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### **The Social Contract and Refugee Protection: A Comparative Study of Turkey and Germany in the 1990s**

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A Comparative Study of Turkey and Germany in the 1990s\***

**Summary**

This paper hopes to challenge the existing paradigm in refugee studies, which presents the development of domestic asylum policies as being essentially driven by a conflict between international humanitarian norms and the self-interest calculations of sovereign states. This paper will show that asylum policies are determined more by conflicting domestic principles, and that the dominance of one or another of the competing domestic principles is decided largely by the prevailing ‘social contract’ notions held by the state. That is, notions about social contract determine what the perceived obligations and priorities of the state are; this ‘hierarchy of obligations’ is clearly manifested in, and indeed guides the development of, asylum policies.

Looking first at the macro level, the paper outlines some of the important philosophical dimensions of the social contract idea, some possible variations, as well as the role of the social contract in international refugee and human rights law. Moving on to the chosen case studies, the second half of the paper examines the dominant notions of ‘social contract’ in Turkey and Germany, and highlights some of the many ways these notions impacted upon refugee protection in each country during the 1990s. Finally, the paper compares and contrasts briefly some of the themes and processes which emerged in the two case studies, and concludes by evaluating these results in light of the existing refugee studies paradigm.

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## 1. Introduction

In his article ‘Obligations and Refugees’, H. Adelman has suggested that refugees are subject to ‘the choices and power’ of the political communities in receiving states (Adelman 1987: 76). Building upon this idea, the present paper attempts to show that refugees are subject, in particular, to the specific social contract notions that are held by receiving states, and that differing notions can have huge consequences for refugee protection. In particular, this will be seen to be true of refugee protection in the two countries under examination in this paper, Turkey and Germany.

This paper thus hopes to challenge the existing paradigm in refugee studies, which presents the development of domestic asylum policies as being essentially driven by a conflict between international humanitarian norms and the self-interest calculations of sovereign states. The paper will show that asylum policies (specifically, the standards of refugee protection) are determined more by conflicting domestic principles, and that the dominance of one or another of the competing domestic principles is decided largely by the prevailing social contract notions held by the state. That is, notions about social contract determine what the perceived obligations and priorities of the state are; this ‘hierarchy of obligations’ is clearly manifested in, and indeed guides the development of, asylum policies.

The first section will outline some of the important philosophical dimensions of the social contract idea, and highlight some possible variations. The second section examines the role of the social contract in international refugee and human rights law. Moving on to the chosen case studies, the third and fourth sections examine the dominant Turkish social contract notions, and then highlight some of the many ways these notions have impacted upon refugee protection in Turkey. The fifth and sixth sections focus on Germany, and illustrate how competing social contract notions have been reflected in, and indeed have guided, the asylum debates in the 1990s which had such huge impact on levels of refugee protection. The final part of the paper compares and contrasts briefly some of the themes and processes which emerged in the two case studies, and concludes by evaluating these results in light of the existing refugee studies paradigm.

## 2. What is the ‘Social Contract’

In order to discuss the impact that differing social contract notions have upon levels of refugee protection, it is necessary to give a brief background of some of the philosophical trends that characterise the contractarian tradition. An exhaustive examination of the theories presented in Hobbes’s *Leviathan* (1651), Locke’s *Two Treatises of Government* (1690), Rousseau’s *The Social Contract* (1762), and even Rawls’ *A Theory of Justice* (1971), is obviously beyond the scope of this paper<sup>†</sup>. Instead this paper will identify three important dimensions of social contract theory which are particularly relevant to asylum debates. Hence this section will discuss, firstly, the idea of obligation and reciprocity; secondly, the extent to which the social contract determines the way states prioritise their different obligations; and, finally, the relationship between social contract notions and citizenship.

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<sup>†</sup> Such an examination has been carried out elsewhere on numerous occasions; see for example Riley, P. (1982) *Will and Political Legitimacy*.

