNHCR’, p.3.

<sup>63</sup> UN High Commissioner for Refugees. ‘*So Solutions in Sight: the problem of protracted situations in Africa*’, UN High Commissioner for Refugees Evaluation and Policy Analysis Unit, Working Paper No.75, (January 2003), [www.unhcr.org/3e2d66c34.html](http://www.unhcr.org/3e2d66c34.html), [accessed 22/08/2013].

years,<sup>64</sup> (and over 6.4 million individuals falling into this category)<sup>65</sup> the depoliticised and dehistoricised nature of refugee camps can have a big impact on the agency and voice of the refugees over time. As Michael Ignatieff warns, ‘... if aid agencies refuse to tell a political story – one that attributes causation and consequence for the disaster they are helping to relieve, they risk falling back on a narrative of simple victimhood, empty of context and meaning’.<sup>66</sup> The refugee crisis, in a sense, becomes politically and historically sterile. Amputated from history, the refugees reside in a ‘dehistoricised’ limbo, where political agency and belonging is denied. The refugee, as Szörényi states, becomes merely an ‘intrinsic state of being’.<sup>67</sup> There is no past for the refugee in the eyes of the humanitarian agencies. The whole process of refuge is focused purely upon the here and now of the individual in need. This victimhood is spanning into the decades now for many refugees due to their time in the camps being protracted. As such, refugees, through the processes of humanitarianism, are being deprived of their speech and language for extended periods of time, while the temporary emergency continues to manifest.

Within the environment of the refugee camps, Malkki argues that rather than being allowed a platform to speak of their trauma, due to the humanitarian agencies, the focus is on the body of the refugee. For the aid agencies, the physical depiction of the refugee speaks more strongly to the observer (especially the funding donors) than necessarily their personal testimonies. The distant observer, Paul Farmer argues, views ‘the horror of suffering’ residing not just with its vastness but also in the ‘faces of the anonymous victims’- those individuals who have no voice,<sup>68</sup> no name, no identity, nor story. Hence, Escobar notes, that it is forgotten when we are referring to these populations of people, that it is ‘human life

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<sup>64</sup> This figure is as of 2003 when it was stipulated by the Executive Committee of the UNHCR, but has been utilised far beyond the UNHCR as an example of the nature of protracted situations. SEE: UN High Commissioner for Refugees. ‘Protracted Refugee Situations’, Executive Committee of the High Commissioner’s Programme, Standing Committee, 30<sup>th</sup> Meeting, EC/54/SC/CRP.14 (10<sup>th</sup> June 2004), <http://www.unhcr.org/40c982172.pdf>, [accessed 22/08/2013] and Women’s Refugee Commission. ‘Building Livelihoods. A Field Manual for Practitioners in Humanitarian Settings’, (May 2009), <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4af181066&query=average%20time%20in%20camp%2017%20years>, [accessed 22/08/2013], p.iii.

<sup>65</sup> UN High Commissioner for Refugees. *Global Trends 2012: Displacement, The New 21<sup>st</sup> Century Challenge*, [http://www.unhcr.org.uk/fileadmin/user\\_upload/pdf/UNHCR\\_Global\\_Trends\\_2012.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/pdf/UNHCR_Global_Trends_2012.pdf), [accessed 22/08/2013].

<sup>66</sup> Ignatieff, M. ‘The Stories We Tell. Television and Humanitarian Aid’, in Moores, J. *Hard Choices. Moral Dilemma’s in Humanitarian Intervention*, (Oxford: Rowman and Littlefield Publishers, 1998), pp. 287-302, p.296.

<sup>67</sup> Szörényi, A. ‘The images speak for themselves? Reading refugee coffee-table books’, *Visual Studies*, 21(1)(2006):24-41, p.28.

<sup>68</sup> Farmer, P. ‘On Suffering and Structural Violence’, in Kleinman, A., Das, V. and Lock, M. *Social Suffering*, (London: University of California, 1997), p.272.

itself' that we are viewing. Rather, he argues that the 'populations' are perceived by Western experts and the media as 'helpless... (dark) masses, items to be counted and measured'.<sup>69</sup> The human is lost within the crisis and the focus is diverted instead to the physical body. The silence of the victims, Farmer asserts, adds to the horror of the crisis.

What then emerges from this labelling is a quintessential refugee figure, traumatised and helpless, requiring care and treatment as well as aid. And it is the role of the humanitarian agencies to assist this figure. Denis Kennedy illuminates this position when he notes that aid agencies 'derive emotional force through their reliance on human misery'.<sup>70</sup> In the instance of the camps, the image of the refugee, wounded and traumatised, speaks far more than their words - for the image (supposedly) is able to articulate what language fails to. Following this understanding of the positioning of the refugee, Malkki notes in her research that the figure of the refugee is at their purest when their 'refugeness' is most distinct - when it is visible upon the body. A genuine refugee is a victim and needs caring for - in the eyes of the aid agencies. Their physical state speaks for them - of the trauma, suffering and exhaustion experienced. The voice of the refugee is silenced. In this manner, the representation of the silent, traumatised victim, for Kennedy, discards:

... that which is most human about the victim: autonomy, dignity, and individual specificity... victimhood is abstracted to a level of universal anguishes and pure animal emotions and victims reduced to the most basic of rights. The victim becomes personless - without dignity.<sup>71</sup>

Through the process of 'clinical humanitarianism', the gaze of the aid agencies is upon the pure body, of helping the helpless, the victim. Labelled in what Mark Franke terms 'the targets of ethical address', the refugee is reduced to a 'mere body or psyche to be scrutinized as if a thing'.<sup>72</sup> In elaborating this position, Peter Nyers states that during the process of refuge, the figure of the refugee is reduced purely to a physicality. He argues that when an individual is forced to flee, through engaging with the processes of refuge and entering into the power relations at play within the process of the refugee regime, 'their human life is stripped bare'. The refugee can be viewed not so much as a site of the humane, but rather as a

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<sup>69</sup> Escobar, A. *Encountering Development*, p.103-104.

<sup>70</sup> Kennedy, D. 'Selling the Distant Other: Humanitarianism and Imagery- Ethical Dilemmas of Humanitarian Action', *The Journal of Humanitarian Assistance*, (February 28 2009), p1.

<sup>71</sup> Kennedy, D. 'Selling the Distant Other', p.7.

<sup>72</sup> Franke, M. F. N. 'Political Exclusion of Refugees in the Ethics of International Relations', in Hayden, P. *The Ashgate Research Companion to Ethics and International Relations*, (Surrey: Ashgate Publishing Limited, 2009), pp.309-325, p.317.

site 'where the human stops'.<sup>73</sup> What is left is purely a physical body. Within a camp situation, where political and historical agency are stripped, and platforms for speech are removed, the refugee is reduced to a physical (bare) body.

But, when those needs (to an extent) have been met, shelter provided, ration cards distributed and the vulnerable located, the figure of the refugee is rendered silent. Silence takes hold and any platform for potential communication of their personal trauma is removed, or has already been denied within the structure of the camp. Even when the refugee is reduced to their physical form - 'at their purest' with the body being a site of knowledge - they are still a homogenous mass, rendered silent and devoid of political or historical agency. We do not know what their personal stories are - what their personal accounts of persecution are, or why they chose to flee when they did and in the way that they did. All of this information is lost within the processes of the OAU Convention and the UNHCR mandate. The focus of the aid agencies is upon saving lives, but when that has been achieved, or when that develops into a protracted process spanning decades, what happens to the refugee? As Spivak argues, 'finding the subaltern is not so hard, but actually entering into a responsibility structure with the subaltern, learning to learn without this quick-fix frenzy of doing good with an implied assumption of cultural supremacy... that's the hard part'.<sup>74</sup> Locating the refugees within the refugee crisis is the simple part, but developing a relationship where speaking and listening are mutual, I would argue has yet to be achieved by the humanitarian organisations. What's more, I would argue that this position is imposed upon them by those from the aid agencies. This is how the refugees are portrayed, through the eyes of the aid agencies, the media and the donors, although it is not necessarily the reality. In the words of Horst, 'refugees stop being specific persons but are reduced to pure victims of the worst in humanity. They are stripped of the particular characteristics of their person, place and history, left only with a humanness of the most basic sense'.<sup>75</sup>

### **The Refugee 'Other': Identity Construction in Dadaab**

The analysis so far has discussed how the figure of the refugee is constructed during a mass refugee crisis, when they are positioned within the frame of the humanitarian organisations'

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<sup>73</sup> Nyers, P. *Rethinking Refugees. Beyond States as Emergency*, (London: Routledge, 2006), p.129.

<sup>74</sup> Spivak, G. C. *The Spivak Reader*, (London: Routledge, 1996), p.295.

<sup>75</sup> Horst, C. *Transnational Nomads*, p.12.

narrative, as well as the OAU definition and the UNHCR mandate. Through the language of humanitarian emergencies, the refugee figure is depoliticised and dehistoricised as well as denied a platform in which to speak. Refugees are not perceived as a site of knowledge with regard to the crisis that is unfolding. The refugee voice is marginalised in favour of the humanitarian workers who assume the role of knowledge maker and speaker. They have the agency and possess subjectivity within the relationship, with the refugee being reduced to the object. The humanitarian workers are there to offer assistance and aid to the refugees in need - this is their *raison d'être*, or more critically, they require refugees to continue their existence. Through the bureaucratisation of knowledge and clinical humanitarianism, the focus is upon the management of the humanitarian response, on the construction of knowledge and upon helping the physical body of the refugee. They are there to assist the refugees' with their physical needs. Yet this, I argue, can lead to a silencing of the refugee population, for they are reduced purely to a homogenous group. The individuality of the situation is erased, and their personal stories are lost within the clinical humanitarianism, as well as the bureaucracy of knowledge that develops as a mechanism to control the situation.

To fully understand the refugee figure from afar, the final section will analyse how this works in practice, by drawing upon the Dadaab refugee camps as an example. By examining the Dadaab refugee camps, the following section intends to highlight how the refugees there, who have been in a camp for over twenty years, have been represented and constructed, not only by humanitarian organisations such as the UNHCR, but also by the media, and crucially by themselves. In undertaking this, I intended for this small comparison to be more of a reflective piece that allows us to examine how the refugee other is constructed and situated within the refugee camp from afar, rather than when they are entering into our own borders (here in Britain). How are they represented, and where is the knowledge of the crisis emanating from? Does an unequal relationship of power exist between the aid agencies and the refugees, and can it be argued that clinical humanitarianism is in operation within the camps? Importantly, I want to stress that although engaging with a different system of refuge - and it is within a completely different situation - I want to focus upon the significance of language within the wider refugee process, as well as on the silencing that is central within the refugee process (regardless of whether it is within the British refugee system or within the Dadaab refugee complex), and ultimately how this then situates the individual refugee. For language and speaking are central to the process of refuge. Importantly, this reflective examination will engage with and seek to draw out further the discrepancies within the

refugee regime, between the responsibility and implementation of protection offered by the UNHCR, revealing a gap between the law and the actual protection provided.

The Dadaab refugee camps are made up of a series of camps situated in the North Eastern district of Garissa in Kenya. Located in close proximity to the Somali border, the Dadaab complex is positioned far from the political centre of Kenya (Nairobi)<sup>76</sup> within a semi-arid and sparsely populated district, which Crisp spoke of as being ‘totally devoid of any investment or development activity’.<sup>77</sup> The Dadaab complex was originally established between October 1991 and June 1992 to handle the movements of people fleeing the fall of Somalia’s central government, and the eventual state collapse and civil war.<sup>78</sup> The camp complex, also became a refuge to hundreds of thousands seeking sanctuary from the Somali famine of 2011 after the UN declared that the country was experiencing the worst drought in decades.<sup>79</sup>

The UNHCR Emergency Handbook stresses that large settlements should be avoided and that refugee camps should be considered as the last available option within a humanitarian emergency.<sup>80</sup> Or, if camps are the last available option, the UNHCR states that camps of over 20,000 people should generally be avoided.<sup>81</sup> The original Dadaab camps, comprised of Hagadera, Ifo and Dahaley, were established to hold a maximum of 90,000 people. Despite this though, the Dadaab complex now retains the dubious title of the world’s largest refugee camp complex,<sup>82</sup> as well as being one of the oldest refugee camps in the world (it should be noted that the United Nations Relief and Works Agency, not the UNHCR, is mandated to

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<sup>76</sup> Jaji, R. ‘Social Technology and Refugee Encampment in Kenya’, p.223.

<sup>77</sup> Crisp, J. ‘*A State of Insecurity: the political economy of violence in refugee-populated areas of Kenya*’, UN High Commissioner for Refugees, Evaluation and Policy Analysis Unit, Working Paper No.16, (December 1999), <http://www.unhcr.org/3ae6a0c44.html>, [accessed 29/08/2013], p.19.

<sup>78</sup> UN High Commissioner for Refugees. ‘*Dadaab - the World’s Biggest Refugee Camp 20 years old*’, <http://www.unhcr.org/4f439dbb9.html>, [accessed 2/09/2013].

<sup>79</sup> United Nations. UN News Centre, ‘*UN Declares Famine in Two Regions of Somalia*’, (20<sup>th</sup> July 2011), <http://www.un.org/apps/news/story.asp?NewsID=39086#.UicMH9TClg>, [accessed 4/09/2013].

<sup>80</sup> UN High Commissioner for Refugees. *Handbook for Emergencies*, p.106.

<sup>81</sup> UN High Commissioner for Refugees. *Handbook for Emergencies*, p.211.

<sup>82</sup> At the time of writing this chapter, the Syrian crisis was escalating on a daily basis. The 3<sup>rd</sup> September 2013 saw the UNHCR marking the 2millionth Syrian refugee within the surrounding region. The main camp for Syrian refugees is located at Al Zaatari, Jordan. As of 29<sup>th</sup> April 2014, the UNHCR was noted as only having registered 103,269 refugees, but cautioned users that this was an imprecise number due to the continuing emergence and daily fluctuations of arrivals. In the weeks to follow, it is expected that Al Zaatari (if it has not done so already), will house the world’s largest refugee population, outstripping Dadaab. See: UN High Commissioner for Refugee. ‘*Syrian Regional Refugee Response*’, (29<sup>th</sup> April 2014), <http://data.unhcr.org/syrianrefugees/settlement.php?id=176&country=107&region=77>, [accessed 29/04/2014].

assist the 5 million registered Palestinian refugees).<sup>83</sup> Although it was intended that it would only be temporary, 2013 saw the Dadaab complex reach its twenty-second year of operation, with the complex expanding to include a fourth and fifth camp - Ifo 2 and Kambioos - in order to provide for the growing population. As of 29<sup>th</sup> April 2014, the population of the Dadaab complex was recorded by the UNHCR as being 342,694.<sup>84</sup> Indeed, over the last five years, the refugee population within the complex has been fairly consistent, hovering around the 500,000 mark. As a result of the size, scale and development of the camps, Dadaab has actually become the fourth largest 'city' within Kenya.<sup>85</sup>

The establishment of the Dadaab complex occurred due to the unfolding crisis within Somalia. It was established in response to a (temporary) humanitarian emergency and this was how the UNHCR and the Kenyan government engaged with the process. The refugee situation was portrayed as an emergency, but after 22 years, the situation in Dadaab is still within the throes of an emergency. There has been no end to the level of hardship and suffering experienced by the refugees. The camps are regularly perceived as extremely violent; they are notorious for rape, sexual violence, banditry, smuggling and abduction.<sup>86</sup> In referring to the Dadaab camps, Sir Nicholas Young, Chief Executive of the British Red Cross, described the complex as a 'lawless, windswept place'.<sup>87</sup>

In creating an understanding of the conditions within Dadaab, reports from the UNHCR dating back to as early as 1999, highlight a situation where conditions were extreme, with the needs of the refugees being difficult to secure due to funding, infrastructure and population

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<sup>83</sup> United Nations. 'General Assembly Resolution 302 (IV) Assistance to Palestine Refugees', (8 December 1949), A/ RES/ 302 (IV), <http://unispal.un.org/UNISPAL.NSF/0/AF5F909791DE7FB0852560E500687282> [accessed 2/09/2013].

<sup>84</sup> UN High Commissioner for Refugees. 'Camp Population Statistics by Country of Origin, Sex, and Age Group, Alinjujar/Dadaab, Kenya', (29<sup>th</sup> April 2014), <http://data.unhcr.org/horn-of-africa/region.php?id=3&country=110>, [accessed 29/04/2014].

<sup>85</sup> Medecins Sans Frontiers. 'Sweet Sixty. The 60<sup>th</sup> Anniversary of the UN Refugee Convention: refugee crisis in 2011 and challenges for the future', (December 2011), <http://www.msf.org.au/nc/resources/reports/page/4.html>, [accessed 05/05/2014], p.14.

<sup>86</sup> CARE, Catholic Relief Services, Danish Refugee Council, International Rescue Committee, Lutheran World Federation, Norwegian Refugee Council, Oxfam and Terre des Hommes, 'The Human Cost of the Funding Shortfalls for the Dadaab Refugee Camps', (12<sup>th</sup> July 2012), <http://www.oxfam.org/sites/www.oxfam.org/files/the-human-costs-of-the-funding-shortfalls-for-the-dadaab-refugee-camps.pdf>, [accessed 16/09/2013], p.3.

<sup>87</sup> Young, N. 'Dadaab Refugee Camp: Waiting to Go Home', British Red Cross, (21<sup>st</sup> June 2013), <http://blogs.redcross.org.uk/international/2013/06/dadaab-refugee-camp-waiting-to-go-home/>, [accessed 24/08/2013].



influxes.<sup>88</sup> As a result, on the 20<sup>th</sup> anniversary of the camps, MSF described the Dadaab situation as ‘extreme with little hope for improvement in the short term’. According to MSF, the conditions experienced within the Dadaab complex in 2012 were ‘inhuman’, with ‘desperate living conditions’. MSF argued that the survival of the refugees within Dadaab rested upon the continuing support of international aid organisations.<sup>89</sup> From the start of the emergency back in 1991, creating a stable and habitable living environment where human rights can flourish has been a permanent challenge for aid agencies operating within the complex. The fact that the aid organisations have had to work with a continuously growing population has only exasperated the already fragile situation. The UNHCR admits itself that during an emergency, ‘trade-offs’ such as compromising on human rights are sometimes necessary in order to provide immediate protection for the target population. But, when the emergency stretches into its third decade, such as in Dadaab, the wider protection, aid practices and human rights needs of the camp population have to be seriously considered.<sup>90</sup>

The refugees that reside within the Dadaab complex have been allocated prima facie refugee status, and as such, they do not receive any of the benefits and basic rights that are available to Kenyan citizens, nor do they have access to the rights that are enshrined within the 1951 Convention.<sup>91</sup> They do not have freedom of movement, and are in effect, bound to the camp. They are also banned from seeking employment.<sup>92</sup> Denise Hoffman Brandt writes that the conditions within the Dadaab refugee camps ‘constrain the scope and complexity of their inhabitants’ lives’ to such an extent that their basic human rights cannot be fulfilled.<sup>93</sup> Due to the constraints upon their freedom of movement and because of their lack of prospects and hope, Crisp has argued that the refugees are in effect being ‘warehoused... with all the negative social and psychological consequences implied by that phrase’.<sup>94</sup> This notion of ‘warehousing’ refugees was highlighted by Gil Loescher as early as 1993, when he warned

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<sup>88</sup> UN High Commissioner for Refugee. *Global Report 1999*, Country Operation Kenya, <http://www.unhcr.org/4a0d20356.html>, [accessed 28/08/2013], pp.148-153.

<sup>89</sup> Medicine Sans Frontiers, ‘*Dadaab Refugee Camps. Back to Square One Briefing Paper*’, (February 2012), <http://somalia.msf.org/2012/02/dadaab-refugee-camps-back-to-square-one/>, [accessed 28/08/2013].

<sup>90</sup> Arafat, J. ‘Minimum Standards and Essential Needs in a Protracted Refugee Situation’, UN High Commissioner for Refugees Evaluation and Policy Analysis Unit, (November 2000), EPAU/2000/05, <http://www.unhcr.org/3ae6bd4c0.html>, [accessed 03/09/2013], p.8.

<sup>91</sup> Arafat, J. ‘Minimum Standards and Essential Needs’, p.7.

<sup>92</sup> See: Arafat, J. ‘Minimum Standards and Essential Needs’, p.7 and Jaji, R. ‘Social Technology and Refugee Encampment in Kenya’.

<sup>93</sup> Brandt, D. H. ‘Relief Organism. Re-thinking Refugee Encampment at Dadaab Kenya’, in Egaz, S., Makhzoumi, J. and Pungetti, G. *The Right to Landscape. Contesting Landscape and Human Right*, (Surrey: Ashgate PL, 2011), pp.245-262, p.245.

<sup>94</sup> Crisp, J. ‘A State of Insecurity’, p.24-26. and Jaji, R. ‘Social Technology and Refugee Encampment in Kenya’, p.24.

against the dangers of containing refugees ‘in a state of dependency’.<sup>95</sup> Loescher argued that aid agency practices ‘force refugees to live in camps and to rely on the distribution of food and health supplies’.<sup>96</sup> This sense of a warehouse, prison or jail mentality, is repeated often within the literature, such as within the work of Loescher, Crisp, Agiers and Damien McSweeney,<sup>97</sup> but can also be seen in primary research conducted with refugees within Dadaab itself. As one female refugee asserted within the 2012 MSF report, *Shadows of Lives*, ‘I wish I could move freely and get a job, in 20 years I have never left the camp, I have no identity documents, and I feel like a prisoner’.<sup>98</sup> Somali refugee, Bashir Baihii spoke to CARE International about how he had resided within the camps since 1991 and felt like a prisoner every single day, ‘bound by the need for assistance in every part of my life. I could not be a breadwinner for my family’.<sup>99</sup> Furthermore, Bare Osman Abdi, the Dagahaley Youth vice-chair, described the Dadaab complex as an ‘open prison’.<sup>100</sup> The concept of warehousing has also been taken up by the U.S Committee for Refugee and Immigrants, which has a ‘Warehousing Campaign’ to raise awareness. It describes the situation experienced by certain refugee populations as:

... typically, but not always, confined to camps or settlements, virtually dependent on humanitarian assistance. They have no legal options to work or move freely throughout the country. Even refugees who have freedom of movement are warehoused, in effect, if they are denied the right to work, practice professions, run businesses, and own property...<sup>101</sup>

The notion of prison or warehousing feeds back into the clinical humanitarianism espoused by Malkki, in which the focus is purely upon the physicality of the refugees. The

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<sup>95</sup> Loescher, G. *Beyond Charity. International Cooperation and the Global Refugee Crisis*, (Oxford, Oxford University Press, 1993), p.175.

<sup>96</sup> Loescher, G. *Beyond Charity*, p.173.

<sup>97</sup> McSweeney, D. ‘Protracted Refugee Situations: issues facing the international community when a humanitarian emergency refuses to go away’, Cork Government Department Lecture Series, University College Cork, (3<sup>rd</sup> October 2012), [http://www.ucc.ie/cgd/media\\_player\\_4d.html](http://www.ucc.ie/cgd/media_player_4d.html) and McSweeney, D. ‘Conflict and Deteriorating Security in Dadaab, Humanitarian Exchange Magazine’, *Humanitarian Practice Network*, 53(March 2012), <http://www.odihpn.org/humanitarian-exchange-magazine/issue-53/conflict-and-deteriorating-security-in-dadaab> [accessed 5/09/2013]. Agiers, M. *Managing the Undesirables*.

<sup>98</sup> Female Dadaab refugee cited in Medicins Sans Frontiers, ‘Dadaab: *Shadows of Lives*’, (June 2012), <http://www.msf-me.org/en/resource/resources-and-publications/special-reports-1/dadaab-shadows-of-lives.html>, [accessed 28/08/2013].

<sup>99</sup> Baihii, B. cited in Care International, ‘Greener Side of Dadaab Taking Root’, (no date), <http://www.care.or.ke/index.php/storiesfromthefield/2-uncategorised/72-greenerdadaab>, [accessed 05/09/2013].

<sup>100</sup> Abdi, B. O. cited in Medicins Sans Frontiers, ‘Dadaab Twenty Years on’, in IRIN News, ‘Kenya/ Somalia: No consensus on way ahead for world's biggest refugee camp’, (15<sup>th</sup> June 2012), <http://www.irinnews.org/report/95657/kenya-somalia-no-consensus-on-way-ahead-for-world-s-biggest-refugee-camp>, [accessed 04/09/2013].

<sup>101</sup> US Committee for Refugee and Immigrants. *Warehousing Campaign*, <http://www.refugees.org/our-work/refugee-rights/warehousing-campaign/>, [accessed 05/09/2013].

warehouse/prison analogy highlights issues of statistics, factory processing, and logistics. And, within this analysis, the figure of the refugee disappears; they are reduced merely to an objective group that requires assistance, but who are unable to be individually identified. They are consumed by the warehouse/jail environment that is the Dadaab refugee complex. This lack of freedom of movement and warehouse/prison analogy is reinforced for the refugee population by their lack of work entitlements within the Dadaab complex (and Kenya as a whole). In being denied the opportunity to sustain themselves through employment, the vast majority of the refugee population need to rely upon the assistance of the aid organisations' food distribution services. This has led to what is termed the dependency syndrome. This is when refugees who are in receipt of aid apparently become dependent upon the aid packages and lose all of their 'self-initiative', which, Sidney Waldron and Naima Hasci argue, is normally linked closely to a 'moral breach... they would rather be beggars than take care of themselves'.<sup>102</sup> As Cindy Horst argues, 'the assumed identity of refugees creates and imposes an institutional dependency, to become a refugee is to accept the passive role of recipient'.<sup>103</sup> However, what the dependency syndrome fails to note, is that the refugees are not becoming dependent upon the aid agencies for assistance through choice, but rather through a lack of choice that is connected to the structures of the camp practices, such as confinement and forced unemployment. As CARE highlighted in a 2012 report, many refugees residing within Dadaab view the status of refugee as a disability, for despite their skills, they have to depend upon aid agencies for every aspect of their life.<sup>104</sup> Agiers supports this notion, asserting that denial of movement and employment has taken its toll upon the refugee population, leading to 'inactivity, apathy and dependence on humanitarian care and assistance, or alternatively towards local networks of work and commerce, informal and inevitably, 'illegal''.<sup>105</sup>

The confines of the Dadaab camp have forced the refugees to adopt dependency behaviours in order to survive. As Denise Brandt observed in 2011, 'camp residents rely on deliveries of food and water from beyond their operative territory; they have no control over what they will eat, how much, or when they will receive rations'.<sup>106</sup> This restrictive nature of the camps has been highlighted by the Chief Executive of the British Red Cross, Sir Nicholas Young.

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<sup>102</sup> Waldron, S. and Hasci, N. 'Somali Refugee in the Horn of Africa. State of the Art Literature Review', *Studies on Emergency and Disaster Relief*, 3(1995):1-98, p.28.

<sup>103</sup> Horst, C. *Transnational Nomads*, p.15.

<sup>104</sup> Care International, 'Greener Side of Dadaab Taking Root'.

<sup>105</sup> Agiers, M. *Managing the Undesirables*, p.55.

<sup>106</sup> Brandt, D. H. 'Relief Organism. Re-thinking Refugee Encampment at Dadaab Kenya', p.245.

He also follows this position, noting that the residents of the camp have become dependent on aid. He argues that this is due to being ‘coralled in the camps, when they could have been given land and tools, a few seeds and a water supply to allow them some self-sufficiency at least’.<sup>107</sup> Rather, many of the humanitarian policies have been reduced to what Erin Baines and Emily Paddon argue is the ‘receipt of aid by a voiceless, supposedly helpless other’.<sup>108</sup>

This dependency, controlling and ‘coralling’ of the refugee population, creates a situation where the camp can be viewed as a ‘highly dysfunctional’ entity, in which suffering and hardship are imposed upon the population.<sup>109</sup> The refugees are faced with few permanent solutions to their situation, and thus as Hyndman explains, they are forced to endure the ‘temporary’ arrangements and avail themselves of the support of the international aid agencies.<sup>110</sup> Indeed, the analogy of prison/jail highlights the violence of the camps that Eric Niyitunga argues are consumed by corruption. He spoke of his experiences as a refugee in Kenya, stating that ‘even in refugee camps, corruption is still there, because in refugee camps, supplies are supplied... frankly speaking that food is not enough. And the UNHCR can’t give them that food. UN gives food, and that food goes into other people’s pockets. Got it? Problems require money. Corruption is all over Kenya, it’s quite terrible’.<sup>111</sup> Yet, when the temporary slides into the long term, the conditions for the refugees become precarious. Oxfam International’s Robbert Van Den Berg declared in 2009 that the Dadaab complex ‘is barely fit for humans’.<sup>112</sup> Indeed, Crisp wrote within the paper entitled, *No Solution in Sight: The Problem of Protracted Situations in Kenya*, that the experience for Africans residing in protracted situations such as in Dadaab is ‘dismal in a number of respects’.<sup>113</sup> In protracted situations such as in Dadaab, where the spectacle of suffering was (and is) acute, Brauman argues that the causes of suffering are pushed to the background and instead ‘the humanitarian credo rules out any speculation about them. The pressing need for emergency

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<sup>107</sup> Young, N. ‘*Dadaab Refugee Camp: Waiting to Go Home*’.

<sup>108</sup> Baines, E, and Paddon, E. ‘This is How we Survived’: Civilian Agency and Humanitarian Protection’, *Security Dialogue*, 43(3)(2012):231-247, p.232.

<sup>109</sup> Crisp, J. ‘*A State of Insecurity*’, p.24-26.

<sup>110</sup> Hyndman, J. and Nylund, B. V. ‘UNHCR and the Status of Prima Facie Refugees in Kenya’, *International Journal of Refugee Law*, 10(1/2):21-48.

<sup>111</sup> Niyitunga, E. Postgraduate Student, Burundian Refugee. Skype interview conducted on 13<sup>th</sup> January 2014.

<sup>112</sup> Van den Berg, R, cited in Oxfam International. ‘*Somali Conflict: Camps are ‘Barely Fit for Humans: International Response Inadequate*’, (3<sup>rd</sup> September 2009), <http://www.oxfam.org/pressroom/pressrelease/2009-09-03/somali-conflict-overcrowded-camps-action-required>, [accessed 16/09/2013].

<sup>113</sup> Crisp, J. ‘*No Solution in Sight: The Problems of Protracted Situations in Africa*’, Evaluation and Policy Analysis Unit, Working Paper No.75, (January 2003), [www.unhcr.org/3e3d66c34.html](http://www.unhcr.org/3e3d66c34.html), p.13.

relief eclipsed all other considerations'.<sup>114</sup>

As noted previously, the *raison d'être* of the international agencies is to assist the refugees, the victims, the masses of humanity, within the confines of a temporary 'humanitarian space'. But, the emergency within Dadaab has continued for over two decades. The continuing emergency situation within the region has meant that aid organisations such as the UNHCR, have struggled to 'keep pace' with the situation rather than being able to 'revise ongoing policy'.<sup>115</sup> This exact point was raised by McSweeney, when he noted that Dadaab is still viewed as a temporary emergency situation, despite heading into its third decade. Since it has not been allowed to develop into a permanent emergency (due to Kenyan Government unease, as well as restrictions from the UNHCR due to various funding constraints that would be imposed), no permanent policy initiatives have been discussed.<sup>116</sup> But significantly, the refugees have continued to be seen as victims, requiring aid and assistance due to camp practices and policies. They have been positioned in a state of limbo and permanent victimhood, within a "temporary" environment that has become protracted. This is the situation for the Dadaab refugees. They have been rendered silent within the continuing emergency with no permanent measures being brought into consideration. Language and the ability to be heard resides with the aid agencies. The refugees have not been rendered mute through the process of refuge, but they have been rendered silent; the voice of authority, knowledge (and power) within the camp is that of the aid agencies. Yet, through it all they still retain the label of refugee, of victim, of dependent.

## **Conclusion**

In undertaking this analysis of an alternative way of becoming a refugee, I wanted to present a different approach to highlight how the refugee other is portrayed, one where language is removed and the position of the refugee is situated within a fixed, marginalised, homogenous environment of vulnerability. Whereby the voice of knowledge and authority regarding the crisis does not reside with the refugees but with the aid agencies, who arrive to offer assistance and support for the 'victims'. In the process of becoming a refugee, victimhood is essential, and with it comes the stripping of identity, history and politics. And, whilst I am not

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<sup>114</sup> Brauman, R. 'Refugee Camps, Population Transfers and NGOs', p.183-184.

<sup>115</sup> Brandt, D. H. 'Relief Organism. Re-thinking Refugee Encampment at Dadaab Kenya', p.245.

<sup>116</sup> McSweeney, D. 'Protracted Refugee Situations: issues facing the international community when a humanitarian emergency refuses to go away'.

arguing that the refugees are speechless, I would argue that instead they have been rendered silenced by the unequal relation of power that emerges when international organisations such as the UNHCR, MSF and the British Red Cross arrive to provide aid. Individual narratives of persecution, trauma and flight are lost within the large processes and labelling of clinical humanitarianism and the bureaucratisation of knowledge. Through the bestowing of *prima facie* refugee status, the refugees are not forced into speaking of their personal experiences of flight. They do not have to grapple with articulating their memories of flight into a coherent, detailed and consistent narrative for border agencies. That they have crossed an international border is proof that they are *prima facie* refugees (to an extent). Rather, in this instance, the emphasis becomes not upon the speech and language of the refugee, but instead upon the physical body of the refugee that can be cared for and assisted by the aid agencies. The focus in this instance is transferred from the verbal stories of persecution and flight, to the physical body as an object in itself. The refugee, as a result of this process of humanitarianism, is silenced, with language residing with the aid organisations, which create and disseminate information regarding the crisis through the bureaucratisation of knowledge. The process of refuge and speech then, compared with the British system in Chapter Four, is inverted. Yet, as noted in Chapter Three, with regard to forcing asylum seekers to speak, I wanted to highlight here that the denial of speech is just as dangerous for the individual as the enforcement of speech. For the denial of speech in this instance, and the silencing of the refugee results in lost narratives, as well as the rise of the Western voice in the form of aid agencies to fill the void. Importantly in this instance, the cloak of silence occurs alongside the loss of the individual, through processes of homogenisation.

In focusing upon the African perspective of refuge, the aim was to present an alternative way of becoming a refugee beyond the (British) European asylum system, one where the denial of speech is just as damaging to the individual as the enforcement of speech. Jonathan Darling argues that the figure of the refugee within states such as Britain is perceived as the ‘outsider par excellence’ who is the ‘rightless, speechless emissary of political and ethical demands upon the nation’. Whilst I support Darling’s argument of the rightless figure, who is subject to political and ethical demands, I am keen to stress the importance that language, speech and silence have had, and are having upon the process of ‘becoming’ a refugee. In drawing upon the African example, I feel that it can only help to strengthen the case for the importance of language, silence and speech within the (wider) asylum process. An individual becomes a refugee, and with that comes a host of personal experiences, traumas, emotions

and narratives; yet in order to seek refuge, in both of these cases, the refugee is either forced to articulate their memories in a structured narrative, or is rendered silent and consumed within the mechanisms of the larger humanitarian crisis. Thus, regardless of whether the individual is ‘becoming’ a refugee by having crossed from Somalia over into Kenya, heading for the Dadaab camps, or entering into Britain to seek refuge - the refugee will be affected by the process, with either their experiences being silenced, or as in Britain, their narrative of flight needing to be expressed. In either case, language, speech and silence play a significant part in the process of becoming a refugee, with labelling, othering and unequal relations of power emerging in both instances. The case of Africa and the Dadaab complex strengthen the notion of the significance and importance of language, speech and silence, and the unequal power relations at play within the processes of refuge, as well as affirming a discrepancy between the UNHCR and the 1951 Convention and protection, with the refugee falling into the gaps.

The final chapter of the thesis *The Colonial Legacy in the Refugee Regime: A Discussion on Othering* reflects on the use of postcolonial politics throughout the thesis in order to examine the discrepancy between the protection offered and that mandated by the UNHCR and by the 1951 Convention. The chapter then makes a call to acknowledge the colonial legacy of the refugee regime, arguing that by combining a postcolonial framework and a reintroduction of colonialism itself, it is then possible to evaluate the history and practices of the refugee regime within the colonial context, a context that is so often overlooked and marginalised from UNHCR history. Thus, Chapter Six makes a call for a much needed ‘colonial turn’ when examining the refugee regime in order to reflect on the continuities of power, othering and labelling that are still occurring towards not only the ex-colonised other, but the foreign other in the refugee regime.

## Chapter Six

### *The Colonial Legacy in the Refugee Regime*

#### **Introduction**

Throughout the previous chapters of this thesis, I have engaged with the process of refuge, from the international level, to the regional level and down to the state level. The focus of the thesis has been on the discrepancy between the 1951 Convention and the implementation of the protection offered, with the central examination centring on practices of colonialism within the asylum system, specifically how language and silence are framing, labelling and positioning the would-be refugee in particular ways.

Up to this point, the thesis has focused specifically on the notions of language and silence to evaluate the tensions within the international refugee regime and to examine how states have retained a high degree of autonomy within the system, whilst at the same time adhering to their international responsibility. Chapters One and Two focused on the use of language and silence within the 1951 Convention, as well within the regional refugee conventions, to highlight a gap between the international treaties themselves, and the actual protection emerging from the conventions. The language employed within the 1951 Convention has allowed for silence to embed itself, surrounding the understanding of persecution with no definitive definition emerging as to what it takes to be a refugee. The term has been rendered vague allowing states the ability to shape and define the term to suit themselves. In Chapter Two the silencing nature of the 1951 Convention was apparent when we looked beyond Geneva and drew on regional refugee regimes. What we saw emerging was a gap between the Convention and the protection offered, with the regional regimes attempting, in their own ways, to develop the language of refuge and bridge the silences of the 1951 Convention through the use of broad, defined language. Chapters Three, Four and Five provided two examples of the asylum system at the nation state level, with a focus on Britain and Kenya. Not offered as a comparative analysis, the discussion here used Britain and Kenya as examples of the asylum system in operation to draw upon and point to the questions that they raise regarding the positioning of the asylum seeker. Throughout the chapters, in different



ways, I have highlighted the state response to asylum seeking. Although never removing themselves from the 1951 Convention, due to the silence inbuilt into the convention and the flexibility that this accords, states, such as Britain, have been able to narrow the parameters, tightening access and castigating the would-be refugee as bogus, abusive and disingenuous. Language, silence and labelling have allowed the state to marginalise the figure of the refugee, controlling access to a defined and regulated category of the genuine refugee. By preventing access, the state has attempted to make the process of asylum as complex as possible for the would-be refugee. Chapter Three focused on the British refugee system and examining how through the various policies enacted, consecutive governments have framed and marginalised the figure of the asylum seeker in such a way that the government is able to retain a high degree of control and power, whilst ensuring its commitment to international refugee law. By engaging with notions such as labelling, binaries, categorisations and hospitality, Chapter Three highlighted the marginalised position of asylum, as well as the drive to make the process as defined and regulated as possible. Chapter Four then deepened the discussion on language and silence, and engaging with speech, language and silence, again in the British asylum system. The chapter examined the tensions in the refugee regime highlighting the themes of silence and language and the various ways in which they manifest themselves within the asylum system, and examining the impact that this has on attaining refuge. Chapter Five continued with the notion of silence and language, extending the analysis to Kenya, and providing an alternative means of ‘becoming’ within the refugee system focusing on prima facie refugee movements. Within this chapter the emphasis was on silence and the body, with those in authority having the power of speech. Chapter Five continued with the discussion on the discrepancies between the 1951 Convention and the practical implementation of the protection regime, with the rendering of the refugee as an object occurring within the process of protection.

Up to this point in the thesis, the focus has been on examining the international refugee system, its language and its silences. The language of the 1951 Convention, and what I find are silences within it, seem to translate into abusive and marginalising practices at the state level. There appears to be a disjuncture between the international refugee law and the protection that is meant to come from it, resulting in the silencing of potential would-be refugees. This itself, I argue, is due in part at least to the use of language and silence that resides within the 1951 Convention and that has allowed states the manoeuvrability to retain a high degree of control at the expense of the asylum seeker, all the while presenting

themselves as adhering to their international responsibility. In examining this discrepancy, throughout the thesis, I have drawn on various postcolonial political tools, for instance, language, silence, speech, labelling, binaries and hospitality in order to understand the disjuncture between the 1951 Convention and the protection that is offered by states. However, in order to understand how this gap between the 1951 Convention and protection offered results in the ‘othering’ of the refugee, I propose that it is necessary to revisit the question of colonialism itself - which has been marginalised heavily in the refugee literature - and examine whether the international refugee system could be viewed as bearing the traces of colonialism that are still emerging in its behaviours with regard to the other within the present. For postcolonialism alone is not enough in engaging with the refugee regime, the framework can only explain so much of the practices and the relations between the state and the refugee. But, by introducing a historical and theoretical context to the analysis, and bringing in the colonial legacy of the refugee regime, I argue that this allows Chapter Six to reflect on colonial practices of language and silence, power, labelling and othering that have been discussed in Chapters One to Five, and to ground the postcolonial framework in a historical and theoretical colonial legacy. In a sense, Chapter Six provides the core to the central research question, examining not only the postcolonial politics, but the colonial legacies within the asylum system, how colonial practices through the host state are continuing to frame, label and position the would-be refugee in particular ways.