## *2.1 Obligations and Reciprocity*

The idea of a social contract is predicated on the notion that mutual obligations (for both citizen and state) are created as the result of the (would-be citizens') initial exercise of consent; hence Riley, for example, summarises social contract theory as 'the doctrine that political legitimacy, political authority, and political obligations are derived from the consent of those who create a government' (Riley 1982: 1). The social contract is thus what results when the members of a society consent to transfer sovereignty into the hands of a state. This consent is premised on the understanding that the state thus becomes obligated to pursue and protect the interests of the members of this society. This is a task which the state must fulfil so as to retain the sovereignty with which it has been entrusted (Simmons 1979: 68; Mills 1998: 36-38). Importantly, however, it is not only the state which has obligations. There is a strong element of reciprocity in that the citizens are also presumed to accept certain obligations, which they must fulfil if they wish to remain a part of this political community. This 'contract', therefore, identifies, above all, the obligations which each party must fulfil.

The importance of reciprocity can be seen with some of the earliest social contract theories. Thomas Hobbes, for example, presented the state as an instrument for the protection of order, in a society where 'the sovereign acted as the provider of security and the citizen in turn offered allegiance and obedience' (Devetak and Higgott 1999: 5). Equally, John Locke also emphasised the importance of reciprocity with his theory of 'tacit consent' as the source of political obligation (Simmons 1979).

If consent is seen as the source of legitimacy, it logically follows that any state which claims authority in the absence of such consent, is fundamentally illegitimate (Riley 1982). Moreover, the corollary of the link between consent, legitimacy and obligations is that, as Simmons points out, 'the method of consent protects the individual from becoming bound to any government which he finds unpalatable' (Simmons 1979: 69). The established citizen-state bond is thus conditional upon the state fulfilling its obligations (Mills 1998: 37) – a dimension of the social contract idea which is crucial to the notion of refugee status as 'surrogate protection'.

Indeed, the link between consent, obligations and legitimacy is of particular importance regarding the manifestations of the 'terms' of the social contract in different societies. As the social contract is an abstract idea which may or may not be reproduced in a concrete form (i.e. in constitutions, jurisprudence etc), the ideas which a specific nation-state may hold regarding the social contract that exists between citizen(s) and state, are often most evident in the arguments of political actors. If, as Mills argues, 'those who are acting within the realm of the socially constructed state must accept the purposes of that entity in order to be able to claim legitimacy for their actions' (Mills 1998: 38), then clearly political actors will strive to show that their action or proposals are consistent with the obligations of the state.

Specifically, political debates are often marked by attempts by actors on all sides to present their proposals as being consistent with the most important obligations of the state. That is, political debates reflect the manner in which a state prioritises its various obligations. This prioritising is largely determined by (interpretations of) the 'terms' of the social contract for, in addition to identifying the obligations of the state, the social contract also determines which of these obligations are seen as most important.

## 2.2 *The State's Priorities and Human Rights*

Beyond the identification of the state's obligations, the social contract also determines whether each obligation is seen as absolutely fundamental to the existence of the nation-state, as imperative in all but the gravest circumstances, or else merely desirable if the circumstances permit. Hence the social contract not only determines what the 'national interests' are, but also which of these 'interests' are to take precedence.

Such prioritising is manifested, for example, with the perceived importance of the protection of individual rights, compared with the perceived importance of maintaining the well being of the community as a whole. Such weighting of priorities has long been at the centre of social contract theories. Cole, for example, explains that for Rousseau, 'the Sovereign people has a right to enforce whatever the general interest requires, and where this interest calls for public intervention no appeal can be made against it to individual rights' (Cole 1993: xlvi – emphasis added)<sup>‡</sup>. Different notions of social contract can lead to differing priorities regarding this balance between the obligation to protect the rights of the individual and the obligation to assure the well being of the community.

One manifestation of this is the way different states attach less or more importance to the protection of human rights. Zubaida explains that this variation results largely from differing cultural perspectives: Western individualism, for example, contrasts with 'some cultural perspectives, including, arguably, that of Islam, [where] the communal perspective is ascendant over the individual' (Zubaida 1994: 2). This is not to say that those societies which prioritise the 'communal perspective' do not acknowledge the existence of human rights, but that such societies may have different opinions regarding when such human rights can (legitimately) be violated<sup>§</sup>.