Accordingly, Chapter Six proposes that the colonial legacy left a mentality regarding the colonial state’s engagement with the colonial other, but also with the non-colonised other in general. Colonialism does not operate merely within the relationship of the coloniser/colonised, but actively shapes how the ex-coloniser engages with the foreign other: this is the coloniser’s colonial legacy and it is one that I argue needs to be considered when we are engaging with the refugee regime. For I argue that the othering that enabled colonialism in the first place is still continuing and encompasses not only the colonial other, but also the foreign other.

Throughout the thesis, my focus has been on the position of the state, and the state’s ability to control and regulate the extent of its 1951 responsibility. By never elaborating on the definition of persecution, and remaining silent on the understanding of refuge, states have been provided with a wealth of flexibility that they have then used to provide a controlled and narrow understanding of refuge; one that suits their own needs. To help us to understand

further why this is occurring and the relationship between the state and the refugee, this final chapter introduces colonialism back into the framework. It does not focus on the refugees, the minority other. For they are seeking an international right to asylum; they do not need to justify or provide a reason for their actions. Rather, the final chapter of this thesis will focus on the state as an ex-coloniser and examine its position and behaviour in the refugee system. In doing so, I am drawing on the work of Sherene Razack, *Looking White People in the Eye*. In her book, she makes the pertinent point that rather than focusing on the other, the minority in society, why do more people not focus their attention on ‘the describers and imaginers whose gaze constructs asylum seekers from the third world’.<sup>1</sup> In the unequal relationship between the refugee and the state, it is the state that is doing the labelling. It is the state that is doing the observing. As such, I want the final chapter to engage with the labeller in this relationship - the subject within the refugee system, rather than the traditional focus on the refugee object - and examine the impact that colonialism is still having within the refugee regime.

In doing so, I particularly want to delve into the historical role of the coloniser, and examine the impact that the colonial experience had on the coloniser and how it has shaped their behaviour towards the other - not only the colonised other but also the foreign other - when they arrive for instance at Britain’s shores. In examining the relationship between colonialism and refuge, I want to draw the discussion towards viewing the UNHCR and the 1951 Convention as a colonial product, and identify the impact that this has had on the relationship between the state and the refugee. The UNHCR is a colonial institution and the convention is a product of the colonial era, yet rarely is this discussed or mentioned in analyses of the UNHCR. In addressing the colonial impact within the refugee system and the UNHCR itself, the chapter examines the role that colonialism has had on the silencing of the refugee regime.

The chapter will begin by addressing the UNHCR and the 1951 Convention. In doing so, I will be drawing on the work of critical Human Rights historians, such as Samuel Moyn, Mark Mazower, A.W.P. Anderson and Makua Matua. I want to engage with the founding myths of the United Nations and the Universal Declaration of Human Rights and discuss some of the contradictions and ironies of states establishing a universal human rights agenda, whilst at the

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<sup>1</sup> Razack, S. *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (London: University of Toronto, 2008), p.88.

same time maintaining firm control of colonial territories. For in undertaking this analysis of the colonial history surrounding the 1940s human rights era, the chapter draws connections between the establishment of the UN and the UNDR and the UNHCR/ 1951 Convention. In doing so, the chapter challenges the origins and behaviour of (Western) states, which led the development of the human rights regime (and the refugee regime) whilst maintaining colonial control, and brings this criticism to bear on the UNHCR; an organisation, I argue, which has not come to terms with its colonial origins.

The chapter will then engage with the ex-coloniser within the asylum system, examining the impact that colonialism has had upon the coloniser and the legacies of colonialism that are potentially still manifest within the refugee system. I will be drawing in particular on the work of Razack, Aime Césaire and Ashis Nandy, to discuss the impact that colonialism has had on the former-coloniser. For colonialism is a two-way process and the coloniser is just as affected and transformed by the colonial engagement, as the colonised. Thus, I want to examine how (European) states have been affected by the process of colonialism, and how this has then impacted on how they engage and react, not only with the coloniser other, but also with the foreign other when they arrive at the border. For as postcolonialism teaches us, colonialism should not be viewed as confined to a certain era; it has continued to shape and manifest itself in practices since the 'formal' colonial era ended. Accordingly, this section will engage with the impact of colonialism and the degradation of the coloniser, and it will engage with issues of racism towards and fear of the (colonial) other. Finally, the chapter will bring the colonial discussion back round to engage with the notion of silence and silencing, arguing that the notion of language and silence that I have spoken of throughout the thesis is connected with the colonial engagement and the relationship towards the (ex-colonised) other who is now seeking sanctuary. How we react to the refugee other is a product of the colonial encounter and as Razack notes, 'remains a moment when powerful narratives turn oppressed peoples into objects, to be held in contempt, or to be saved from their fates by more civilized beings'.<sup>2</sup>

The colonial legacy is a history that has been marginalised considerably within the field of asylum; yet reintroducing this legacy allows us to re-examine the behaviour of institutions such as the UNHCR and reposition this in light of the colonial lens. Importantly, by drawing

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<sup>2</sup> Razack, S. *Looking White People in the Eye*, p.3.

upon postcolonial politics and their use of language, silence, labelling, binaries... etc for instance, and developing that analysis through an engagement with the actual colonial legacy in the asylum system, the thesis is able to address a neglected history and present an alternative way of understanding the disparity between the 1951 Convention claims to refuge, and the actual positioning of the would-be refugee as an abusive, bogus refugee other. Indeed, I aim to shed light on the refugee process, as well as on the silences inherent in the system and the silencing impact that colonialism has had on those individuals who are seeking asylum in states such as Britain.

### **The UNHCR and Colonialism: A Forgotten History?**

The first section of the thesis engaged with examining the position of the UNHCR as a colonial institution. By engaging with the UNHCR and its colonial origins, this analysis provided a rounded discussion that is generally not considered, and that will help to strengthen the understanding of the relationship between the state, the asylum seeker and its colonial legacy. For as Robert Young reminds us, when evaluating European history ‘the decolonization of the European empires has taken place, as has the accompanying attempt to decolonize European thought and the forms of its history as well’.<sup>3</sup> Colonialism has been overlooked in the UN and UNHCR’s history, with the focus instead being on the Second World War and the emergence of a human rights regime. The following discussion wants to re-orientate the discussion of the UN and the UNHCR specifically around the West’s colonial engagement and subsequent legacy.

In Chapter One, I provided a discussion of the history of the UNHCR, engaging with the Conference of Plenipotentiaries and the drafting of the 1951 Convention. In that chapter I highlighted the silence in the language, as well as the discord surrounding the understanding of the persecution criteria. I argued that the silence in the definitional understanding of what persecution means has accorded states a high level of control. The silence allows for various divergent interpretations of the meaning to emerge that can be altered and changed to suit the needs of the individual state, and the occurring refugee problem. However, in that chapter, although I reflected on wider political issues such as the impact of the Second World War, the Holocaust and the Cold War on the understanding of refugee, persecution, and

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<sup>3</sup> Young, R. ‘Colonialism and Humanism’ in Donald, J. and Rattansi, A. *‘Race’, Culture and Difference*, (London: Sage, 1999), pp.243-251, p.243.

particularly underpinning the notion of the political refugee, I did not elaborate on the impact of colonialism on the establishment and creation of refugees.

Granted, when the 1951 Convention was established, as noted in Chapter One, there were defined spatial limitations placed on the Convention that meant that it was only ever applicable to peoples affected before 1951, and primarily in Europe. Interestingly, as I noted in Chapter One, the UNHCR, when it was originally set up, was meant to be a temporary organisation; it was never meant to be permanent. However, when the 1967 Protocol came into force, and considering the disintegration of empires that was happening at the time, such as the British empire, it is rather surprising that the definitional understanding of what constituted a refugee was not up for consideration. The only aspect that was changed was the dropping of the temporal elements of the original convention. With the disintegration of the colonial sphere, there was a rise in the number of refugees fleeing instability, from the new states emerging from colonial rule. As the Independent Commission on International Humanitarian Issues reported ‘they inherited artificial boundaries, fragile national unity, brittle political systems and distorted economies... Local disputes were aggravated and exploited by external powers competing for economic and political advantage’.<sup>4</sup> Yet, none of this was reflected in either the 1951 Convention or the 1967 Protocol.

### The Good Offices as a Colonial Bridge?

Interestingly, even when we incorporate the UNHCR’s ‘good office’ policy, there is still a discrepancy between the 1951 Convention and the UNHCR’s approach to asylum seekers beyond the European arena. Gil Loescher writes that during the 1950s the UNHCR started to take greater responsibility for refugees in the developing world. During this time period, the world saw refugees proliferating beyond the confines of Europe, for example in places such as Algeria, Tunisia, Guinea-Bissau, Mozambique and China. By the 1960s, western states were aware that the refugee issue was no longer a problem that was confined to Europe alone, and the UNHCR asserted that the ‘nerve centre’ was shifting from the European continent, to Africa and Asia.<sup>5</sup> Yet, with the process of decolonisation occurring violently, in places such

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<sup>4</sup> Independent Commission on International Humanitarian Issues, *Refugees: Dynamics of Displacement*, (London: Zed Books, 1986), p.3.

<sup>5</sup> UN High Commissioner for Refugees. ‘*Report of the United Nations High Commissioner for Refugees to the General Assembly, New York*’, (1<sup>st</sup> January 1966), A/6311/Rev.1, <http://www.refworld.org/docid/3ae68c8c0.html>, [accessed 14/03/2014].

as the French and Portuguese occupied colonies in Africa, there was an influx of refugees. This raised issues in itself for the UNHCR. As Loescher wrote:

In many cases, refugee situations directly involved either the political interests of the Western colonial powers who were also among the founding members of the international refugee regime, or the security concerns of newly independent states who were the newest members of the United Nations. In such cases the UNHCR and UN states sought a means to avoid the embarrassment of treating refugees involving their supporters and close allies, as victims of persecution. In the end, a distinctly new way of responding to refugee problems emerged in the United Nations.<sup>6</sup>

Regarding the UNHCR's 'good offices' policy, High Commissioner August Lindt in 1960, stated that the policy had indeed, 'strengthened the coordination' of the UNHCR as an organisation, and he asserted that 'in order to study and convey to those interested the specific needs of some of the refugee groups, the interest of the Office has been widened'. Interestingly though, Lindt argued that the mandate of the UNHCR had always been global. He argued that through the 'good offices' policy, the High Commissioner's Office had geographically widened its scope considerably.<sup>7</sup> For the mandate then reached far beyond the confines of the 1951 Convention. Indeed, Gerrit Jan van Goedhart, the first High Commissioner for Refugees stressed this, asserting that the 'office had a universal mandate to assist refugees everywhere and that he was prepared to help if he were given the authority and funds to do so'.<sup>8</sup> The mandate of the UNHCR was universal, but the scope of the 1951 Convention was European in nature, being fixed by temporal limitations and bound by the criteria of persecution. Hence the High Commissioner, Felix Schnyder, who inherited the 'good offices' policy from Lindt, his predecessor, declared in a speech to the UNHCR's Executive Committee in 1962 that:

The "good offices" procedure, now part of UNHCR's normal activities, has introduced into the already long-established structure of the mandate an element of flexibility and dynamism which meets the requirements of the present situation. Being concerned solely with the refugees' needs, the "good offices" procedure has at the same time once again drawn attention to and stressed the specifically humanitarian nature of UNHCR's work. But these adjustments have

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<sup>6</sup> Loescher, G. *The UNHCR and World Politics: A Perilous Path*, (Oxford: Oxford University Press, 2001), p.92.

<sup>7</sup> Lindt, A. R. *Speech by Dr Auguste R. Lindt, United Nations High Commissioner for Refugees, to the United Nations Economic and Social Council (ECOSOC)*, 25<sup>th</sup> July 1960, UNHCR Agency, <http://www.unhcr.org/3ae68fb80.html> [accessed 1/03/2014].

<sup>8</sup> van Goedhart, G. J. cited in Loescher, G. *The UNHCR and World Politics: A Perilous Path*, p.93.

in a sense extended the competence of the Office in an anarchical or unrestricted way, and UNHCR's essential task remains unchanged – to apply international protection, combined where necessary with adequate assistance as a means of contributing to the final solution of refugee problems by facilitating either the repatriation of the refugees in cases where they have freely agreed to this, or their admission to and complete assimilation in a new community. Thus, far from modifying the traditional functions of the Office, the purpose and effect of the Assembly's recent decisions has been to adapt the Office to the needs which it is now called on to meet.<sup>9</sup>

Significantly, the developments with regard to the ‘good office’ policy, Loescher argued, signalled a shift in the future actions of the UNHCR in the third world and highlighted the universal nature of future UNHCR business, as well as the political implications of refuge.<sup>10</sup> High Commissioner Schnyder highlighted that persecution ‘was the root of many misunderstandings with countries of origin whose susceptibilities were offended by eligibility decisions which they tend to regard as more or less open criticisms of themselves’. Indeed, High Commissioner Schnyder argued that with regard to the ‘new’ refugees emerging from the developing world, they should be covered purely by the ‘good offices’ policy, rather than extending the mandate of the UNHCR itself - possibly, he argued, in a quest to avoid any dispute with either the old or emerging new powers. As a result of this, Loescher argued that, in viewing the ‘good offices’:

The approach was both pragmatic and provisional. It enabled the UNHCR to avoid the undesirable political consequences of making refugee determinations in the developing world that might damage relations with some of the principle Western supporters of the international refugee regime or of newly independent governments. The good offices basis for action contained no assumption of persecution and avoided most of the limitations for action in the international refugee legal instruments.<sup>11</sup>

Indeed, as Albert Bender commented in 1967 regarding the ‘good office’ policy:

... I have found that there is a special concern lest the labelling of individuals as “refugees in the mandate of the High Commissioner” might cause political difficulties with countries of origin, particularly in Africa ...like a fire brigade, the

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<sup>9</sup> Schnyder, F. *Statement by Mr. Felix Schnyder, United Nations High Commissioner for Refugees, to the Executive Committee of the High Commissioner's Programme, Seventh Session, Geneva, 14<sup>th</sup> May 1962*, <http://unhcr.org/print/49f81108e.html> [accessed 1/03/2014].

<sup>10</sup> Loescher, G. *The UNHCR and World Politics: A Perilous Path*, p.108.

<sup>11</sup> Loescher, G. *The UNHCR and World Politics: A Perilous Path*, p.113.



office tries to help without concerning itself with the underlying causes of the fire.<sup>12</sup>

Indeed, the preference for using the label ‘good offices’, Sara Davies argues, highlights how the refugee regime was engrossed in a process of ‘legal argumentation, whereby the struggle between politics and law leads to exclusion, in order to privilege particular concepts that are more politically acceptable to powerful actors’.<sup>13</sup> However, examining the discussion of the ‘good offices’, and the growing responsibility for and realisation of the continuing refugee growth, raises the question as to why the 1951 Convention was not updated in order to meet the emerging requirements of individuals who were not even considered during the initial drafting of the Convention. States such as Nigeria were appealing to the UNHCR for the establishment of a more universal refugee convention to meet the needs of refugee flows in the continent of Africa. Indeed, the Nigerian representative to the UNHCR emphasised:

[the ] difficulty of applying the Convention in Africa which, in his view, had made it necessary to resort to regional arrangements. He expressed the hope that the High Commissioner would take appropriate action which would either make it unnecessary to adopt a separate convention for Africa or would ensure that such a convention, if adopted, would possess a truly subordinate character.<sup>14</sup>

The 1951 Convention was not written for a non-European audience. Yet, when the UNHCR was called on to introduce the 1967 Protocol, only the temporal specifications of the original convention were altered - is it then the case that a silence was maintained in the 1951 Convention in order to avoid politically awkward scenarios between the traditional western powers who had established the regime, and the new postcolonial states that were emerging? Indeed, it appears that the ‘legal argumentation’ was able to allow for a gap to emerge between the treatment of and responsibility for Convention refugees, and that of mandate refugees who fell in the ‘good offices’ catchment. Davies highlights through her archival research into the 1967 Protocol, that at the onset of the Bellagio Conference at which the Protocol was decided upon, states asserted that there would be no modification to the 1951 Convention itself. Rather, it was felt that a Protocol was the most effective way of addressing the growing refugee crises and the quickest way to remove the temporal limitations of the

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<sup>12</sup> Bender, A. F. Jr. Paper (2<sup>nd</sup> October 1967), Fonds 11, Series 1, Box 58, “Good Office” Policy, [3.1967/11/1970], UN High Commissioner for Refugees Archives, Geneva, [accessed 21/10/2011].

<sup>13</sup> Davies, S. E. ‘Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol’, *International Journal for Refugee Law*, 19(40)(2008):703-728, p.706.

<sup>14</sup> UN High Commissioner for Refugees. *Addendum to the Report of the United Nations High Commissioner for Refugees*, 1 January 1966, A/6011/Rev.1/Add.1, <http://www.refworld.org/docid/3ae68ca80.html>, [accessed 14 March 2014], Point 39.

1951 Convention, rather than establishing a conference to overhaul the Convention, which would require all of the signatories to be present and possible limitations and amendments to be imposed on the subsequent convention - in what Davies terms as the possibility of opening a 'Pandora's box'.<sup>15</sup>

Marjolienne Zieck raises a similar point, although she makes no reference to the colonial politics occurring at the time. She argues that in regard to the UNHCR there has emerged a problematic parallel universe whereby there is a marked discrepancy between the objectives of the 1951 Convention (and, as always, I am including the developments of the 1967 Protocol) and the actual mandate of the UNHCR itself. With the establishment of the 'good offices' policy, the UNHCR was addressing the needs of refugees beyond the scope of the original 1951 Convention, and this was eventually confirmed as a 'general designation of the UNHCR's competence'. In an address to the United Nations General Assembly in November 1986, High Commissioner for Refugees, Jean-Pierre Hocké noted that in contemporary refugee flows:

The vast majority of today's refugee and asylum-seekers who find themselves in developing countries do not always correspond to the formal definition. They belong to the wider category of persons, who leave their countries because of danger to their lives and security emanating from armed conflicts or other grave forms or violence or danger. That such persons are in need of international protection has been recognized by the international community through various resolutions adopted by the General Assembly. But there cannot be different sets of standards for different regions. The main criteria to determine the competence of the High Commissioner and the concern of States should be the existence of a need for international protection.<sup>16</sup>

Indeed, as the UNHCR's mandate stresses 'the High Commissioner is also legally entitled to and responsible for interceding directly on behalf of refugees and stateless persons who would otherwise not be represented legally on the international plane'.<sup>17</sup> However, what this has led to, and what the policy of the 'good offices' highlights, (as well as the UNHCR's continuously growing mandate for 'refugees of concern') is what Zieck terms a parallel universe, whereby a 'growing gap between the obligations of states and the mandate of the

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<sup>15</sup> Davies, S. E. 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol', p.720-722.

<sup>16</sup> Hocké, J. P. *Statement by Mr. Jean-Pierre Hocké, United Nations High Commissioner for Refugees, to the Third Committee of the United Nations General Assembly, 7<sup>th</sup> November 1986*, The UN High Commissioner for Refugees, <http://www.unhcr.org/3ae68faf2c.html> [accessed 7<sup>th</sup> March 2014].

<sup>17</sup> UN High Commissioner for Refugees. 'Note on the Mandate for the High Commissioner for Refugees and his Office', <http://www.unhcr.org/526a22cb6.html>, [accessed 7/03/2014], p.2.

UNHCR' has emerged. Indeed, it was recognised at the time that the 'good offices' policy prevented a great deal of political tension, as it was viewed as an elastic instrument for handling 'emerging refugee situations. By assisting new refugee groups rapidly, practically and efficiently, the High Commissioner has contributed to the peaceful solution of problems which otherwise might have led to considerable political tension'.<sup>18</sup> However, in the 1967 Protocol, the advancements made by the UNHCR's 'good offices' were never incorporated and the definition was never extended in an 'inexorable process'. From that point on, states adhered to a refugee definition defined solely by the 1951 Convention. However, the UNHCR itself has substantially developed its mandate beyond the confines of the original 1951 Convention. As a result, in the international refugee regimes, Zieck argues that the 'consistency of the regime has vanished as a result of widely diverging definitions of its beneficiaries affecting the original allocation of responsibilities between states and UNHCR, in favour of the latter'.<sup>19</sup>

While I support Zieck's analysis of the parallel universe within the UNHCR and the discrepancies between the 1951 Convention and the UNHCR mandate, I want to merge this with Razack's observations of those who are doing the labelling, in this respect, to examine how the colonial encounter contributed to the emergence of this discrepancy, which favours the state. By introducing the colonial origins into the discussion on the UNHCR, as well as the subsequent colonial legacy, I propose that an understanding of the colonial question helps to elucidate this apparent silence, or what Zieck terms the 'gap,' in the development of the 1951 Convention.

#### The UNHCR as a Colonial Institute: a marginalised history

There is little literature to draw on that speaks of the UNHCR's relationship with colonialism. Thus I find that it is necessary to look towards the UN itself, to examine the relationship of the UN and colonialism (especially the establishment of the Universal Declaration of Human Rights (UDHR)), and then apply this analysis to the UNHCR. Glen Peterson, one of the few scholars to address the UNHCR as a colonial institute, asserts that its origins 'seem so far to

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<sup>18</sup> Mr Rorholt, Letter to Mr Colmar (1/1/1971), Fonds 11, Series 1, Box 58, "Good Office" Policy, [3.1967/11/1970], UN High Commissioner for Refugees Archives, Geneva, [accessed 21/10/2011].

<sup>19</sup> Zieck, M. *UNHCR's Parallel Universe: Marking the Contours of a Problem. Inaugural Lecture*, (Amsterdam: Voissiuspers UVA, 2010), p.17.

have escaped the attention of refugee scholars'.<sup>20</sup> Certainly, as Andreas Huyssen asserts, the 'colonial genealogy must be recognized'.<sup>21</sup> Indeed, Susan Waltz writes that very little attention has been paid to the impact of colonialism on organisations such as the UN. Although her analysis is centred on the UN and the UDHR, I find that it is highly appropriate to extend it to engage with the colonial silence surrounding the UNHCR. As Waltz wrote:

It is neither surprising nor unnatural that historians and other analysts should focus attention on the dominant events of an epoch, and so it has been with the Cold War. Cold War tensions gave texture to the UDHR discussions as soon as they opened, and the impact of those tensions on both the UDHR itself and the subsequent development of the multilateral human rights regime have been subject to many analyses. However, more than one political agenda claimed global attention in 1948.<sup>22</sup>

The United Nations and the UN Charter were established in 1945, the Universal Declaration of Human Rights in 1948 and the Refugee Convention in 1951. Less than six years separate these events in the post-war era and although events were escalating into the Cold War, international politics did not deviate substantially in this six-year period to prevent the analysis of the UN being applied to the establishment of the UNHCR. Importantly - and I believe that this needs to be addressed - during the mid-1940s, states such as Britain ruled over a quarter of the world through their territorial acquisitions,<sup>23</sup> with Britain managing to retain what John Darwin terms, 'the vast bulk of the empire'.<sup>24</sup> Thus, in using an analysis of the UN's colonial history as a basis for analysing the UNHCR, the chapter will address the wider political climate that was driving states' interests in establishing international organisations, whilst protecting and maintaining their own colonial interests.

When examining the formation of the United Nations, Samuel Moyn argues that there is a myth surrounding the post Second World War era, as being a time of the birth and expansion of human rights. With the establishment of the UN and the UDHR, human rights were seen as blossoming out of the ashes of the war. Yet, Moyn argues that this is an 'inaccurate and depoliticised view' of events following the war, which has allowed a myth to emerge, that

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<sup>20</sup> Peterson, G. 'The Uneven Development of the International Refugee Regime in Postwar Asia: Evidence from China, Hong Kong and Indonesia', *Journal of Refugee Studies*, 25(3)(2012):326-343, p. 327.

<sup>21</sup> Huyssen, A. 'International Human Rights and the Politics of Memory: Limits and Challenges', *Criticism*, 53(4)(2011):607-624, p.614.

<sup>22</sup> Waltz, S. E. 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights', *Human Rights Quarterly*, 23(1)( 2001):44-72, p.62.

<sup>23</sup> Lynch, M. *The British Empire*, (London: Hodder Education, 2005), p.194.

<sup>24</sup> Darwin, J. *Britain and Decolonization: The Retreat from Empire in the Post-War World*, (London: Macmillan Press, 1988), p.165.

human rights were a direct result of the horrors of the war and specifically the Holocaust. He argues that this myth ‘compounds the importance of focusing on the more recent invention of the contemporary utopian imagination’ and that the current human rights regime, as we know it, emerged later in the 1970s and 1980s.<sup>25</sup> This is still a contested issue, and scholars such as Devin Pendas argue that Moyn does not give the 1940s enough credit in the emergence of the human rights regime. However, Pendas does note that human rights, following their ‘emergence’, were disused and in some regards in disrepute, and he views the 1970s as more of a revival of human rights.<sup>26</sup> Either way, this allows for a delay in the emergence of a human rights regime, one that I can position in the context of the continued colonial politics of the era.

When we examine the establishment of the UN or the UDHR in the light of the extent of colonialism operating in the period, the significance of human rights appears as a facade, if not misplaced. Or importantly, it highlights the question: human rights for whom? When so many states were in possession of colonial powers, who was the recipient of the human rights that were emerging, or were the emerging human rights regime and the UN means of stabilising and retaining the status quo after the Second World War? Indeed, Mazower argues that the UN’s subsequent ‘embrace of anticolonialism... has tended to obscure the awkward fact that like the league, it was a product of empire and indeed, at least at the outset, regarded by those with colonies to keep as a more than adequate mechanism for its defence’.<sup>27</sup> This takes us back to Balakrishnan Rajagopal’s argument in Chapter Two, that the UN upholds a self-image of being a postcolonial institution, untouched by the Western colonial politics of pre-1948 when the Universal Declaration of Human Rights (UDHR) gave birth to the contemporary human rights movement. As Rajagopal has argued, this self-worth is merely a facade, for the new regime merely follows the old international system of colonialism.<sup>28</sup>

This is particularly true when we examine the development of the United Nations. The initial planning and formatting of the UN occurred at a confidential meeting at Dumbarton

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<sup>25</sup> Moyn, S. *The Last Utopia: Human Rights in History*, (London: Harvard University Press, 2010), p.83.

<sup>26</sup> Pendas, D. O. ‘Towards a New Politics? On the Recent Historiography of Human Rights’, *Contemporary European History*, 21(1)(2011):95-111, p.108.

<sup>27</sup> Mazower, M. *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations*, (Oxford: Princeton University Press, 2009), p.17.

<sup>28</sup> Rajagopal, B. ‘Counter-hegemonic International Law: rethinking human rights and development as a third world strategy’, *Third World Quarterly*, 27(5)(2006):767-783, p.769.

Oaks, United States in August 1944, with the United States, Britain, Russia and China being the only states present. These four states established a proposal for the organisation that went on to be discussed at the San Francisco Conference in 1945 and that would later form the Charter of the United Nations.<sup>29</sup> Interestingly, at the Dumbarton Oaks conference, the concept of human rights was hardly discussed. As Mark Mazower writes, the four powers instead concentrated on the structure of the forthcoming organisation and ‘the extent to which the Great Powers would remain in control of its operations’.<sup>30</sup> Indeed, the final Charter of the United Nations, whilst making reference to ‘faith in fundamental human rights’, and seeking to ‘promote’, ‘respect’, and ‘encourage’ human rights,<sup>31</sup> at the same time underlined the significance of the domestic jurisdiction of states in Article 2(7), declaring that ‘nothing contained in the present Charter shall authorize the United Nations to intervene in the domestic jurisdiction of any State’.<sup>32</sup>

Mazower argues that ‘a democratic imperial order had been preserved, thanks to the formation of the UN, even as fascist militarism had been defeated. The work of civilizing inferior races, and keeping them in order, could continue’.<sup>33</sup> Having fought against the Nazi regime, Europe emerged in the aftermath still firmly attached to its empires. As W.E.B. Du Bois argued in the post war era, ‘we have conquered Germany... but not their ideas. We still behave in white supremacy, keeping Negroes in their place and lying about democracy when we mean imperial control of 750 millions of human beings in colonies’.<sup>34</sup>

Colonialism retained a massive position on the post Second World War political stage, and authors such as Mazower, Mutua and Moyn situate the rise of the UN in a colonial framework, rather than in a burgeoning human rights framework. For as Mazower argues, ‘the initial sense of many of the UN’s principle backers was that it might still serve the old purpose’.<sup>35</sup> Indeed, when viewing the emergence of these organisations, the centrality of colonialism needs to be repositioned, rather than viewed as an era that can be successfully

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<sup>29</sup> SEE: Waltz, S. E. ‘Universalizing Human Rights’ and Mazower, M. ‘The Strange Triumph of Human Rights, 1933 1950’, *The Historical Journal*, 47(2)(2004):379-398, p.387.

<sup>30</sup> Mazower, M. ‘The Strange Triumph of Human Rights’, p.391.

<sup>31</sup> Gandhi, S. *Blackstone’s International Human Rights Documents* (7<sup>th</sup> Editions), (Oxford: Oxford University Press, 2010), Charter of the United Nations, p.2-7. The language employed in regards to human rights can be observed specifically in the Preamble, Article 1(3), Article 55(C), Article(62) and Article 76(C).

<sup>32</sup> Gandhi, S. *Blackstone’s International Human Rights Documents*, p.3.

<sup>33</sup> Mazower, M. *No Enchanted Palace*, p. 21.

<sup>34</sup> Du Bois, W. E. B. cited in Mazower, M. *No Enchanted Palace*, p. 63.

<sup>35</sup> Mazower, M. *No Enchanted Palace*, p.196.

bypassed, forgotten or neatly packaged away. As Dembour stresses, we must never forget our colonial engagement and ‘act as if it had nothing to do with the way we are today’, especially if you happen to be a state such as Britain; an ex-coloniser, who whilst engaging in the establishment of international global orders of governance and human rights regimes, was still in possession of a colonial empire.

Even when we consider the Universal Declaration of Human Rights (UDHR), by situating the declaration in the framework of colonialism, the universal nature and larger objectives of the imperial states involved in the establishment of the declaration, cannot be ignored. The Declaration established the ‘first universal statement on the basic principle of inalienable human rights’ and declared a ‘common standard of achievement for the people of all nations’.<sup>36</sup> The UDHR articulated to the international community that the world would not tolerate further atrocities, and that for the first time, human rights were recognised and to be upheld universally. It highlighted that ‘belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people’<sup>37</sup>. However, although claiming to be universal and inalienable in nature, the concept of human rights could be accredited with merely upholding a Eurocentric notion of human rights that was Western in orientation and universal solely in name. To quote Jose Alves:

Given that eight countries abstained out of an international body made up then of only fifty-six states – most of which were from the West or politically “Westernized” – the Universal Declaration of Human Rights was thus not born “universal”, even for those who took direct part in the process of its elaboration.<sup>38</sup>

Klose argues that the colonial powers’ ambition to retain their overseas territories was of more importance than their obligation to uphold and protect universal human rights. It led to a paradox where human rights were proclaimed and upheld, yet violated and abused at the same time.<sup>39</sup> Indeed, the apparent universal applicability is rooted in a Eurocentric basis. As Makua Mutua asserts of the UDHR, ‘although the human rights movement is located in the historical continuum of Eurocentrism as a civilizing mission... it is critical to note that it was

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<sup>36</sup> United Nations. *The Universal Declaration of Human Rights* (1948), <http://www.un.org/en/documents/udhr/>, [accessed 12/01/10].

<sup>37</sup> United Nations. *The Universal Declaration of Human Rights*.

<sup>38</sup> Alves, J. cited in Hoover, J. ‘Rereading the Universal Declaration of Human Rights: Plurality and Contestation, no Consensus’, *Journal of Human Rights*, 12(2)(2013):1-39, p.7.

<sup>39</sup> Klose, K. ‘Sources of Embarrassment: Human Rights, State of Emergency, and the Wars of Decolonization’, in Hoffman, S. L. *Human Rights in the Twentieth Century*, (Cambridge, Cambridge University Press, 2011), pp.237-257, p.256.

European and not non-European, atrocities that gave rise to it'.<sup>40</sup> For it is important to remember that non-European atrocities, perpetrated by European states, still occurred post-UDHR. This is perhaps particularly the case for Britain, one of the main players in the establishment and ratification of the UN, the UN Charter and the UDHR. For example, the Mau Mau emergency in British colonial Kenya (1952-60) occurred in an era where human rights had been proclaimed universally essential and when the world united together in its condemnation of and horror regarding the Nazi concentration camps, and cried 'never again'. As one former colonial officer noted of the Mau Mau emergency, 'short rations, overwork, brutality, humiliating and disgusting treatment and flogging – all in violation of the UN Universal Declaration on Human Rights'.<sup>41</sup> This follows Mazower's assessment of the British approach to the UDHR. He highlights that Britain tried to maintain that the dialogue surrounding human rights should be for 'European ears alone' and not for the colonies. Britain, during this time period, was coming to realise that human rights 'might be a necessary evil'.<sup>42</sup> As Frantz Fanon, the influential post-colonial theorist, declaimed in 1961, 'leave this Europe where they are never done talking of Man, yet murder men everywhere they find them, at the corner of every one of their own streets, in all the corners of the globe'.<sup>43</sup>

During the initial period of UDHR drafting, as Johannes Morsink notes, the question of colonialism did not arise, with the early drafts making no reference to the issue. But when the colonies did make it to the drafting table, even then, countries like Britain entered into a precarious 'tight-rope' affair in upholding human rights whilst maintaining and suppressing their colonies<sup>44</sup>. In the British case, the delegates involved in the drafting actively sought to curtail the impact that human rights would have on their own interests in their colonies, and 'intervened when "too much" human rights threatened to upset colonial security'.<sup>45</sup> As a consequence of such interventions and biases, how universal can the UDHR really be? It was this question specifically, that W.E.B Du Bois posed against the UDHR. He argued that the declaration, given the climate in which it emerged, in the aftermath of the Second World

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<sup>40</sup> Mutua, M. 'Savages, Victims and Saviours: The Metaphor of Human Rights', *Harvard International Law Journal*, 42(10)(2001):201-245, p.210.

<sup>41</sup> Colonial officer, cited in Curtis, M. *Web of Deceit. Britain's Real Role in the World*, (London: Vintage, 2003), p.316.

<sup>42</sup> Mazower, M. 'The Strange Triumph of Human Rights', p.387.

<sup>43</sup> Fanon, F. *The Wretched of the Earth*, (London: Penguin Books, 1990), p.251.

<sup>44</sup> Morsink, J. *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, (Pennsylvania: Pennsylvania University Press, 1999), p.97.

<sup>45</sup> Klose, K. 'Sources of Embarrassment: Human Rights, State of Emergency', p.248.



War, was ‘a very easily understood declaration of Jewish rights’, yet he strenuously challenged the universal range of the convention and asked, ‘why call it the Universal Declaration of Human Rights?’<sup>46</sup> As Jasiah Cobbah stresses, there is a massive irony residing in the UDHR; he writes, ‘in December 1948, at a time when most of the populations of Africa south of Sahara were still under colonial domination, a General Assembly dominated by the Western world adopted a Universal Declaration of Human Rights at the United Nations’.

Similarly, Jean-Paul Sartre offers an interesting analysis of the relationship between colonialism and human rights. Sartre argues that with the nature of colonialism, conquest occurred normally with aggression, over-exploitation and subjugation. Due to the nature of colonialism, the system denied human rights to the people it subjugated by violence and kept them in poverty and ignorance by force or, as Karl Marx would say, in a state of ‘subhumanity’.<sup>47</sup> Racism, as Sartre understands, was embedded in the very foundations of colonialism - with it emanating from the very institutions and mechanisms utilised throughout the colonial system. Since the colonised were perceived by the colonisers as ‘subhuman’, conventions such as the UDHR were not applicable. Indeed, Sartre argues:

Racism is already here, carried by the praxis of colonialism, engendered at every instant by the colonial apparatus, sustained by those relationships of production which define two sorts of individuals: for some, privilege and humanity are one and the same thing; they assert their humanity through the free exercise of their rights; for the others, the absence of rights sanctions their poverty, their chronic hunger, their ignorance, in short their subhumanity.<sup>48</sup>

As Sartre asserts, the European state was only able to proclaim itself human through consistent processes of ‘racist humanism’ that established slaves and monsters who resided ‘on the other side of the sea’ as a race of subhumans.<sup>49</sup> Solomon Benatar argues that the Declaration was an international agreement on ‘the rejection of human domination and exploitation of fellow humans, a dedication to the need for respecting individual human dignity, and an attempt to foster this through development of international law’.<sup>50</sup> Yet as

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<sup>46</sup> Du Bois, W. E. B. cited in Rothberg, M. ‘W.E.B. Du Boise in Warsaw: Holocaust Memory and the Color Line, 1945-1952’, *The Yale Journal of Criticism*, 14(1)(2001):169-89, p.175.

<sup>47</sup> Sartre, J. P. *Colonialism and Neocolonialism*, (London: Routledge, 2006), p.58.

<sup>48</sup> Sartre, J. P. *Colonialism and Neocolonialism*, p.59.

<sup>49</sup> Sartre, J. P. *Colonialism and Neocolonialism*, p.170.

<sup>50</sup> Benatar, S. R. ‘Global disparities in Health and Human Rights: A Critical Commentary’, *American Journal of Public Health*, 88(1998):295-300, p. 296.

Sartre notes, the mechanisms of the colonial system (and the grander claim of Western humanism) allowed for the denial of the burgeoning human rights regime against the majority of the world's population.<sup>51</sup> Accordingly, in colonies such as Kenya, human rights, even when created and ratified, could be (and were) circumnavigated in order to maintain colonial security and power. Hence, Moyn argues that in fact, with the establishment of the UDHR 'it was less the annunciation of a new age than a funeral wreath laid on the grave of wartime hopes'. The world looked up for a moment. Then it resumed its post war agenda.<sup>52</sup> Makua Mutua presents a similar argument, when he states that the creation of the UN, the UN Charter and the UDHR fall 'in the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions. Precisely because of this cultural and historical context, the human rights movement's basic claim of universality is undermined'.<sup>53</sup> It is with regard to this point that J. A. Lindgren Alves stresses that the UDHR 'was a document aiming at all human beings in a period when three-fourths of mankind still lived under colonial yoke'.<sup>54</sup> Indeed, even the language of the UDHR highlights the attitude of the drafters. As James Green reflected in 1956, 'the key words used were "promoting", "encouraging", "assisting in the realization of" and not "protecting", "safeguarding", and "guaranteeing"'.<sup>55</sup> This brings us back to Razack's analysis of those who were the 'describers and imaginers'. The Western/European colonial empires were establishing the agenda on global governance and human rights, and the creation of such organisations and conventions was occurring within a colonial era - it was not separate or distinct. Accordingly, we cannot contain the colonial engagement merely to issues of the colonies, but rather as Naeem Inayatullah and David Blaney assert, the violence and brutality of colonialism is so often overlooked or confined to a history of colonialism itself rather than being applied beyond the colonial territories to highlight the reach of the 'legacies of colonial domination'.<sup>56</sup>

In making this analysis of the colonial engagement of the UN and the UDHR, this section has sought to highlight how institutions such as these cannot extract themselves from colonial

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<sup>51</sup> Young, R. cited in Sartre, J. *Colonialism and Neocolonialism*, p.xvii.

<sup>52</sup> Moyn, S. *The Last Utopia: Human Rights in History*, p.42.

<sup>53</sup> Mutua, M. 'Savages, Victims and Saviours', p.204.

<sup>54</sup> Alves, J. A. L. 'The Declaration of Human Rights in Postmodernity', *Human Rights Quarterly*, 22(2)(2000): 478-500, p.481.

<sup>55</sup> Green, J. F. *The United Nations and Human Rights*, (Washington: Brookings Institution, 1956), p.18.