Indeed, this idea of prioritising the obligations of the state and allowing for certain rights of the individual to be violated in certain circumstances, is enshrined in international human rights law. Crucially, however, the way in which individual states prioritise their obligations does not always correspond to their (supposed) priorities as set out in international human rights law. No matter how 'universal' human rights are supposed to be, the level of importance which different states attach to the protection of these rights, is far from universal. The guarantee (if not the acknowledgement) of these rights will thus vary according to the varying social contract doctrines held by different states.

If a state perceives that protecting the human rights of its own citizens is a secondary consideration (i.e. which can be subordinated to the needs of the community), it seems highly unlikely that this state will attach much importance to providing protection to refugees, that is, to providing 'surrogate protection' to the rights of foreigners. This will be seen below, but here it is worth considering that – in light of the undoubted reliance of international refugee law on international human rights law – such varying priorities may be one reason why certain non-Western regions, specifically those of the Middle East and southern Asia (UNHCR, 2000a), tend to be over-represented among those countries that have signed neither the 1951 Convention nor its 1967 Protocol.

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<sup>‡</sup> In Rousseau's own words, 'When the prince says to [the citizen]: 'It is expedient for the State that you should die', he ought to die, because it is only on that condition that he has been living in security up to the present' (Rousseau 1993: 208).

<sup>§</sup> This can be seen, for example, with the 'Universal Islamic Declaration of Human Rights', which presented a doctrine of rights, but one which could be used to 'justify violations of rights and provide ideological support to repressive regimes, especially if they claim to be Islamic' (Zubaida 1994: 10).

### *2.3 The Social Contract and Citizenship Notions*

Of course, the social contract also identifies the citizen's obligations towards the state. A third important dimension of the social contract, therefore, is its reciprocal relationship with citizenship notions. Closa argues that 'the notion of a social contract has been central to concepts of citizenship both in political theory and constitutional practice' (Closa 1996: 1), and this is unsurprising given that citizenship notions are founded, not only upon ideas of belonging (ethnicity, heritage, cultural ties etc.), but also upon ideas of the obligations to the state which (prospective) citizens must fulfil, such as military service or participating in the political life of the state (Barbieri 1998; Simmons 1979). Again, the type of obligations which citizens are perceived to have, are determined by the prevailing social contract ideas.

That is not to say, however, that citizenship notions do not impact upon the perceived obligations of the state. If, for example, a common cultural identity was seen as a pre-requisite of citizenship, then it is likely that the state would have an obligation to protect and preserve this cultural identity.

Nonetheless, for the purposes of this paper it must be stressed that citizenship notions are hugely influenced by the prevailing ideas about the 'terms' of the social contract. As will be seen, varying notions of citizenship, as determined by varying notions of the social contract, can have huge implications upon refugee protection.

## **3. The Social Contract in International Refugee Law**

Before examining the specific cases of Turkey and Germany, it is necessary to discuss the impact that social contract notions have upon refugee protection on a normative level. Hence this section of the paper will illustrate that the idea of a social contract between state and citizen, is a fundamental premise underlying international refugee law. Focus will be placed on two aspects of international refugee law which best illustrate this: the refugee determination process, and situations where cessation of refugee status is warranted. The impact of social contract ideas upon human rights law will also be discussed.

### *3.1 The Social Contract as an Underlying Premise: 'Surrogate Protection'*

Vernant suggests that 'the events which are the root-cause of a man's becoming a refugee derive from the relations between the State and its nationals' (Cited in Hathaway 1991: 135). Specifically, refugee law concerns itself with situations where the (perceived) 'normal' citizen-state relationship has disintegrated (Shacknove, 1985; Hathaway 1991; Goodwin-Gill 1996). This paper argues that the notion of a social contract between citizen and state thus underlies international refugee law.