<sup>56</sup> Inayatullah, N. and Blaney, D. L. 'The Heart of Darkness: The Social Construction of Deflection', *International Studies Perspectives*, (13)(2012):164-175, p.164.

history. They were defined, established and born in a colonial era, and as such, are colonial institutions. Colonialism, and colonial politics were a factor in the establishment and ordering of the UN power structure. The history of the UN reveals that Western and European states initially sought to retain the status quo in an era viewed as a new beginning for international politics. By refocusing our attention back to the colonial encounter, we find that colonialism underpinned the interests of those who were establishing these new frameworks of power. As Roxanne Doty argues, it is impossible to deny the imperial encounter. She asserts that the imperial encounter established representations of self-identity that ‘we cannot escape the infinity of traces’ for they have in themselves established binaries that ‘constitute “us” vis-à-vis “them”’.<sup>57</sup> The colonial encounter underpinned how we engaged with the ‘other’, even at the highest level, such as within the UN - for it needs to be remembered that the colonial encounter was not an equal relationship of power, but one of domination and subservience regarding how the coloniser engaged and reacted to the non-European colonial other. How then does this help us to understand the UNHCR? How did the colonial encounter impact and shape the UNHCR, if not fully in the 1951 Convention (which as stated had temporal restrictions attached to it), then through the ‘good offices’, specifically with regard to the emerging refugee emergencies emanating from the decolonised nations in Africa?

The colonial origins and colonial relationship within institutions such as the UN and the UDHR allow us to reflect on the role that colonialism may have played in the establishment of institutions such as the UNHCR. Although little to no work has been written on the UNHCR’s history as a colonial institution, reflecting on the UNHCR through the critical historical framework presented by Moyn, Mazower and Matua, allows for questions to be raised regarding the colonial origins of the UNCHR, as well as with regard to the colonial legacy within the institution and its relationship with the ex-colonial refugee other.

These historians highlight the significance of colonialism during the creation of the UN and the UDHR - from the establishment of the UN at the secret Dumbarton conference, to the continuation of the great power positions in the UN Security Council, and the silence of human rights. Through the analysis of the UN and the UDHR, we can see the extent to which colonialism still played a role in the international stage, and this aspect did not wane when it came to the 1951 Convention (or possibly more significantly with the subsequent 1967

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<sup>57</sup> Doty, R. L. *Imperial Encounters: The Politics of Representation in North-South Relations*, (London: University of Minnesota, 1996), p.164.

Protocol when decolonisation was occurring in empires such as the British, French, Belgian or Portuguese with varying degrees of violence).

My argument then, is that when we combine the histories of the UN and the UDHR and the significance of colonialism at the time of their creation, alongside the development of the UNHCR, this raises questions as to the prominence and influence of colonialism on the UNHCR- specifically in terms of its influential impact on the UNHCR's expanding mandate, the silence regarding the continued constrictions of the 1951 Convention (particularly the 1967 Protocol), and the restrictive and undefined notion of what constitutes a refugee. Indeed, James Hathaway's assessment that the 1951 Convention 'exhibits acute concern for the protection of the self-defined interests of states' and is a 'minimalist commitment of states to the effectuation of guarantees of human dignity', can be read in light of the colonial legacy, regarding the refugee regime and the continuation of colonial politics; the unequal relationship between the coloniser and the colonised and the castigation of the ex-colonial other along with the more general foreign other. For it should not be forgotten that even by the end of the 1950s, as Louise Holborn writes, only the state of Morocco from the continent of Africa, was a signatory to the 1951 Convention.<sup>58</sup> The UNHCR is a colonial institution, born in an era of colonialism, and consequently, is an institution affected by the colonial legacy. Hence, Hathaway argues that 'refugee law as currently administered, allows Western states to maintain the facade of universal, humane concern without necessity of affording genuine protection'.<sup>59</sup>

When we combine this with the analysis in Chapter One regarding the silence of the 1951 Convention with regard to the definition of persecution, a pattern emerges regarding the extent to which state autonomy and self-interest have remained in these international organisations and institutions. As much as the 1951 Convention is silent in respect of what constitutes the meaning of persecution, I find that the gap deepened when the convention was provided with an opportunity in 1967 to match the 'good offices' mandate and take on responsibility for refugees created after 1951 and subsequently, beyond Europe. In focusing on this gap in particular, I find that colonialism helps in understanding the state's reaction to the potential broadening of refugee responsibility. By 1951, the states that were drafting the

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<sup>58</sup> Holborn, L. *Refugees: A Problem of Our Time: The Work of The United Nations High Commissioner for Refugees, 1951-1972*, Vol. 1, (New Jersey: The Scarecrow Press, 1975 ), p.183.

<sup>59</sup> Hathaway, J. C. 'A Reconsideration of the Underlying Premise of Refugee Law', *Harvard International Law Journal*, 31(1)(1990):129-183, p.180.

convention were still primarily in control of their colonies. However by 1967, decolonisation was in motion, with the UNHCR already taking on responsibility for ‘people of concern’, specifically those from the decolonised African territories. As David Kennedy argues, the distinction between the UNHCR’s core mandate to refugees and the varying responsibility of states within the 1951 Convention ‘was sharpest in the 1960s, precisely as the UNHCR asserted its identity and authority as an international institution more strongly’.<sup>60</sup> This corresponds with a time of heightened decolonisation, the loss of empires and the emergence, importantly, of the postcolonial other. As Rita Abrahamsen observed, colonialism did not come to an end with decolonisation but rather this signalled the continuation of colonialism as a fluid and interconnected practice of structural and political othering.<sup>61</sup>

In reflecting on the UNHCR as a colonial institution affected by the colonial legacy, the following part of this chapter will address further the issue of colonialism, examining the impact of colonialism on the (ex)coloniser and addressing the impact that colonialism has had on the coloniser’s relation with itself, the (ex)colonised and the other in general. In doing so, the thesis will not only engage with colonial politics, but address colonialism itself, introducing the colonial legacy and examining the impact of the colonial legacy on the UNHCR, the 1951 Convention and importantly, on the state implementing the convention.

### **Examining the Coloniser/Observer**

It is important to remember that postcolonialism is the history, before, during and after colonialism. It is an overarching term that incorporates the breadth of the colonial engagement as well as the relations after the colonial encounter itself. This section examines the impact of colonialism on the coloniser and analyses the legacies of colonialism for the ex-coloniser. The focus in this discussion is to engage with and observe the observers and labellers within the asylum system: specifically the Western/European states who have been heavily involved in the establishment of institutions such as the UN and the UNCHR and in founding conventions such as the UDHR and the 1951 Convention.

In her book, *Looking White People in the Eye*, Sherene Razack makes the pertinent point

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<sup>60</sup> Kennedy, D. *The Dark Side of Virtue: reassessing international humanitarianism*, (Oxford: Princeton University Press, 2004), p.211.

<sup>61</sup> Abrahamsen, R. ‘African Studies and the Postcolonial Challenge’, *African Affairs*, 102(407)(2003):189-210, p.196-197.

that in the relationship between the state and the refugee, rather than focusing on the other, the minority in society, why are more people not focusing their attention on ‘the describers and imaginers whose gaze constructs asylum seekers from the third world (either as unworthy claimants or supplicants begging to be saved from the tyranny of their own cultures, communities, and men)?’<sup>62</sup> Indeed, Razack makes the pertinent point at the end of her book, that:

We need to examine how we explain to ourselves the social hierarchies that surround us. We need to ask: Where am I in this picture? Am I positioning myself as a saviour of less fortunate people? as the progressive one? as more subordinated? as innocent? These are moves of superiority and we need to reach beyond them... Accountability begins with tracing relations of privilege and penalty. It cannot proceed unless we examine our complicity.<sup>63</sup>

In her work, Razack seeks to locate and examine the significance of the colonial encounter, in relation to issues like education, disability, and the asylum courtroom. Her work is aimed at averting ‘the critical gaze from the racial object to the racial subject; from the described and imagined to the describers and imaginers; from the serving to the served’.<sup>64</sup> For as Young reminds us, the legacy of the colonial encounter is as much an issue for the ex-colonisers, as it is for the postcolonial states<sup>65</sup> and the colonial encounter reaches far beyond that of the so-called colonial period. For the colonial engagement, as Marie-Bénédicte Dembour argues, is too often marginalised and perceived as an era of history ‘which we so would like to forget, think we do not need to talk about any more and most often act as if it had nothing to do with the way we are today’.<sup>66</sup> Thus, Razack’s call to address the continuing colonial encounter, as well as to examine our position in the relationship with the other, is a pertinent one. Thus, following in Razack’s footsteps, I want the following analysis to examine the role and position of the state in the refugee process and emphasise the impact of the colonial engagement on the contemporary refugee regime. For as Inayatullah and Blaney argue, ‘the myth of modern progress, despite its explicit narrative of historical advance, perpetuates a deflection of memory’ whereby the violence and brutality of colonialism is either overlooked or confined to a history of colonialism and does not take into consideration the ‘continuing

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<sup>62</sup> Razack, S. *Looking White People in the Eye*, p.88.

<sup>63</sup> Razack, S. *Looking White People in the Eye*, p.170.

<sup>64</sup> Razack, S. *Looking White People in the Eye*, p.88.

<sup>65</sup> Young, R. ‘Colonialism and Humanism’, p.250.

<sup>66</sup> Dembour, M. ‘Postcolonial Denial: Why the European Court of Human Rights finds it so difficult to acknowledge racism’, in Clarke, K. M. and Goodale, M. *Mirrors of Justice. Law and Power in the Post-Cold War Era*, (Cambridge: Cambridge University Press, 2010), pp.45-66, p.58.

legacies of colonial domination'.<sup>67</sup> Instead we need to shed light on how colonialism shaped and altered the coloniser, and how it continues to shape and alter the ex-coloniser in a postcolonial era. Significantly, how has this, subsequently, impacted on the refugee process? For to examine the asylum system, I argue, is to examine colonialism still in action.

In focusing attention on 'the describers and imaginers whose gaze constructs asylum seekers from the third world', I find the postcolonial writings of Aime Césaire invaluable in this discussion. In examining the impact of colonialism on the coloniser, Aime Césaire's seminal work *Discourse on Colonialism* is an ideal theoretical lens to employ to understand the strain and degenerative nature of colonialism for the coloniser. Césaire, through his work, sought to vigorously challenge the Western concept of the colonial discourse and debase notions of superiority and power. He was perceived as providing a unique political voice of a 'socialistic and humanistic' vision against Western hypocrisy and specifically the West's brutality towards the Third World. In highlighting Western actions in colonialism that were 'morally, spiritually indefensible', Césaire captured the double standards of Western, European states and positioned colonialism centre stage in his text.<sup>68</sup>

Radically, within his work, Césaire argued that the ideology of Fascism, far from being a dramatic tangent in the development of Liberal democracy, instead emerged naturally from the sort of assumptions that governed the work of various revered 'liberal scholars and social scientists', who circulated in the late nineteenth century, notably, Roger Caillois, Octava Mannoni, Yves Florenne and Jules Romains.<sup>69</sup> Césaire highlights the work of various European intellectuals who were regarded as great scholars and accepted by a 'forward thinking' European society as progressive and enlightened, yet whose work is ingrained with attitudes of racism and superiority. He strikes out against these attitudes of European intellectual advancement that are mixed with European colonial practices, declaring that no country 'colonizes innocently. That no one colonizes with impunity either, that a nation which colonizes, which justifies colonization and therefore force, is already a sick civilization, a civilization which is morally diseased'.<sup>70</sup> In later years, Jean-Paul Sartre would invoke the same sentiment as Césaire, when he declared, 'it is not true that there are some good colons

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<sup>67</sup> Inayatullah, N. and Blaney, D. L. 'The Heart of Darkness', p.164.

<sup>68</sup> Césaire, A. *Discourse on Colonialism*, (New York: Monthly Review Press, 2000), p.32.

<sup>69</sup> Moore-Gilbert, B. *Postcolonial Theory. Contexts, Practices, Politics*. (London: Verso, 1988), p.172.

<sup>70</sup> Césaire, A. *Discourse on Colonialism*, p.32-3.

and others who are wicked. There are colons and that is it'.<sup>71</sup>

Césaire pointed the finger at Europe, arguing that it was a colonial power house. Throughout the years of the Second World War, Europe reacted vehemently against the actions of the Nazis, who, he argued, were applying colonial techniques themselves, but in a European dimension.<sup>72</sup> Césaire argued that the Second World War is regarded with such reverence, not because of the atrocities or the crimes, but because the crimes and humiliation that occurred were against the white European. That Adolf Hitler had utilised colonial practices - which had previously been kept exclusively for the Arabs, Indians and Africans - against the white European, was the most appalling element for European states, Césaire argued.<sup>73</sup> Hannah Arendt has described this as the 'boomerang effect', whereby the theories of racism practised in colonial Africa, went on to shape Europe itself.<sup>74</sup> Indeed, Bart Moore-Gilbert has acknowledged that there was a massive contradiction in European/Western society 'which would be ludicrous, were it not so painful, in the fact that a decade after a war against the totalitarian system of fascism, a doctrine premised of course on racial superiority, Western Europeans should still be clinging on to their colonies'<sup>75</sup>. It is for this reason that Césaire's work launches such a stinging attack on the West's attitude to upholding and maintaining the yardstick of human advancement.<sup>76</sup> Europe, in the eyes of Césaire, was 'morally and spiritually indefensible' with regard to its colonial behaviour,<sup>77</sup> specifically during and just after the Second World War. Throughout his work, Césaire confronts Europe directly with regard to its colonial engagement and its colonial legacy, and shows how Europe itself has been affected by colonialism.

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<sup>71</sup> Sartre, J. P. *Colonialism and Neocolonialism*, p.38.

<sup>72</sup> This is a growing literature in this area discussing the colonial origins of the Nazi actions and building on not only Césaire's discussion of colonialism, but also Arendt's. By engaging with the legacy of colonialism, scholars have been able to address the continuation of German colonial rule and racial politics from their colonies in South West Africa, such as in Namibia and the genocidal actions against tribes such as the Herero, and draw comparisons and connections with the Nazi atrocities and the Holocaust. Indeed, Micheal Rothberg refers to this as 'the colonial turn in Holocaust studies'. See: Rothberg, M. *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization*, (Stanford: Stanford University Press, 2009), p.70; Zimmerer, J. 'The Birth of the Ostland out of the Spirit of Colonialism: a postcolonial perspective of the Nazi policy of conquest and extermination', *Patterns of Prejudice*, 39(2)(2005):197-219; Madley, B. 'From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe', *European History Quarterly*, 35(3)(2005):429-464; and Fitzpatrick, M. P. 'The Pre-History of the Holocaust? The Sonderweg and Historikerstreit Debates and the Abject Colonial Past', *European History Quarterly*, 41(3)(2008):477-503.

<sup>73</sup> Césaire, A. *Discourse on Colonialism*, p.36.

<sup>74</sup> Arendt, H. *The Origins of Totalitarianism*, (London: Harvest Book, 1976), p.206.

<sup>75</sup> Moore-Gilbert, B. *Postcolonial Theory*, p.172.

<sup>76</sup> Césaire, A. *Discourse on Colonialism*, p.37.

<sup>77</sup> Césaire, A. *Discourse on Colonialism*, p.32.



Presenting an engagement with the loss of humanity on both sides of the colonial relationship,<sup>78</sup> Césaire recognises that the coloniser was equally as affected by the processes of colonialism as the colonised themselves. Césaire is emphatic that in regarding colonialism:

we must study how colonization works to decivilize the colonizer, to brutalize him in the true sense of the word, to degrade him, to awaken him to buried instincts, to covetousness, violence, race hatred, and moral relativism; and we must show that each time... they accept the fact, civilization acquires another dead weight, a universal regression takes place, a gangrene sets in, a centre of infection begins to spread<sup>79</sup>

Examining the coloniser in the colonial relationship is crucial, for it is not enough to assert that there existed an unequal relationship between the two. Rather, Césaire is quick to argue the change that over came the coloniser by entering into a relationship with the colonial other: the loss of humanity and of morals, and the rise of barbarism in the coloniser. The coloniser could not expect to remain unsullied by the colonial encounter. He asserts in one passage of *Discourse on Colonialism*, that the nature of colonialism detrimentally impacted on the coloniser:

... colonization, I repeat, dehumanizes even the most civilized man; that colonial activity, colonial enterprise, colonial conquest, which is based on contempt for the native and justified by that contempt, inevitably tends to change him who undertakes it; that the colonizer, who in order to ease his conscience gets into the habit of seeing the other man as an animal, accustoms himself to treating him like an animal, and tends objectively to transform himself into an animal.<sup>80</sup>

Here, Césaire reminds us not to underestimate the impact of colonialism. He highlights the degenerative nature of colonialism for the coloniser, the loss of humanity experienced by the colonisers and the dehumanisation process that occurred in order to justify the colonial mission. Only by perceiving the colonial other as non-human, or less than human, were the colonisers able to maintain the colonial relationship of control and power. Colonialism was not merely an outward process, but in fact it was a two-way system, whereby the colonial society were affected themselves by the techniques and power of colonialism. Indeed, Césaire accuses Europe, declaring that ‘all this wreckage, all this waste, humanity reduced to

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<sup>78</sup> Finn, J. *Voices of Negritude*. (London: Quartet Books, 1988), p. 68.

<sup>79</sup> Césaire, A. *Discourse on Colonialism*, p.35.

<sup>80</sup> Césaire, A. *Discourse on Colonialism*, p.41.

a monologue, and you think all that does not have its price?’<sup>81</sup> The price, Césaire argues, was the degeneration of European society itself; viewing the colonial other as subhuman allowed for an increase in violence, for a particular level of brutalism to emerge, and for a level of superiority and subordination to emanate in the colonial relationship. In one sense, it allowed for the justification of colonialism itself. But in doing so, it meant that the colonisers became less than human themselves. It allowed for dehumanisation to occur, and for a gangrene to fester in society with regard to the colonial ‘other’, reducing the coloniser to the position of a defensive animal seeking to dominate and maintain its alpha position. As Césaire argues, ‘away with racism! Away with colonialism! They smack too much of barbarism’.<sup>82</sup> The colonisers, in subjugating the colonial other and deploying tactics of violence and brutal behaviour, were in turn dehumanising themselves. Césaire termed this the ‘this boomerang effect of colonization’.<sup>83</sup> Colonial practices adversely impacted on the homeland as well as on the self-identity of the coloniser. Significantly, the theorist Hannah Arendt spoke of the colonial engagement and the impact that colonialism had on the coloniser. Writing in her influential work, *The Origins of Totalitarianism*, she asserts that the British approach of indirect coloniality ‘strengthened tremendously the new imperialist consciousness of a fundamental and not just a temporary superiority of man over man, of the “higher” over the “lowerbreds”’.<sup>84</sup> Importantly, Arendt stresses in her work that through the processes of colonialism, the ‘logical consequence is the destruction of all living communities, those of the conquered peoples as well as of the people at home’.<sup>85</sup> Countries such as Britain were not able to escape unscathed from the colonial experience, for the processes of domination and subjugation involved in the enterprises resulted in the shaping of their own outlook: one which was lofty, hardened, desensitised, exploitive, and when called for, violent towards the ‘other’.

Examining the impact of colonialism on the coloniser is not very common, with scholars generally focusing on the colonised or the relationship between the coloniser/colonised. Like Césaire though, Ashis Nandy examines the impact of colonialism on the coloniser when

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<sup>81</sup> Césaire, A. *Discourse on Colonialism*, p.74.

<sup>82</sup> Césaire, A. *Discourse on Colonialism*, p.59.

<sup>83</sup> Césaire, A. *Discourse on Colonialism*, p.41. Note that the language employed here by Césaire is similar to Arendt’s, both using the term ‘boomerang’ in the same manner, to refer to the practice of colonial practices occurring within a European context. Michael Rothberg refers to both works as “Boomerang Effects” noting that both provide us with the ‘turn and returns of colonial discourse and practice’. Rothberg, M. *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization*, p.66-107.

<sup>84</sup> Arendt, H. *The Origins of Totalitarianism*, p.130.

<sup>85</sup> Arendt, H. *The Origins of Totalitarianism*, p.137.

viewing the British relationship with Imperial India. Nandy speaks of the impact that colonialism has had on the coloniser and writes how colonialism has shaped, altered and affected the coloniser's own society. He notes that 'the experience of colonizing did not leave the internal culture of Britain untouched. It began to bring into prominence those parts of the British political culture which were least tender and humane'.<sup>86</sup> Nandy argues that compared with India that was 'culturally fragmented and politically heterogeneous', colonialism had a far wider impact on the British colonisers, for in India it could be partially contained in the urban centres of Indian society. However, Nandy perceived Britain to be a relatively 'homogenous island... they were overwhelmed by the experience of being colonial rulers. As a result, the long term cultural damage colonialism did to the British society was greater'.<sup>87</sup> In a sense, India's self-identity was able to retain more than just that of the British Empire, but the same could not be said for Britain. As Albert Memmi observes, colonialism would take its toll on both the colonised and the coloniser alike. He argues that 'oppression is the greatest calamity of humanity. It diverts and pollutes the best energies of man- of oppressed and oppressor alike. For if colonization destroys the colonized, it also rots the colonizer'.<sup>88</sup> Indeed, speaking of the damage to the colonial power, George Orwell argues that colonialism extracted certain behaviour and expectations from the colonised with regard to the colonisers - they both had a function to 'perform' in the colonial relationship. Neither could be untouched by the colonial encounter. Thus, in *Shooting the Elephant*, Orwell asserts that the coloniser 'wears a mask, and his face grows to fit it'.<sup>89</sup> Hence, Michael Sheldon, reflecting on Orwell's story, asserts that it is easy 'to see how imperialism enslaves its subjects, but the great lesson that Orwell learned in Burma is that the system also has endless ways of enslaving its masters'.<sup>90</sup>

In examining the impact of colonialism on the coloniser, Nandy, like Césaire, argues that the colonial engagement encouraged and 'openly sanctified - in the name of such values as competition, achievement, control and productivity - new forms of institutional violence and

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<sup>86</sup> Nandy, A. *The Intimate Enemy. Loss and Recovery of Self Under Colonialism*, (Oxford: Oxford University Press, 2005), p.32.

<sup>87</sup> Nandy, A. *The Intimate Enemy*, p.321-31.

<sup>88</sup> Memmi, A. *The Colonizer and the Colonized*, (London: Earthscan, 2003), p.13.

<sup>89</sup> Orwell, G. 'Shooting the Elephant', in Sonia Orwell and Ian Argus, *The Collected Essays, Journalism and Letters of George Orwell, Volume 1. And Age Like This 1920-1940*, (London: Sector and Warburg, 1968), pp.235-242, p.239.

<sup>90</sup> Sheldon, M. cited in Tyner, J. A. 'Landscape and the Mask of Self in Orwell's Shooting the Elephant', *Area*, 37(3)(2005):260-267, p.266.

ruthless social Darwinism'.<sup>91</sup> Nandy argues that the colonial encounter encouraged the manifestation of 'magical feelings' in the colonizer of 'omnipotence and permanence', which filtered down, for example, into British representations of self-identity.<sup>92</sup> For as James Morris asserts, 'in the days of their imperial supremacy the British genuinely believed themselves to be performing a divine purpose, innocently, nobly, in the name of God and the Queen'.<sup>93</sup> Indeed, A. P. Thornton writes of the 'glow' of colonialism with regard to Britain:

It became their faith, that it was the role of the British Empire to lead the world in the arts of civilisation, to bring light to the dark places, to teach the true political method, to nourish and to protect the liberal tradition. It was to act as trustee for the weak, and bring arrogance low. It was to represent in itself the highest aims of human society. It was to command, and deserve, a status and prestige shared by no other. It was to captivate the imagination and hold fast the allegiance of the million... it was to gain its greatest trophies in war, it was to find its main task in serving the ends of justice, law and order. It was an idea that moved, an idea that expanded, and an idea that had to continue to move and to expand in order to retain its vitality and its virtue.<sup>94</sup>

Yet, in regarding this 'magic' or 'glow' of colonialism, Gayatri Spivak refers to these colonial illusions as the 'fantasy of the imperial saviour' and one of the long-term toxic effects of the colonial encounter.<sup>95</sup> It is this myth of the 'imperial saviour' that with the demise of the colonial empire resulted in 'a long trail of racial arrogance, so that long after Great Britain had retreated into the second ranks of the nations, the good-natured British people still sneered at blacks and laughed at foreigners'.<sup>96</sup> As Césaire would have it, this was the price of colonialism for the coloniser- their legacy of colonialism.<sup>97</sup> And it was not just

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<sup>91</sup> Nandy, A. *The Intimate Enemy*, p.32.

<sup>92</sup> Nandy, A. *The Intimate Enemy*, p.32.

<sup>93</sup> Morris, J. cited in Nandy, A. *The Intimate Enemy*, p.32.

<sup>94</sup> Thornton, A. P. *The Imperial Idea and its Enemies. A Study in British Power*, (London: Macmillan and Co LTD, 1959), p.x.

<sup>95</sup> Spivak, G, C. cited in Razack, S. *Looking White People in the Eye*, p.89.

<sup>96</sup> Morris, J. *Farewell the Trumpets: an Imperial Retreat*, (London: Faber and Faber, 1978), p.551.

<sup>97</sup> The legacy of colonialism and the racial arrogance or 'imperial saviour' complex has been expressed colourfully by government officials over the years, highlighting a disregard for the history of colonialism and for the impact on the colonised and the coloniser. A good example of this is Gordon Brown's 2005 speech in Tanzania, when as Chancellor he asserted that 'I think the days of Britain having to apologise for our history are over. I think we should move forward. I think we should celebrate much of our past rather than apologise for it and we should talk, rightly so, about British values. If you look at the whole span of British history it's time to emphasise that that is at the core of our history, that's at the core of our Britishness and it's such a potential influence on our future that I believe we should be talking about it more not less.' Brown, G. cited in Kearney, M. 'Brown Seeks out 'British values'', *Newsnight*, BBC, (14<sup>th</sup> March 2005).

<http://news.bbc.co.uk/1/hi/programmes/newsnight/4347369.stm> [accessed 07/05/2014]. Brown's speech on the ex-colonizer's perceived colonial legacy is similar to French President, Nicholas Sarkozy's 2007 Dakar speech which caused immense controversy when regarding French colonialism, he asserted that '[T]hey took, but I would like to say, with respect, that they also gave: they built bridges, roads, hospitals, chemists, schools. They

reserved for the ex-coloniser; it was directed at the foreign other.

As well as Césaire and Nandy, Edward Said also highlights, to a certain degree, the impact that colonialism had on the coloniser, as well as the portrayal of the ((ex)colonial) other. Through the notion of Orientalism, states sought to justify their actions of colonialism, as well as their superiority and colonial power, at the same time as producing the oriental 'other'. Said refers to Orientalism as a 'body of ideas, beliefs and clichés about the Orient', as well as unchallenged knowledge, regarding the orient other's apparent 'sensuality, its tendency to despotism, its aberrant mentality, its habits of inaccuracy, its backwardness...'<sup>98</sup> Establishing the notion of Orientalism allows states, such as Britain for example, to construct and reaffirm the orient as the inferior 'other'. Said argues in his work that the construction of the orient only ever occurred in order to reaffirm the position and power of the West. He asserts that 'orientals were rarely seen or looked at; they were seen through, analyzed not as citizens, or even people, but as problems to be solved or confined or - as the colonial powers openly coveted their territory - taken over'.<sup>99</sup> In this instance, the orient was a 'thing' to be studied, examined and ruled over. As Vijay Mishra and Bob Hodge assert, in the colonial relationship, 'the colonized never know when the colonizers consider them for what they are, humans in full possession of a self, or merely objects'.<sup>100</sup> In this regard, the oriental other was a member of an inferior race; he automatically needed to be subjugated; 'it was that simple'.<sup>101</sup> For as Said was to argue 'the Oriental man' in the eyes of the West, 'was first an Oriental and only second a man'.<sup>102</sup> However, in contrast, in the West, he was first and foremost a human. Importantly for my analysis, this process did not pass with the collapse of colonialism, but has continued as a means for the West to depict and understand the Eastern 'other'. In a postcolonial environment, the process of Orientalism is as present now as during the height of colonial acquisitions. Thus, the process of Orientalism is quite interesting when we engage it with the refugee system and how states interact with the refugee 'other' with preconceived notions of 'ideas, beliefs and clichés' regarding the genuine or bogus asylum

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made virgin soil bear fruit; they invested their concern, their labours and their knowledge. I want to say it here: The colonials were not all thieves. The colonials were not all exploiters... The tragedy of Africa is that the Africa man has never really entered history.' Sarkozy, N. 'Excerpts from the Speech by Nicholas Sarkozy, Darkar' (2007),

[http://www.royalafricansociety.org/index.php?option=com\\_content&task=view&id=416](http://www.royalafricansociety.org/index.php?option=com_content&task=view&id=416), [accessed 05/5/2014].

<sup>98</sup> Said, E. *Orientalism*, (London: Penguin Books, 2003), p.205.

<sup>99</sup> Said, E. *Orientalism*, p.207.

<sup>100</sup> Mishra, V. and Hodge, B. 'What is Post(-)colonialism?', *Textual Practice*, 5(3)(1991):399-414, p.401.

<sup>101</sup> Said, E. *Orientalism*, p.207.

<sup>102</sup> Said, E. *Orientalism*, p.231.

seeker. Through the understanding of the construction of the orient, we can see how ex-colonisers, such as Britain for example, have been able to expand the label of the other and apply it not just to the ex-colonised, but to the wider foreign other who is seeking asylum within their country. As we can see from Chapter Three, colonial politics and practices of power - labelling, binaries and silence - are being applied to the ex-colonial other as well as to the non-colonial other - highlighting the continuity in colonial politics and the fluidity of the practices still operating within the postcolonial state.

For in viewing Britain as an ex-coloniser and observer in the refugee system, what I am trying to highlight is the colonial behaviours and practices that have continued to be exerted beyond the colonial period of acquisition, particularly within the refugee regime. The main issue of concern for me, is that these behaviours and practices of colonialism did not pass away with the collapse of the colonies, but have continued to manifest themselves in the ex-coloniser in the postcolonial era. If postcolonialism is the history, before, during and after colonialism, then it can rightly be construed that behaviours as discussed by Césaire, Nandy and Said are still being practised when it comes to states, like Britain, which are engaging with the other as a would-be asylum seeker. Thus, it is for these reasons that I believe that Razack's approach to examining the 'the dreamers and the imaginers whose gaze constructs asylum seekers from the third world' is so important and that the postcolonial approach identified by Razack is required more than ever. Those who are doing the imagining are ex-colonisers, and just how has the legacy of colonial domination that Inayatullah and Blaney speak of, shaped their behaviours in engaging with the other? Importantly, for too long the colonial legacy has been neglected and perceived as confined as a thing of the past, an issue that has been addressed. However, what my analysis has emphasised is not only the continuation of colonial practices and politics as discussed in Chapters One to Five, but also the significance of and need to address colonialism and the colonial legacy within the refugee regime. The international refugee regime is a product of the colonial era. It was established by colonial states and within a European dimension is implemented by ex-colonial states.

How has the imperial gaze constituted itself in the 'describers and imaginers' who are orchestrating the asylum process? In answering this question, I find that the work of Césaire, Nandy and Said is extremely pertinent to help gain further insight into how the ex-coloniser operates (specifically in the refugee system). I argue through the work of these authors, as well as Arendt and Morris, that the colonial encounter was a two-way process that impacted

on and considerably shaped the behaviour and actions of the colonisers themselves. It was not just a process of domination and control, for the colonisers were unable to remain unsullied or untarnished by this process of colonialism. Through their work, these authors address the degenerative and dehumanising nature of the colonial encounter, specifically for the coloniser, raising the issue of the ‘boomerang’ nature of colonialism. As Césaire puts it, it was the price to pay for the destruction and damage of colonialism. Césaire, Nandy and Said argue that the colonial encounter encouraged debased behaviours in the coloniser; it drew out brutal practices that were based on the premise of colonial superiority and power. The development of colonial practices was seen as a means to maintain, develop and justify the colonial encounter, for the colonial other was presented as in need of salvation, guidance and discipline in order to achieve enlightenment. Yet, by treating the colonial other as less than human, the colonisers themselves, through the behaviours they adopted, became less than human themselves, with extreme colonial practices being tolerated in the name of colonialism.

In particular when drawing on the work of Césaire, I find that this analysis does not just speak of a time when European states were in possession of their colonies. The attitudes, behaviours and superiority are not confined to a distinct era of colonialism. As Robin Kelley argues, Césaire’s work is ‘hardly a dead document about a dead order’ but can help us to understand our ‘postcolonial predicament’.<sup>103</sup> I find that reintroducing colonialism into the discussion helps to provide a deeper insight into and analysis of the discussions around issues such as labelling and hospitality, and the language barriers and actions of border agencies in the asylum process, such as that in Britain, and specifically, the inaction and silence that I find resides in the 1951 Convention. This is especially true of the analysis regarding the labelling of the asylum seeker in Chapter Three. The chapter itself highlighted how various British governments have sought to undermine the position of the asylum seeker by constructing an idealised notion of a genuine asylum seeker. Processes such as labelling have allowed states to successfully categorise asylum seekers as abusive, bogus or illegal, as well as to construct idealised notions of what a genuine asylum seeker should be. The chapter highlighted the power of labelling - regarding both the labeller and the labelled. By labelling an individual or a group, the labeller (the state in this case) is socially demarcating a specific group in society and, in the instance of the asylum seeker, removing them from the normal

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<sup>103</sup> Kelley, R. D. G. ‘A Poetics of Anticolonialism’ in Césaire, A. *Discourse on Colonialism*, pp.1-28, p.28.

spheres of social engagement. I find that this aspect speaks considerably of the theories of postcolonialism, the relations of power, as well as the othering that occurs regarding the asylum seeker.

In providing this analysis, I want to highlight that the work of Césaire, Nandy and Said should not be read merely to reflect the relationship of the colonisers and the colonised, but should be appropriated to understanding the postcolonial relationship between the ex-coloniser and the colonial/foreign other, specifically in systems such as the refugee system. The practices that Césaire, Nandy and Said speak of did not disappear and dissolve when colonialism fell. Rather, these practices and behaviours have continued to manifest themselves, continuing the unequal relationship between the West and the ‘other’ that has, I argue continued to manifest itself in the refugee system. That is why I draw so much upon Razack’s call to acknowledge the position of power of those who are doing the observing in the refugee processes. Reintroducing colonialism into the refugee debate provides us with an alternative framework, one that is rarely considered but that allows us to reflect on the practices and politics inherent within the system that could be perceived as continuities and manifestations of colonial politics.

### **(Post)colonial Silences: Reflections on the Refugee Regime**

In writing this chapter, the analysis has attempted to provide a colonial discussion on the refugee system. At the root of the chapter is the call from Razack to focus our attention on the ‘describers and imaginers whose gaze constructs asylum seekers from the third world’.<sup>104</sup> It is the (European) state that is doing the observing; it is the state that is doing the labelling. And crucially, in this context, many states are ex-colonisers, who, until the mid-1960s, were still in possession of vast empires. Accordingly, the chapter has sought to focus on the labeller and subject in the refugee relationship, rather than the traditional focus on the refugee as the object. In doing so, the chapter has offered to present a colonial engagement and critique of the refugee process from the perspective of the ex-coloniser, to illuminate on the silences in the refugee process that impact on individuals seeking asylum in Britain. For by reintroducing the question of colonialism itself, the chapter reflects on whether the international refugee system could be viewed as bearing traces of colonialism that are still

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<sup>104</sup> Razack, S. *Looking White People in the Eye*, p.88.



being practiced in regards to the (colonial) other within the present.

In seeking to bring the colonial question back to the issue of refuge, the chapter has addressed two separate issues that I argue can be connected to the theme of state control: self-interest and the maintenance of silence in the state's favour. The first approach engaged with examining the issue of colonialism in relation to the UNHCR by adopting a two-pronged analysis. First, the analysis examined the development in the 'good offices' policy that addressed the growing need for UNHCR responsibility beyond the confines of the 1951 Convention, due to escalating violence, specifically in Africa, due to the decolonisation and independence wars. The chapter engaged with the growing gap that emerged in the UNHCR itself between its broad mandate and the state centred 1951 Convention, and tied this gap to issues of colonialism and decolonisation. Then the section engaged with the UNHCR's colonial origins by focusing on the colonial relationship of the UN and the UDHR, as there has been more engagement with these institutions. I offered an analysis of the significance of colonialism in the shaping and behaviour of the UN and UDHR and drew on critical historians who argue that the UN is a colonial institution that was originally perceived as a means to retain the old colonial status quo. In addition, this section engaged with the hypocrisy and irony of the great powers that, having defeated fascism, were still clinging on to their empires whilst creating a new international order of human rights. I employed this analysis and applied it to the UNHCR, arguing that much of this historical analysis still stands when we reflect on the UNHCR (in the form of the 1951 Convention but specifically with regard to the 1967 Protocol). Combining this with the silence in the Convention that was discussed in Chapter One regarding persecution, I find that a pattern emerges that reveals the intricacies of self-interest and colonialism for states when establishing the international refugee framework.

The UNHCR is a colonial institution. It was created by a range of states who dominated the colonial era, when large parts of the world were still ruled by a handful of European colonial powers. When the 1967 Protocol was introduced, it occurred at a time of heightened decolonisation and independence wars, specifically in Africa, and it reflected the power dynamics at play between the old colonial states' and the emerging postcolonial states' attitudes to refugees. The UNHCR had to tread a path that did not offend its traditional ex-colonial members whilst being appealing to the new postcolonial states - without blaming either for acts of violence or persecution against refugees. When reflecting on the 1967

Protocol and the opportunity to expand the 1951 Convention to meet the broader mandate of the UNHCR itself, many questions arise as to the role and position of the colonial states in the refugee regime and importantly, regarding the role that colonialism/decolonisation played in preventing the expansion of the 1951 Convention. The process of colonialism helps to explain this silence in the institutions and the power of (ex)colonial states in retaining a limited convention in the wake of decolonisation.

The second approach addressed the discussion of Razack and other postcolonial theorists such as Doty, Young and Inayatullah, and introduced the importance of examining the coloniser to engage with the legacies of colonialism and examine how colonialism affected not just the colonised, but also the coloniser. By reintroducing colonialism back into the discussion of refuge, the chapter then grounded the analysis in Césaire's *Discourse on Colonialism*, aiming to highlight the significance and continuing importance of the colonial encounter for the (ex)coloniser, by engaging with the degenerative nature of colonialism as well as the dehumanising and regressive character of colonial practices. In adopting this theoretical position, Césaire, as well as Nandy, Said and Spivak, remind us not to underestimate the colonial encounter, stressing that it was a two-way process, and the price the colonisers paid for their actions.

Postcolonialism engages with the history before, during and after colonialism. So what has been the impact of this colonial legacy towards the other, specifically in the refugee regime? When we reflect on the arguments presented in this thesis, this analysis of postcolonialism and Césaire's degenerative nature of colonialism helps us to analyse the colonial practices already discussed. In Chapter Three, I discussed the creation of an idealised notion of genuine asylum seekers, as well as the use of labelling and hospitality to highlight how consecutive governments have silenced and marginalised asylum seekers through their positioning in the asylum process, and specifically through the language used to frame them. Through these practices, I argue that consecutive governments have sought to offer asylum, yet under reduced and constricted conditions, all the while being concerned that the asylum figure is in fact abusing their position. In Chapter Four, I discussed the various barriers that asylum seekers face in attaining refuge, focusing on the role of speech, silence and language in the process. In the process, the asylum seeker must speak of their personal story of trauma but they are not initially viewed as victims - they must be identified and interviewed, and manage barriers such as traumatic memory recall, shame and silence in a process that is focused on

marginalising the asylum seeker, speed, and reducing numbers. Asylum seekers need to prove that they are seeking refuge first before sanctuary can be secured. When reflecting on these chapters, in light of Césaire, Nandy and Said's work, we can see the continuation of the colonial legacy manifesting itself with regard to the other. The unequal power relationship at play and the imperial gaze can be argued to still exist. Through this we see the ex-coloniser constructing notions of an idealised 'other', who will be bestowed with refuge, but at the cost of those who will be excluded due to not meeting the specified criteria. This refers specifically to Chapter Four and the barriers faced by asylum seekers. To draw on Razack, Britain is the ex-coloniser who is constructing and labelling the asylum seeker and determining *who* is a refugee. Whereas, Chapter Five through a postcolonial lens sought to present an alternative way of becoming a refugee, one where the denial of speech is just as damaging to the individual as the enforcement of speech that is expected. The focus of the chapter was rather upon the silencing of the refugee, and the transference towards the body as a site of knowledge, specifically through practices of clinical humanitarianism and the bureaucratisation of knowledge.

Throughout the previous chapters of this thesis I have stressed the various ways in which states, such as Britain, have sought to maintain their refugee responsibility, yet very much under their own terms and under certain circumstances and restrictions. Through employing silence as a means of state determination in the 1951 Convention, as a means to label the asylum seeker and establish 'genuineness', or as a means in the asylum interview process in which barriers to memory are contorted and used against the asylum seeker and speech is viewed as essential in the system - the state has been able to retain a high degree of control within the refugee regime.