As discussed, the social contract outlines the obligations of the state with regard to the protection of its citizens and, importantly, of their rights. If it is perceived that the state has 'failed' to fulfil these obligations in a significant way, then the normal citizen-state relationship is perceived to have disintegrated, and the 'surrogate protection' that is refugee status is thus deemed necessary (Hathaway 1991; Shacknove 1985).

### 3.2 The Social Contract in the Refugee-Determination Process

The social contract idea is particularly important within the actual refugee-determination process, wherein the absence of state protection in the country of origin is of great importance. In short, the absence of state protection can serve: a) to determine whether instances of maltreatment constitute actual ‘persecution’ and b) to determine whether this persecution was carried out for a ‘convention reason’.

Regarding the first idea, it is clear that an act of maltreatment, even one perpetrated on the basis of one of the grounds enunciated in the 1951 Convention, is alone not sufficient to qualify one for refugee status, unless there is proof that the state failed to protect the citizen against this act. This maxim of refugee law was evident in the *Islam/Shah* case<sup>\*\*</sup> in the UK, for example. Here, Lord Hoffmann explained that domestic violence committed in the UK, ‘would not be regarded as persecution within the meaning of the Convention. This is because the victims of violence would be entitled to the protection of the state [...]. What makes it persecution in Pakistan is the fact that [...] the State was unwilling or unable to offer [the claimant] any protection’<sup>††</sup>. Hence, in this case as in many others, the very absence of state protection serves to determine whether an act of maltreatment constitutes persecution.

Furthermore, an absence of state protection can determine whether the claimant can be considered a victim of persecution for a convention reason (i.e. race, religion etc). In the same *Islam/Shah* case, the absence of state protection was highlighted to argue that, although the women in question were being maltreated on an individual basis, the attitude of the state to their plight signified that they were being persecuted because they were members of a ‘social group’ (i.e. women in Pakistan), and thus deserved refugee status. Normally, a ‘social group’ has to be shown to exist independently of the persecution suffered<sup>‡‡</sup>. In this case, however, a distinction was made between discrimination and persecution, and it was accepted that discrimination by the state of a certain group would suffice as evidence that the society treated them as a ‘social group’, and hence they qualified under the 1951 Convention.<sup>§§</sup>

This paper argues that this emphasis on state protection is predicated on the notion that a social contract exists between citizen and state, according to which the state has certain obligations to protect the citizen. When a state fails to fulfil these obligations, the normal citizen-state is perceived to have disintegrated; then, and only then, is a claim for refugee status warranted.

### 3.3 The Social Contract in International Human Rights Law

Refugee law clearly relies very heavily on human rights law, and while a detailed examination of the role of the social contract within international human rights law is beyond the scope of this paper, a brief discussion is necessary.

The ‘hierarchy’ of human rights, as contained within the various instruments of the International Bill of Rights<sup>\*\*\*</sup>, illustrates clearly that a certain social contract idea underlies much of international human rights law. This hierarchy dictates, firstly, which human rights

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<sup>\*\*</sup> *Islam (AP), Regina v. Secretary of State for the Home Department, Immigration Appeal Tribunal and Another ex parte Shah (AP)* [1999] UK House of Lords.

<sup>††</sup> *Ibid*, per Lord Hoffmann: 507-8.

<sup>‡‡</sup> Opinion of Lord Hoffmann, *Ibid*: 509-10.

<sup>§§</sup> Opinion of Lord Hope of Craighead, *Ibid*: 517.

<sup>\*\*\*</sup> That is, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social, and Cultural Rights (1966).

must be protected in all circumstances (Level 1); secondly, which rights may be derogated only in situations of national emergency; thirdly, which rights must be upheld if the state's resources so permit; and finally those rights, the protection of which is not an obligation for states, but more so a goal for states to work towards (Levels 2, 3 and 4 respectively) (Hathaway 1991). This paper would argue that this 'hierarchy of human rights' reflects the idea, firstly, that a state has certain obligations towards its citizens, and secondly, that a state must balance its obligations to the community against its obligations to the individual citizen.