But, by bringing colonialism into the framework, I argue that the notion of silence is connected to the colonial encounter and is due to hostility generated towards the colonised other who is now seeking sanctuary at our borders. However, as we can see from the refugee regime, the hostility and colonial practices are aimed not only at the ex-colonial other, but also at the foreign other in general. For how we react to the refugee other is a product of the colonial encounter and, to reiterate Sherene Razack's point, 'remains a moment when powerful narratives turn oppressed peoples into objects, to be held in contempt, or to be

saved from their fates by more civilized beings'.<sup>105</sup> This final chapter has sought to provide a historical and theoretical colonial engagement and critique of the refugee process by focusing on the ex-coloniser's colonial legacy. By reintroducing colonialism into the refugee regime, and examining the behaviour of the ex-coloniser, I aimed to shed further light on postcolonial practices, on the silences inherent in the system and the conventions, on the significance of self-interest in the evolution of the UNHCR, and on the silencing impact that colonialism has had, ultimately, on those individuals who are seeking asylum in Britain. In this sense, Chapter Six provides a reflective examination on the previous chapters of the thesis. Postcolonial politics, itself, cannot fully account for the tensions and practices occurring within the refugee regime, but by including a historical and theoretical context to the analysis, it allows the thesis to adopt a broader engagement with the issue of colonialism in the refugee system, building a multi-layered approach to the practices and politics of colonialism in the refugee regime. For the colonial legacy left a mentality with regard to how the ex-colonial state engages with the colonial other, but also with the non-colonised other. I argue that colonialism does not operate merely within the parameters of the coloniser/colonised relationship, but it also affects how the ex-coloniser engages with the foreign other. This is the coloniser's colonial legacy and it is one that needs to be considered when we are engaging with the refugee regime. For the othering that enabled colonialism in the first instance is still occurring, not only towards the colonial other, but the foreign other. To borrow a phrase from Michael Rothberg, Chapter Six, and the thesis at large, has sought to introduce a 'colonial turn'<sup>106</sup> regarding the refugee process, focusing firstly on colonial practices, but then reintroducing colonialism itself to evaluate the impact of the colonial legacy on the refugee regime.

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<sup>105</sup> Razack, S. *Looking White People in the Eye*, p.3.

<sup>106</sup> Rothberg, M. *Multidirectional Memory*, p.70.

## Conclusion

*My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to hyper - and pessimistic activism.<sup>1</sup>*

### Introduction and Thesis Overview

In utilising postcolonialism, it is important not to focus on the prefix ‘post’, but to view it as an overarching theoretical approach that engages with the before, during and after of the colonial encounter, in what Gyan Prakesh refers to as the sidestepping of ‘the language of beginnings and ends’.<sup>2</sup> This approach, as Rita Abrahamsen noted, ‘seeks to capture the continuities and complexities of any historical period, and attempts to transcend strict chronological and dichotomous thinking where history is clearly delineated and the social world neatly categorised into separate boxes’.<sup>3</sup> Rather, postcolonialism seeks to highlight the continuity of colonial practices, politics and behaviours beyond the initial colonial encounter and asserts that an understanding, appreciation and awareness of the colonial legacy is essential for engaging with contemporary politics. In this regard, a postcolonial approach is essential for examining the politics at play within ex-colonial societies, in which colonial practices, it could be argued, are still continuing to manifest and occur long after the original colonial encounter. It is for this reason that I find it essential to bring postcolonial politics into the discussion of the refugee regime. Significantly though, I argue that along with the inclusion of postcolonial thinking, it is essential to bring in the history of colonialism itself, and to engage with the colonial origins as well as the colonial legacy of the era, that can compliment and further the discussion regarding postcolonial politics. Combining the two, allows for a greater engagement with colonialism as a whole, providing context, substance and depth to the examination of contemporary processes, such as the refugee regime. It is for this reason that I draw inspiration from Michael Rothberg and have sought to introduce a

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<sup>1</sup> Foucault, M. *The Essential Works, 1954-1984, vol 1. Ethics, Subjectivity and Truth*, (New York: New York Press, 1997), p.256.

<sup>2</sup> Prakesh, G. cited in Abrahamsen, R. ‘African Studies and the Postcolonial Challenge’, *African Affairs*, 102(407)(2003):189-210, p.195.

<sup>3</sup> Abrahamsen, R. ‘African Studies and the Postcolonial Challenge’, p.195.

‘colonial turn’<sup>4</sup> regarding the refugee process, focusing firstly on colonial practices, but then also reintroducing colonialism itself to evaluate the impact of the colonial legacy in the refugee regime.

The focus of this thesis has been on examining the international refugee system, its language and its silences. The central focus of this thesis has been on examining the colonial legacies within the asylum system, focusing on the practices of language and silence and how colonial practices can be said to frame, label and position the would-be refugee in particular ways. The language of the 1951 Convention and what I find to be the silences within it seem to translate into abusive and marginalising practices at the state level. I find that there appears to be an apparent disjuncture between the international refugee law and the protection that is meant to come from it, resulting in the silencing of potential would-be refugees. This itself, I argue is due to the use of language and silence that resides within the 1951 Convention and that has allowed states the manoeuvrability to retain a high degree of control at the expense of the asylum seeker while still presenting themselves as adhering to their international responsibility. The thesis has sought to examine how the language and terms of the 1951 Convention are translated into a workable refugee regime, and why it is that the convention appears to translate into abusive practices on the ground with the refugee being labelled as the bogus other. In examining this discrepancy, throughout the thesis, I have utilised postcolonial political tools, particularly the politics of language and silence, but also labelling, binaries, hospitality, power and othering, in order to understand the disjuncture between the 1951 Convention and the protection offered by states. Moreover, in order to understand how this gap between the 1951 Convention and the protection offered results in the othering of the refugee, I proposed that it is necessary to bring back in the question of colonialism itself, which has been marginalised heavily in the refugee literature and examine whether the international refugee system could be viewed as bearing the traces of colonialism that are still evident in its behaviours towards the other at the present time. For I argue that postcolonialism alone is not enough in engaging with the refugee regime, as the framework can only explain so much regarding the practices and the relations between the state and the refugee. But, by incorporating a historical and theoretical approach to the analysis, and bringing in the colonial legacy of the refugee regime, this allows the thesis to reflect on the

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<sup>4</sup> Rothberg, M. *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization*, (Stanford: Stanford University Press, 2009), p.70.

colonial practices and ground the postcolonial framework in a historical and theoretical colonial legacy. Indeed, re-introducing colonialism itself into the discussion has allowed the thesis to develop a deeper engagement with the understanding of the colonial legacy, beyond postcolonial politics, helping to account for, and address, the colonial origins of institutions such as the UNHCR as well as the 1951 Convention.

This thesis has presented an engagement with the refugee regime and has pointed towards what I see as a discrepancy between the 1951 Convention and the actual implementation of the refugee regime. In doing so, the thesis began by engaging with the language embedded within the 1951 Refugee Convention, focusing particularly upon the language and understanding of the persecution criteria adopted at the international level of the refugee regime. The focus of Chapter One was on examining the limitations of the language employed by the drafters of the 1951 Convention, and stressing the confusion and discrepancies within the international refugee regime, particularly around the persecution criteria and the notion of what constitutes a refugee. By engaging with the limitations of a defined language of protection, the chapter described how silence, or the process of silencing, which is employed and embedded in the convention, provides space for states to shape and define the terms to suit themselves. It is through the language of refugee and the ambiguity surrounding the concept of refuge that the convention has allowed states the ability to define how refuge should be applied at the nation state level, resulting in, I argue, the silencing of potential would-be refugees.

Chapter Two of the thesis followed in a similar vein and focused on filling in the gaps in the Geneva Convention by drawing upon the regional refugee regime. In doing so, the chapter sought to frame the 1951 Convention within an international arena, and examine the convention in light of the language employed in regional refugee regimes. By examining the OAU, Cartagena and Bangkok regional refugee regimes, the chapter sought to highlight the gaps within the 1951 Convention regarding the language of refugee protection, by showcasing regional regimes where the language of refuge is far more inclusive, undergoing a transformation into a more developed and broader concept. In reflecting on these regional refugee regimes, and by examining the language employed to define and understand refuge, Chapter Two allowed for a broader understanding of refuge to emerge, one that is grounded on the 1951 Convention, but has allowed itself to develop beyond the confines of the 1951 Convention. Looking beyond Geneva, I argue that the language is far more inclusive, with

the definition of refuge undergoing a transformation into a more developed and progressive concept. In contrast, the 1951 Convention appears silent and rigid with regard to developments and changes. Chapter Two drew on regional refugee regimes in order to highlight the variations in language as well as the silences and gaps inherent in the convention and alternative ways in which they have been interpreted beyond Geneva. By engaging with these regional refugee regimes I sought to disrupt the traditional Eurocentric understanding of language surrounding the refugee and highlight how these regional regimes point to, and address, the gaps within the 1951 Convention.

Chapter Three brought the analysis of the refugee regime down to the state level with a detailed focus on the British asylum system. Continuing with the notion of silence and language, I argued that through the positioning of the asylum seeker, the government has been able to engage in an act of silencing of the asylum seeker through processes of othering, rather than through policies per se, and that engaging with postcolonial politics allows for the unequal relationship in the asylum system to emerge, revealing the disparities and inequalities within the British refugee regime. Utilising postcolonial politics, the chapter engaged with the various ways in which language, labelling and binaries have been employed by various governments as a means of positioning the asylum seeker. Moreover, through the practice of hospitality, the chapter examined how various British governments have been open to providing hospitality to the asylum seeker, but under specific circumstances, all the while being concerned that the asylum seeker is in fact abusing their position. Within Chapter Three, I sought to engage with the refugee regime specifically at the national level and highlight how the asylum seeker is positioned and marginalised through refugee policies and practices, and how postcolonial politics help elucidate the silencing nature of the refugee regime as well as the unequal relationship of power that is in operation in the system. I argued that the silence embedded within the practices of labelling, binaries and hospitality obscure and continuously marginalise the refugee, resulting in discrepancies and tensions occurring in the refugee regime.

Chapter Four continued with the focus on the British case. Again, it engaged with the various ways in which language and silence have been employed by the state in order to other the would-be refugee. In a similar manner to Chapter Three, the focus was on the British front line of asylum policies and practices, and examining the significance of language, speech and silence in the process of becoming a refugee. With a focus on female asylum



seekers with rape narratives, Chapter Four examined the various potential barriers that asylum seekers must engage with when trying to tell their story. For gaining refuge rests upon the telling of a story and having that story believed. Language, subsequently, is central to the process of asylum, but it also becomes one of the central barriers to attaining refugee status. The chapter built on the material discussed in Chapter Three and the notion of the genuine asylum seeker. Chapter Four revealed the barriers at play, not only in the British asylum system when having to engage with issues of disbelief and expediency, and when dealing with judgements regarding your emotional reactions, but also to articulating traumatic memories of persecution, with discussions on language, memory and silence. Crucially though, the chapter continued to engage with the discrepancy between the 1951 Convention and state implementation, revealing the unequal relations of power, and the processes of othering occurring within the British asylum system.

Chapter Five then offered a reflexive examination of the refugee regime, by drawing the analysis to Kenya, not as a comparison but as a means of engaging widely with the regime and providing a means to reflect on how we engage with the refugee, either within Britain, Europe or beyond. The chapter continued to highlight the position of the other and the unequal power relationships at play in the refugee regime. Again, the focus was still on the notion of silence and language, providing an alternative means of ‘becoming’ within the refugee system, and focusing on prima facie refugee movements. In this chapter though, the emphasis was on silence and the body, with those in authority having the power of speech. Highlighting the position of the other and the unequal power relationships at play in the refugee regime, the chapter discussed how the individual is lost within the process of becoming a refugee, and becomes consumed within a larger movement of people and the crisis. Engaging with Lisa Malkki’s notion of clinical humanitarianism, Arturo Escobar’s bureaucratisation of knowledge and the UNHCR’s notion of humanitarian spaces,<sup>5</sup> the chapter analysed how the individual story is marginalised and how the voice that emerges out of the crisis emanates from the aid organisations themselves. Chapter Five continued with the discussion of the discrepancies between the 1951 Convention and the practical

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<sup>5</sup> Malkki, L. ‘Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization’, *Cultural Anthropology*, 11(3)(1996):377-404, Escobar, A. *Encountering Development. The Making and Unmaking of the Third World*, (New Jersey: Princeton University Press, 1995), and Tennant, V., Doyle, B. and Mazou, R. ‘Safeguarding Humanitarian Spaces: Review of Key Challenges for UNHCR’, UN High Commissioner for Refugees, Evaluation and Policy Analysis Unit, Working Paper, (February 2010), PDES/2010.01, <http://www.unhcr.org/4b68042d9.html>, [accessed 1/08/2013].

implementation of the protection regime, with the refugee being rendered an object within the process of protection. Through the discourse of the emergency, refugees become involved in a hierarchical process, and are rendered an object to the aid agencies' subject. This creates an unequal power relationship of 'us' and 'them' / 'I' and 'we', whereby language becomes the privilege of the aid agencies, and although not silent, the refugees are silenced through the process, with the emphasis here shifting from their testimonials to their bodies.

Chapter Six began by reflecting on what we have learned from the politics of language, silence and othering and how this has helped us understand the discrepancy between the 1951 Convention and its actual implementation by states. However, I argue that to engage further with the discrepancy between the 1951 Convention and the protection offered, it is necessary to reintroduce colonialism into the discussion, and engage fully with the colonial legacy that is inherent in the international refugee regime. For I argue, drawing on the work of scholars such as Aime Césaire, Ashis Nandy and Edward Said,<sup>6</sup> that the colonial legacy left a mentality with regard to how the colonial state engages with the colonial other. However, colonialism does not operate merely within the relationship of the coloniser/colonised, but actively shapes how the ex-coloniser engages with the foreign other: this is the coloniser's colonial legacy and one which I argue, needs to be considered when we are engaging with the refugee regime. In undertaking this approach of reintroducing colonialism, Chapter Six began by engaging with the UNHCR as a colonial institution. It examined the developments in establishing regimes such as the human rights regime and the refugee regime, and then framed the analysis within the era of colonialism, which is so often overlooked. The Chapter also addressed the figure of the ex-coloniser, to discuss how the process of colonialism impacted and shaped not only the colonised, but also the coloniser, and how the legacy of colonialism and the mentality towards the other is still manifest within society, particularly with regards to the refugee regime; whereby the ex-coloniser is coming into direct contact with the foreign other. I argued that introducing an historical and theoretical 'colonial turn' regarding the refugee regime, alongside postcolonial politics, allows for a long term engagement with the refugee regime, from its creation in the colonial era through to the continuation of colonial practices of othering that are still manifest towards the would-be refugee. In seeking to understand the discrepancy between the 1951 Convention and the

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<sup>6</sup> Césaire, A. *Discourse on Colonialism*, (New York: Monthly Review Press, 2000), Nandy, A. *The Intimate Enemy. Loss and Recovery of Self Under Colonialism*, (Oxford: Oxford University Press, 2005) and Said, E. *Orientalism*, (London: Penguin Books, 2003).

protection actually offered, introducing a ‘colonial turn’, allows us to examine the behaviour of the ex-coloniser and view colonial practices such as the silences inherent in the system and the conventions, the significance of self-interest in the evolution of the UNHCR, and the silencing impact that colonialism has had, ultimately, on those individuals who are seeking asylum in Britain. The colonial legacy left a mentality with regard to how the ex-colonial state engages, not only with the colonised, but also with the non-colonised other. Thus, this thesis argues the significance of the colonial legacy within the refugee regime.

### **Contribution**

Scholars such as Glen Peterson, Anna Holian and G. Daniel Cohen stress the importance of, and need for, a historical approach to be adopted towards the UNHCR and the wider refugee regime. Peterson notes that the early history of the UNHCR was dominated by a focus on post-war politics and the emerging Cold War tension, with little discussion focusing on the issue of colonialism. Meanwhile, Holian and Cohen stress that the post-war era of the refugee regime and the emerging UNHCR, although being a transformative moment with lasting effects, has not been addressed adequately. They argue that historical scholarship of this era is essential for ‘understanding both the contemporary refugee regime and its enduring ‘others’’.<sup>7</sup> However, they argue for a historical engagement with the impact of decolonisation on refugee flows beyond Europe, focusing on Asia and Africa, rather than engaging with the origins of the UNHCR and the signatories of the 1951 Convention in colonialism. This same position is adopted by Panikos Panayi and Pippa Virdee in their edited volume *Refugee and the End of Empire*.<sup>8</sup> Meanwhile, Paul Gatrell links the ‘birth’ of the contemporary refugee to the First World War and the collapse of multi-national empires, like the Habsburg and Ottoman Empires, presenting an alternative way in which to frame the refugee debate.<sup>9</sup> Again though, the focus regarding colonialism for Panayi and Virdee is on examining the link between the collapse of empire, specifically postcolonial India and Pakistan, and the refugee experience. The focus of colonialism is centred on decolonisation itself and the resulting effects for the refugee. The focus is not on rooting the emergence of the UNHCR within a colonial era, or on the colonisers establishing the refugee regime (as well as the early human rights regime), or on the potential impacts of colonialism within the

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<sup>7</sup> Holian, A. and Cohen, G. D. ‘Introduction’, *Journal of Refugee Studies*, 25(3)(2012):313-325, p.324.

<sup>8</sup> Panayi, P. and Virdee, P. *Refugee and the End of Empire: Imperial Collapse and Forced Migration in the Twentieth Century*, (Basingstoke: Palgrave MacMillan, 2011).

<sup>9</sup> Gatrell, P. *The Making of the Modern Refugee*, (Oxford: University of Oxford Press, 2013).

refugee regime; rather the focus is merely on the impact of decolonisation. Indeed, in many refugee texts, I find that there is a silence surrounding colonialism and the refugee regime that is pervasive, and although there is a wide range of literature engaging with colonialism and refugees, it is normally directed to postcolonial refugee regimes and experiences outside of Europe, focusing for example on refugee flows within an African context or drawing comparisons between North and South refugee flows, or viewing processes and behaviours within refugee camps that follow colonial practices of power. These works certainly do not address colonialism and the UNHCR together, nor do they engage with the ex-coloniser as the host.<sup>10</sup>

As a result, my own approach turns to focus on the colonial legacy within the refugee regime. In doing so, I am inspired by the work of feminist theorist Sherene Razack and critical theorist Michael Rothberg. Firstly, this is because Razack calls for us to focus on the ‘describers and imaginers whose gaze constructs asylum seekers from the third world’.<sup>11</sup> Rather than the focus of the analysis centring on the object, Razack argues that we should be focusing on the subject within the refugee relationship and turning our attention to those who are the labellers in the refugee regime. I personally have found that I do not want to focus on the refugee, for I believe that they do not need to account for their actions; they are seeking safety, regardless of the reasons. Rather, I am interested in the power relations and positioning of the individual once they enter into the refugee process and how, through practices of silence and language specifically, the refugee is castigated as the other. Meanwhile, Rothberg’s work centres on re-engaging with the Holocaust and introducing colonialism into the debate as a means to understand, ground and provide context, as well as new accounts of the Holocaust, in what he terms a ‘colonial *turn* in Holocaust studies’.<sup>12</sup>

Accordingly, through my own work, I seek to introduce a ‘colonial turn’ regarding the

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<sup>10</sup> For literature adopting a postcolonial approach but looking beyond European, see: Odhiambo-Abuya, E. ‘A Critical Analysis of Liberalism and Postcolonial Theory in the Context of Refugee Protection’, *King’s College Law Journal*, 16(2005):263-291. Chimni, B. S. ‘The Geopolitics of Refugee Studies: A View from the South’, *Journal of Refugee Studies*, 11(4)(1998):350-374. Hyndman, J. *Managing Displacement, Refugees and the Politics of Humanitarianism*, (London: University of Minnesota Press, 2000). Zolberg, A., Suhrke, A. and Aguayo, S. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, (Oxford: Oxford University Press, 1989). Betts, A., Loescher, G. and Milner, J. *UNHCR: The Politics and Practice of Refugee Protection*, (Oxon: Routledge, 2008), Soguk, N. *States and Strangers. Refugee and Displacement of Statecraft*, (London: University of Minnesota Press, 1999), p.198.

<sup>11</sup> Razack, S. *Looking White People in the Eye*, p.88.

<sup>12</sup> Rothberg, M. *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization*, (Stanford: Stanford University Press, 2009), p.70.

refugee regime, by firstly providing a postcolonial engagement with the refugee process, but then by introducing a ‘colonial turn’ that reintroduces the notion of colonialism into the debate and re-evaluates the UNHCR, the refugee regime and the host country through a theoretical and historical approach. For colonialism does not operate merely within the parameters of the coloniser/colonised relationship, but also affects how the ex-coloniser engages with the foreign other. This is the coloniser’s colonial legacy and it is one that needs to be considered when we are engaging with the refugee regime. Significantly, it is an aspect that needs to be considered when we view institutions such as the UNHCR, and treaties such as the 1951 Convention. The cornerstones of the international refugee regime were established during the colonial encounter, yet this is rarely discussed within the literature on refugees. Accordingly, I seek to bring about a ‘colonial turn’ as to how we view the refugee regime, for overlooking colonialism and postcolonial politics, is to overlook the relations of power between the state and the refugee other.