Of course, just as international law accepts that certain rights can be derogated in certain circumstances, so individual states have their own conceptions about which human rights can be violated, and in what circumstances. Unfortunately, the model presented by international legal instruments does not always correspond to that of individual states.

### *3.4 The Social Contract in Cessation Clauses*

Finally, the importance of the social contract in international refugee law is also manifested in articles pertaining to the cessation of refugee status. As Hathaway explains, 'refugee law is intended simply to afford surrogate protection pending the resumption or establishment of meaningful national protection' (Hathaway 1991: 189). This is reflected in Article 1.C (2) of the 1951 Convention, according to which the cessation of refugee status is foreseen as soon as the refugee is seen to once again enjoy the adequate protection of the state of origin.

Therefore, not only is the state of origin's original failure to provide such protection crucial to refugee determination procedures, but, in addition, the cessation of refugee status is warranted as soon as the state of origin is perceived to be capable and willing to fulfil afresh its obligations under the social contract. Clearly, the notion of a social contract is hugely important in international refugee and human rights law. As will be seen below, social contract notions also exert a huge influence on domestic refugee law. Moreover, the fact that the 1951 Convention is a non-self executing treaty which must be interpreted by individual countries, means that, when it comes to asylum policies, domestic notions of social contract often take precedence over international norms.

## **4. The Turkish Social Contract**

This part of the paper is divided into three sections. The first discusses the dominant perception that the primary obligation of the state is to preserve the integrity of the Turkish nation-state, and illustrates the resulting emphasis on national security. The second section discusses the denial of ethnic plurality, and the third section highlights the impact of such perceptions on the respect of human rights in Turkey.

### *4.1 The Integrity of the Nation-State*

The overriding concern of the Turkish state has always been the need to preserve the integrity of the nation-state. There has long been an 'almost psychotic fear of the loss of 'national unity'' (Bozarslan 1992: 103). This has translated into the perception that the state should concern itself with, first and foremost, issues of national security. Crucially, the still-dominant Kemalist<sup>†††</sup> ideology conceives 'national security' as encompassing both internal

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<sup>†††</sup> Named after Mustafa Kemal 'Atatürk', the founder of the Turkish Republic, whose ideas still exert virtual hegemonic

and external threats; that is, threats to the territorial integrity, as well as to the (supposed) ethnic homogeneity, of the Turkish state (Jung and Piccoli 2001).

In Turkey, ideas about the social contract reflect traditional (Ottoman) political thought, yet have also been influenced by certain (traumatic) historical events, in particular the disintegration of the Ottoman Empire. The latter hugely affected ideas about the priorities of the Turkish state, and led to the ‘historically constructed fear that Turkey will fall apart, as did the Ottoman state’ (Yavuz 1999: 135).

Combined with this fear is the traditional Ottoman tenet that the privileges of the ruling classes were legitimate ‘only if they could maintain [the social] order and defend the Islamic community against the outer world’ (Jung and Piccoli 2001: 37). In the Kemalist social contract, political legitimacy based on religion was replaced by political legitimacy based on ability to protect the integrity of the nation-state. Indeed, the continuing emphasis placed on national security is reflected not only in the rhetoric used to justify state actions, but also in the very institutional structure of Turkish politics.

In the early days of the Republic, the power monopoly of Kemal’s party was justified on the basis of the (internal) security threat (Jung and Piccoli 2001), and this reason has been invoked for similarly undemocratic actions ever since, including the military coups of 1971 and 1980 (Bozarslan 1992; Jung and Piccoli 2001)<sup>†††</sup>. As will be seen, the prevailing notion of social contract permits the violating of democratic principles in the name of ‘national integrity’.

The emphasis which the prevailing social contract ideas places on national integrity and security, is clearly reflected in Turkish jurisprudence. Article 125 of the Criminal Code, for example, prescribes capital punishment for those whose acts aim at undermining the territorial integrity of the nation-state (Gurbey 1996: 11).

The crucial ‘terms’ of the Turkish social contract are further illustrated by the role of the military in Turkish society. Even beyond their impact via the military coups of 1960, 1971 and 1980, the military has a hugely important institutional role, as embodied by the hugely powerful National Security Council (Jung and Piccoli 2001: 95). Given the enlarged Kemalist conception of security, the NSC has huge power to decide both internal and external policy: crucially, this ‘mandate’ enables the NSC to make proposals regarding human rights (Gurbey 1996).

An important corollary of this concern with national security is the ‘Sèvres Syndrome’. The notion that the Ottoman Empire collapsed amidst betrayal and conspiracies between external and internal foes, has been maintained within the Kemalist world-view, and leads to a suspicion that almost all of Turkey’s internal problems are caused (or at least aggravated) by the actions of enemies outside Turkey (Yavuz 1999; Jung and Piccoli 2001)<sup>§§§</sup>. Hence the advice and demands of the West (regarding human rights, for example) are viewed with suspicion, while internal threats to the nation-state are seen as the work of Turkey’s neighbours in the Middle East. This has led to a barely-concealed hostility towards its closest neighbours, in particular Syria (which has supported Kurdish nationalist groups within Turkey) and Iran (whose disgust at Turkish secularism is well-known) (Yavuz 1999; Jung and Piccoli 2001).

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status in modern Turkey (Yavuz 1999).

<sup>†††</sup> The 1971 coup used as its justification the need to guarantee the ‘unity of the homeland’ (Bozarslan 1992: 104), while in 1980 the military announced that ‘the Turkish armed forces have been obliged to take over the running of the state in order to protect the integrity of our nation and its territory’ (Cited in Jung and Piccoli 2001: 93).

<sup>§§§</sup> The term itself relates to the proposed Treaty of Sèvres of 1920, drawn up by European powers, which proposed the territorial division of Turkey and autonomy for many of the ethnic groups within Turkey (Gurbey 1996: 21).

#### *4.2 The Threat of Ethnic Plurality*

In Kemalism, ethnic plurality within Turkey is not just denied, but indeed feared, and viewed as a serious threat to the integrity of the nation. In an attempt to protect the dominant myth of an ethnically homogeneous nation, any articulation of ethnic or even cultural difference is prohibited (Gurbey 1996). Any such articulation which even suggests a desire for autonomy, is immediately portrayed as a threat to the very existence of the nation-state. The best example of such a movement, of course, is that of the Kurdish nationalists.

To the Kemalist establishment, Kurdish nationalism represents an existential threat, to both the territorial unity of Turkey and to the myth of a unified, homogeneous people (Barkey 1996: 65). As Yavuz explains, 'the Kurds are the only group that explicitly challenges the legitimacy of the state and demands a new social contract that carves out political space for their aspirations' (Yavuz 1999: 129). The prevailing social contract notion in Turkey, however, specifically rejects the possibility of individual ethnic groups pursuing their interests at the expense of the integrity of the nation-state. Hence the Kurds are not only calling for a new social contract, but, indeed, are advocating a reformulation which de-prioritises that which takes precedence in the current formulation. They are not just questioning the legitimacy of the current state, but questioning the very basis of that legitimacy.

As the protection of the integrity of the nation-state is seen as the major priority of the Turkish state, it is not surprising that any and all means are used to suppress Kurdish nationalism. The resulting widespread violation of Kurdish human rights, as well the justifications used for such violations, illustrate well the priorities of the Turkish state.

#### *4.3 Human Rights in Turkey: The Community Before the Individual*

As discussed, one of the defining characteristics of social contract notions is the manner in which the rights of the individual are weighted against the well being of the community as a whole. The prevailing conception in modern Turkey clearly prioritises the well being of the community over the rights of the individual; indeed, this conception implies 'an absolute right for modernist elites in the name of the nation to control sovereignty and authority over the individual' (Bozarslan 1992: 112). In this notion of social contract, individual human rights can legitimately be violated if the well being of the people (here presented as the integrity of the nation-state) so requires. Hence numerous articles of the Turkish Anti-Terror Laws, which violate human rights standards, are justified because they aim at protecting the integrity of the nation-state (Gurbey 1996: 11).