As well as encouraging a ‘colonial turn’ when regarding the refugee regime and institutions such as the UNHCR, in order to understand the discrepancy between the 1951 Convention and the protection meted out, my thesis can provide additional contributions to the field of refugee studies. The interview material within the thesis provides interesting and insightful contributions to the practices of language and silence within the (British) refugee regime, as well as to the marginalised position of the refugee through government policies. Having had the opportunity to speak to a range of lawyers, refugee council members, researchers and ministers, the interviews are primary sources regarding the asylum system, offering analysis and reflection on government policies, othering and the impact of language and silence within the refugee regime. They provide depth to the discussion, offering testimonies and narratives from the refugee community as to how the refugee experiences the British refugee system. These interviews stand as a contribution towards the advancement of our understanding of the British refugee regime, alluding to the discrepancy between the 1951 Convention and the protection that is provided by states.

As well as the interviews, I feel that my archival research in particular, regarding the language of the British government towards the refugee, will be of interest to those seeking to research how governments have framed and labelled the asylum seeker. The archival research is based on a search of Hansard parliamentary and Lords debates from 1990 - 2005 using the term ‘asylum’, to examine the ways in which governments and ministers have constructed,

labelled and othered the asylum seeker, as well as how they have constructed an idealised notion of what a genuine asylum seeker should be. The archival material highlights how governments have sought to frame the asylum seeker for their own needs, applying labels where necessary and positioning the status of refugee on a pedestal. For those seeking to follow Razack's example of focusing on the labellers and describers whose gaze constructs the asylum seeker, the archival material presented within Chapter Three offers an empirical contribution to the labelling of asylum seekers by consecutive British governments.

Finally, although I do not centre, or place my work within the field of 'refugee studies', in some sense I think my work may offer a contribution to this area of study. Although I would locate myself at the juncture between postcolonial, third world and (potentially) international politics, my work does engage with the refugee studies field. As I have highlighted throughout, little academic work has been conducted that analyses the colonial impact and origins of institutions such as the UNHCR, or of the 1951 Convention, or of the host states as ex-colonisers. The majority of the research has focused on colonialism, postcolonialism and decolonisation and looked outside of Europe, to the refugee flows of Africa or Asia. However, what of the colonial legacy and mentality operating within host states with regard to the colonial refugee other? How is the colonial legacy affecting and shaping practices of power and subjection within the asylum system? As Glen Peterson and Anna Holian and G. Daniel Cohen<sup>13</sup> assert, little attention has been paid to the impact of colonialism on the UNHCR,<sup>13</sup> nor of the colonial legacy on the host states. Thus, in this regard, my thesis offers a contribution to advancing the argument for incorporating a 'colonial turn' when engaging with the refugee regime within Europe.

### **Limitations of the Research**

In reflecting on this thesis, and my research over the past four years, I am aware that there are several limitations to my own work that I would like to address. Although I am pointing out the limitations to my research, I firmly believe that where possible, the limitations have been mitigated within the work and that ultimately, they do not impinge on the nature of the overall research, or on the resulting conclusions of the thesis. Rather, I view these limitations as part of the nature of a four year project, and in hindsight, they are considerations and

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<sup>13</sup> Holian, A. and Cohen, G. D. 'Introduction', p.324.

observations that I can take on board for future research within the area. Accordingly, the following limitations I am engaging with are connected to the methodological approach to the thesis and present considerations for future research.

Firstly, in considering the limitations of the product I would like to address aspects of my research methodology. When conducting this research into the refugee system, particularly for Chapters Three, Four and Five, I wanted to resist making the error of speaking about refugees, rather than to refugees. In what Nicholas Sagovsky describes as the ‘methodological issue of giving ‘voice’ to refugees’<sup>14</sup>, in commencing this project, I was keen to provide a space for the refugee voice to speak within my research, and provide a platform. However, I found that establishing connections for my interviews was far more of a struggle than I had anticipated. When starting my thesis I set out that I would like to interview people who had either attained refugee status or been denied refugee status, and if possible, those who were still going through the asylum process. As well as this, I wanted to speak to people who were working within the refugee system such as charity members, lawyers, researchers and Members of Parliament, to engage with their position and views of the system. However, when I started to put feelers out to establish interview connections, I found that getting access to certain individuals was going to be an issue. I decided that due to the nature of refuge and the traumatic nature of the experience, I wanted to speak only to those who were actively seeking to have their voices heard, for instance vocal refugee community groups such as those based within London, Manchester, Oxford and Leeds. However, I was unsuccessful each time in making contact, building relations and developing trust when reaching out to these groups. Emails went unanswered, and follow-up phone calls either went unanswered or I was told that it would not be possible to speak to members. I struggled to make contact and build relations with those organisations, and ultimately to gain access to those people who I had wanted to speak with. I think partly this was due to my own geographical location. Based in mid-Wales, the closest refugee communities are in South Wales, Birmingham and Manchester. I believe that if I had been based closer to a larger city with a refugee population for a long period of time, and engaged in volunteer roles, then I would have been able to build the essential relations of trust and friendship with the people that I wanted to speak to, which would have made the likelihood of interviews far higher. Indeed, when speaking of this issue with Morag Gillespie, a policy researcher at the Scottish

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<sup>14</sup> Sagovsky, N. ‘Forward’ in Temple, B. and Moran, R. *Doing Research with Refugees, Issues and Guidelines*, (Bristol: The Policy Press, 2011), p.viii.

Poverty Information Unit, she herself admitted the difficulty in gaining access to the refugee population. She noted that even though she was commissioned by organisations such as the Scottish Refugee Council, Refugee Survival Trust and the British Red Cross, these organisations never put her in touch with their own people.<sup>15</sup> Gaining access to people with personal experiences of the asylum system, particularly women, who I was primarily interested in, was difficult. Karen Jacobsen and Loren Landau highlight how this is an issue both for researchers and practitioners within the field, particularly regarding notions of trust, and that gaining full access to your target population even when working with community groups is difficult.<sup>16</sup> This point is raised by Kenneth Miller, who asserts that trust and access are serious methodological concerns for researchers seeking to engage with refugee communities.<sup>17</sup>

The second main limitation regarding my thesis, again focuses on the methodology and is addressed specifically with regard to Chapter Five of the research, *An Alternative Way of Becoming: Speech, silence and language beyond Britain*. As has been mentioned, in engaging with Kenya and Britain, this was not intended to offer a comparison, but rather to provide examples of two differing regimes of interest that can help to illuminate us on the practices of refuge. Picking Kenya as an example was purely spurred on by my interest in the world's largest refugee camp, Dadaab, which resides in the Eastern part of the country, and the focus here was on prima facie refugees. This example provided a completely different take on the refugee regime, but it is one in which similarities and connections could be made regarding language, silence and importantly, power. When I was writing Chapter Five, it was fairly late on in the project, but I wanted to widen the scope of the analysis. As a result, the chapter is lacking in practical fieldwork results. Written during the final eighteen months of the thesis, a two to four month trip to Kenya was not an option financially. Observing the camps, and meeting representatives of the aid organisations working in them as well as the camp residents themselves, would have been my main objective. On a separate issue though, it should be noted that at the time of writing the security and stability of Dadaab was under threat with increasing bomb attacks and hijackings by Al Shabaab. Aid agencies such as Medicins Sans Frontiers and the Norwegian Refugee Council had experienced kidnappings

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<sup>15</sup> Gillespie, M. Policy Researcher and Lecturer, Scottish Poverty Information Unit. Interview conducted on 9<sup>th</sup> November, 2012, Glasgow.

<sup>16</sup> Jacobsen, K. and Landou, L. 'The Dual Imperative in Refugee Research: Some Methodological and Ethical Considerations in Social Science Research on Forced Migration', *Disasters*, 27(3)(2003):185-206, p.195.

<sup>17</sup> Miller, K. E. 'Beyond the Frontstage: Trust, Access and the Relational Context in Research with Refugee Communities', *American Journal of Community Psychology*, 33(3/4)(2004):217-227.



and, alongside Care and UNHCR, had scaled back their operations due to fears about safety.<sup>18</sup> Indeed, as recently as April 2014, the UNHCR experienced another hijacking within Dadaab.<sup>19</sup>

As a result, Chapter Five is missing the strength of a prolonged empirical ethnographic engagement with the camp. However, I have tried in various ways to rectify this limitation of the thesis, by drawing extensively upon field reports from organisations such as the UNHCR, the British Red Cross, CARE and Mediciens Sans Frontiers, as well as the online documentary resource Dadaab Stories, which provides refugees' stories and accounts of life within the camp.<sup>20</sup> Importantly, in choosing Kenya, I was keen to engage with a refugee environment that had been engaged with before. Kenya and specifically Dadaab have been the basis of a few ethnographic research projects by scholars such as Barbara Harrell-Bond and Jennifer Hyndman. I was keen to draw upon their observations and experiences and use them as a means for engaging with the camp.

In engaging with these limitations of my thesis, they are weighted towards methodological considerations of the thesis and provide constructive criticisms that should be considered in future research. I also feel that these limitations are connected to the overall nature of conducting a three to four year thesis project. With more time and funds, these limitations could have been alleviated. However, as it stands, when I reflect on my thesis at large, these are the two main issues that stand out. However, I do not feel that they detract substantially from the overall thesis project aims being met.

### **Critiques Of the Postcolonial Approach**

When reflecting on the thesis and evaluating the contribution of introducing the issue of colonialism, as well as postcolonial politics on the refugee regime and specifically analyses of the (ex)colonizer within the refugee regime, I am aware of several critiques that could be

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<sup>18</sup> Mediciens Sans Frontiers, 'Press Release: Somalia: MSF Forced to Close all Medical Programmes', (14<sup>th</sup> August 2013), <http://www.msf.org.uk/article/somalia-msf-forced-close-all-medical-programmes>, [accessed 21/05/2014] and Boniface, B. 'Refugee agencies suspended aid in Dadaabcamps after kidnapping', (2<sup>nd</sup> July 2012), Sabahi Online, [http://sabahionline.com/en\\_GB/articles/hoa/articles/features/2012/07/02/feature-03](http://sabahionline.com/en_GB/articles/hoa/articles/features/2012/07/02/feature-03), [accessed 21/05/2014].

<sup>19</sup> UN High Commissioner for Refugees. 'UN Vehicle Hijacked by Suspected Somali Militants', <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=5358a1de8>, [accessed 21/05/2014].

<sup>20</sup> Dadaab Stories. <http://www.dadaabstories.org/>, [accessed 21/05/2014].

levelled at this research. I have presented colonialism and postcolonial politics as essential for engaging with the refugee regime, and I have stressed the need to employ a ‘colonial turn’ to understand and contextualise the power and practice occurring within the refugee regime, which could be said to be rooted within colonialism. Postcolonialism, but also a history of colonialism are essential, not just for viewing the international refugee regime, but other regimes such as human rights. As I have argued, colonialism is an overarching term that encompasses the length and breadth of the colonial engagement. Postcolonialism perceives the process of colonialism as continuous. Even after decolonisation, there is still postcolonialism; affected, shaped and moulded by the processes and practices of colonialism.<sup>21</sup> A constricted understanding of postcolonialism, such as a basic emphasis on the ‘post’ prefix for example, classifies and constricts the term, eliminating any comprehension and context from the term. For it is important to remember that postcolonialism is the history before, during and after colonialism. It is an overarching term that incorporates the breadth of the colonial engagement as well as the relations after the colonial encounter itself. Postcolonialism in this sense refers rather to the continuation of practices and power rooted in the original colonial encounter: a ‘paradoxical in-betweenness’<sup>22</sup>

By utilising postcolonialism, I am aware that the research could be criticised for engaging with an approach that is regarded as too theoretically engaged and consumed with a focus on ‘textuality and discourse’.<sup>23</sup> Certainly Sankaran Krishna writes that postcolonialism has been noted as being ‘too caught up in a linguistic and cultural turn to be of much relevance to real history. It seems theoretically radical and avant garde, but studiously ignores the present world situation, its contradictions, and their origins in the history of capitalism and colonialism’.<sup>24</sup> Postcolonialism has been charged with having little to provide when understanding contemporary politics and being unable to contribute to issues such as ‘social

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<sup>21</sup> For discussions on the practices and process of postcolonialism, SEE: Dembour, M. ‘Postcolonial Denial: Why the European Court of Human Rights finds it so difficult to acknowledge racism’, in Clarke, K. M. and Goodale, M. *Mirrors of Justice. Law and Power in the Post-Cold War Era*, (Cambridge: Cambridge University Press, 2010), Abrahamsen, R. ‘African Studies and the Postcolonial Challenge’, and Young, R. ‘Colonialism and Humanism’ in Donald, J. and Rattansi, A. *Race, Culture and Difference*, (London: Sage, 1999), pp.243-251,

<sup>22</sup> Childs, P. and Williams, P. *An Introduction to Post-Colonial Theory*, p.7.

<sup>23</sup> Abrahamsen, R. ‘African Studies and the Postcolonial Challenge’, p.190.

<sup>24</sup> Krishna, S. *Globalization & Postcolonialism: Hegemony and Resistance in the Twenty-First Century*, (Plymouth: Rown & Littlefield, 2009), p.111.

and economic suffering'.<sup>25</sup> Indeed, Anthony Appiah asserts that the approach of postcolonialism is a 'meretricious form of intellectual activity'. He views postcoloniality as a 'condition of what we might ungenerously call a comprador intelligentsia: a relatively small, Western-style, Western-trained group of writers and thinkers who mediate the trade in cultural commodities of world capitalism at the periphery'.<sup>26</sup> Indeed, postcolonialism, and its central theorists such as Homi Bhabha have been charged with 'political mystification and theoretical obfuscation'.<sup>27</sup> Postcolonialism is perceived as engaging with high theory that is untranslatable into the realms of contemporary political use. This is especially true when seeking to apply postcolonialism to the subject of the refugee regime. Is it the case that postcolonialism is too theoretically convoluted to engage with the complexities and life experiences of the refugee regime?

Importantly, when engaging with colonialism and postcolonial politics, questions do arise as to whose colonialism/postcoloniality is being referred to. Jane Hiddleston notes that much of postcolonialism refers to the collapse of the British and the French empires during the mid-twentieth century<sup>28</sup>, but how does this notion of colonialism stand alongside Spanish and Portuguese colonialism, which was occurring in the late nineteenth and twentieth centuries? What colonialism is being referred to, and is it appropriate to place the colonialism/postcolonialism of the British or French empires in Africa, alongside the Spanish and Portuguese in Latin America for example? Moreover, as Aijaz Ahmad argues, by placing the focus on the ex-coloniser within the colonial relationship, is it possible then that I am privileging the experience of the coloniser over that of the colonised? Am I, through this thesis, theoretically perpetuating the power relations of the colonial encounter by focusing upon the coloniser and their behaviours and actions? Indeed, in my quest to engage with the position of the refugee, by focusing on the ex-coloniser as the host, have I been complicit in the silencing of the refugee? This is especially true when drawing upon multiple colonial experiences that are bound within the refugee process. Although my research adopts a regional approach to the refugee regime, taking in Latin America, Asia and Africa, the thesis is grounded within the 1951 Convention - a convention with Eurocentric foundations. Indeed, as I argued against the humanitarians in Chapter Five who had identified the subaltern refugee but had failed to enter into a 'responsibility structure with the subaltern...

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<sup>25</sup> Abrahamsen, R. 'African Studies and the Postcolonial Challenge', p.192.

<sup>26</sup> Appiah, A. cited in Childs, P. and Williams, P. *An Introduction to Post-Colonial Theory*, p.18.

<sup>27</sup> Krishna, S. *Globalization & Postcolonialism*, p.111.

<sup>28</sup> Hiddleston, J. *Understanding Postcolonialism*, (Stockfield: Acumen, 2009), p.3.

learning to learn without this quick-fix frenzy of doing good with an implied assumption of cultural supremacy... that's the hard part'.<sup>29</sup> I posit whether through my own approach, this criticism can be directed towards myself, in identifying the refugee, yet failing to enter into a responsible dialogue with them, whilst at the same time, turning my attention to the actions of the (ex)coloniser.

When I view postcolonialism though, I view the approach as offering a framework for the 'expansion, exploration and clarification'<sup>30</sup> of colonialism, providing fresh insight into the colonial mentality, the colonial legacy and allowing us to reflect and evaluate on the continuities and fluidity of colonial structures, practices and power – both historically and theoretically. Even with the potential criticisms that could be directed at the approach, I believe that the thesis provides an alternative framework for reengaging with the refugee regime, one where the structures and power of the system are evaluated in light of the continuing colonial legacy that for too long has been overlooked and sidelined. Repositioning not only postcolonial politics, but also colonialism itself and its historical roots within the refugee regime, presents the reader with the opportunity to consider that colonial practices, power and structures are still at work, especially within the refugee regime, resulting in the othering of not only the ex-colonised, but also the foreign other refugee.

## **Conclusion**

In undertaking this research, I believe that this thesis has highlighted the importance and necessity for engaging, not only with postcolonial politics, but also with colonialism and its history itself. The thesis has engaged with the international refugee regime and the disjuncture being the regime and the protection offered, and focused on the various ways in which language and silence have been utilised in order to control and determine the refugee regime at the expense of the refugee. In using postcolonial politics, the thesis has employed various tools, for instance, language, silence, speech, labelling, binaries and hospitality, to examine the disparity between the 1951 Convention and the protection provided by host states. In doing so, the thesis has presented the various ways in which colonial practices of power, labelling and marginalisation are still arising in a system that is supposedly built to protect the refugee. Accordingly, states have maintained a level of self-control whilst

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<sup>29</sup> Spivak, G. C. *The Spivak Reader*, (London: Routledge, 1996), p.293.

<sup>30</sup> Hiddleston, J. *Understanding Postcolonialism*, p.4.

adhering to their international responsibility. I make a call to reintroduce colonialism into the discussion. I propose that the contemporary international refugee system can be viewed as bearing the traces of colonialism that are still arising in its practices towards the colonial other. The thesis argues that the colonial legacy has left a mentality regarding how the colonial state engages with, not only the colonial other, but also the non-colonised other. Colonialism is not merely bound by the relationship of the coloniser/colonised, but influences how the (ex)coloniser engages with the foreign other. Because of this the legacy of colonialism needs to be considered when we are engaging with the refugee regime.

My point is that the othering that enabled colonialism in the first place is still continuing and encompasses not only the colonial other, but the foreign other too. It is only by introducing a 'colonial turn' into the engagement with the refugee regime that we are able to reflect on the origins of the refugee regime within the colonial era, and consider the possibility of the colonial legacy operating within the regime: shaping and influencing the relationship between the ex-coloniser host and the foreign refugee other. Alongside the postcolonial practices of language and silence, this allows us to reflect at large on the continuity and fluidity of colonial practices, politics and power, operating within the refugee regime and provides an interpretative understanding of the refugee regime that is normally silenced.

Indeed, in developing on from the 'colonial turn' in this research, I am keen at this stage to continue with this approach, focusing on the legacy of colonialism in Britain, and examining how colonial practices, power and behaviours have continued to manifest within the British asylum system and how this is resulting in violence and violent practices in the system, such as detention, self-harm, and the suicide of the Serykh family, mentioned in the Introduction. By engaging with a 'colonial turn', I want to examine the practices of asylum that are in operation in Britain in light of the colonial legacy: practices of control, and practices of power and resistance that are in operation. How is the asylum seeker being positioned, and how are practices of silence operating within the system, especially regarding violence and the notion of suicide within the British asylum system? I would like to develop my PhD research, by conducting further research into the 'colonial turn' regarding the British refugee regime.

Importantly, I hope that my research, following in Rothberg's footsteps, highlights the

necessity for including a 'colonial turn' when researching the refugee regime. Far too often, the colonial issue is engaged not with, but beyond Europe with the focus on the postcolonial or the decolonial state. However, focusing on the ex-coloniser, and noting that colonialism affected not only the colonised, but also the coloniser, allows the research to engage with the colonial legacy operating in institutions such as the UNHCR. Colonialism should not be bracketed and viewed as a contained historical event, but rather as a process whereby we are still able to witness the politics and practices of colonialism operating. Thus, I hope that this research will contribute by highlighting the necessity for a 'colonial turn' as well as by revealing the impact and extent of colonialism within the refugee regime.

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