Given the perception of Kurdish nationalism as a particularly serious threat, it was no surprise when, in August 1990, basic rights in the 'crisis regions' of south-eastern Anatolia (where the government forces battle the Kurdish PKK) were suspended, 'which was justified because of threats to national security' (Gurbey 1996: 15).

Finally, while the Kemalist ideology still enjoys virtual hegemonic status, it is important to note that even those political movements in Turkey which are perceived as presenting an alternative notion of social contract, have in fact much in common with Kemalism. Fethullah Gulen's Nurcu movement, for example, is often presented as a possible alternative to Kemalist dominance. However, 'Gulen's notion of politics cannot be considered liberal since he gives priority to community and state over individual rights' (Yavuz 1999: 124). This is fundamentally the same prioritising as that in the Kemalist notion of social contract. Furthermore, Gulen also shares the Kemalists' hostility towards Turkey's Arab neighbours, and indeed advocates a state-centric understanding of Islam which is hugely

influenced by the prevailing security culture throughout Turkish politics (Yavuz 1999: 122). Turkey's dominant social contract notions, therefore, are remarkably pervasive and indeed are noticeable across party lines.

## **5. The Impact of Social Contract Nations on Refugee Protection in Turkey in the 1990s**

This part of the paper is divided into four sections. The first section shows how the overriding concern with national security manifested itself in Turkish asylum policy long before the 1990s. The second section deals specifically with the level of refugee protection enjoyed by Kurdish asylum-seekers in Turkey. The third section discusses the geographical limitation which Turkey maintains regarding the 1951 Convention. The final section deals with the special asylum regulations that Turkey introduced in 1994, and examines the possibility of new developments in Turkey's asylum policies.

### **5.1 National Security Ahead of Refugee Protection: Prior to 1990s**

The importance of national security considerations has long marked the attitude of the Turkish government towards refugee protection. Even during the negotiation of the 1951 Refugee Convention, the proposals of the Turkish representative were characterised by a concern for how refugee flows would affect national security. During the negotiation of Article 26 ('Freedom of Movement' of refugees in host societies), for example, the Turkish representative 'pointed to the existence in many countries of frontier or strategic zones, access to which was forbidden to aliens', and expressed a concern that the proposed draft might act so as to limit the capacity of Contracting States to apply such regulations to refugees (Weis 1995: 229).

Moreover, at the 1977 Conference on Territorial Asylum, Turkey, 'in a prescient move, proposed an amendment whereby non-refoulement might not be claimed 'in exceptional cases, by a great number of persons where a massive influx may constitute a serious problem to the security of a Contracting State'' (Goodwin-Gill 1996: 141). This proposal reflected the fact that Turkey has long prioritised national security considerations far above any supposed humanitarian obligations.

### *5.2 Operation 'Provide Comfort': The Special Threat of the Kurds*

In 1991, almost 500,000 Kurdish asylum-seekers flooded towards Turkey in an attempt to flee Saddam Hussein's brutal repression of a failed uprising. The reaction of the Turkish government, which effectively closed its borders to the Kurds, and persuaded the international community to set up refugee camps within Iraq (Kirisici 1991), was the clearest possible indicator of the manner in which the Turkish state prioritised its obligations.

Given the ongoing civil strife between the Turkish government and Kurdish nationalist forces within its borders, there was no way that Turkey would further endanger that which it valued above all, namely the integrity of the nation-state, by allowing hundreds of thousands of Kurdish refugees to enter its territory and swell the ranks of the Kurdish nationalist forces. It could thus be argued that the domestic policy of brutally repressing Kurdish nationalism was complemented by the policy of preventing the inflow of more Kurds.

Moreover, this rejection of refugees was not merely because the huge numbers would have stretched Turkey's resources to an unacceptable degree: while this may have been true, such issues had not been considered in 1989, when 300,000 ethnic Turks from Bulgaria streamed into Turkey (Kirisci 1991: 4). In this case, of course, the refugees did not present a potential threat to Turkey's supposed ethnic homogeneity, and so national security priorities did not conflict with Turkey's humanitarian obligations, hence Turkey allowed them to enter the country.

In 1991, however, Kurdish refugees were seen as perhaps an even greater threat than the Kurds within Turkey. As discussed, the 'Sèvres syndrome' leads to a blurring of internal and external threats to the state. In the eyes of the Turkish state, therefore, refugee flows (which are fundamentally trans-national) present a unique threat to the integrity of the nation-state, particularly if they originate from one of Turkey's hostile neighbours. If such refugee flows involve Kurds, who represent a particular threat, then, clearly, Turkey's prioritising of national security will lead it to show little concern for its humanitarian obligations. Robins has pointed out that '[Western journalists'] criticism was particularly sharp over Ankara's priority of *raison d'état* over humanitarianism' (Robins 1996: 115). Such criticism was clearly warranted, and, in effect, amounted to a criticism of the fundamental basis of the Turkish state – a criticism of the very 'terms' of the Turkish social contract. Apart from endangering the lives of thousands of refugees, Turkey's actions may have also done long-term damage to the crucial principle of non-refoulement (Goodwin-Gill 1996: 141, 289).

### *5.3 The Geographical Limitation Prior to 1994*

Although Turkey signed the 1967 Protocol to the Refugee Convention, it nonetheless upheld the geographical limitation which was present in the original Convention. Hence Turkey only extends refugee protection to asylum-seekers coming from Europe. Conversely, non-European asylum-seekers in Turkey receive none of the legal protection guaranteed by the Refugee Convention.

Indeed, domestic Turkish law has no separate provisions for non-European asylum-seekers, who are thus subject to general laws relating to foreigners in Turkey - 'naturally, these laws are not designed in a manner to safeguard the needs and rights of asylum-seekers' (Kirisci 1991: 10; see also Amnesty International 1994). Because the law views them as foreigners, they must have appropriate documentation when they enter the country, otherwise they are liable to be deported for 'illegal entry' (Amnesty International 1994: 14). Clearly, such practice contradicts Article 31 of the Refugee Convention. Moreover, being subject to general laws governing foreigners, means they are allocated a certain length of time during which they can legally remain in Turkey, after which they are expected to leave the country (Kirisci 1991: 3).

Such policies clearly violate Article 33 of the Convention, the principle of non-refoulement, which is increasingly viewed as part of customary international law (Goodwin-Gill 1996: 167)<sup>\*\*\*\*</sup>, and is enshrined in other conventions to which Turkey is a party (including the UN Convention against Torture and the European Convention on Human Rights and Fundamental Freedoms) (Amnesty International 1994: 5).

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<sup>\*\*\*\*</sup> Indeed, UNHCR's Executive Committee has stressed 'the fundamental importance of the principle of *non-refoulement* [...] *irrespective of whether or not individuals have been formally recognised as refugees*' (Cited in Goodwin-Gill 1996: 137 – emphasis added).

In response to this lack of legal protection against refoulement, UNHCR had developed an informal arrangement with the Turkish authorities whereby non-European asylum-seekers would be permitted to remain in Turkey while UNHCR examined their claim, on the strict understanding that those granted refugee status would be quickly resettled outside of Turkey, while those whose claims were rejected would be deported. This arrangement had no legal basis, however, so the Turkish authorities were basically free to deport asylum-seekers and even refugees who had been recognised by UNHCR and were awaiting resettlement. Amnesty International has reported numerous cases of refoulement of asylum-seekers to countries where they were likely to face persecution, and even execution (Amnesty International 1994: 5-6).

This paper argues that Turkey has maintained the geographical limitation because it (still) does not view its humanitarian duties as sufficiently important for it to accept a legal obligation, which could entail providing asylum to people from its Arab neighbours (i.e. those very countries which, it believes, threaten the very integrity of the Turkish nation-state). Of course, the fact that many of the asylum-seekers from these countries belong to ethnic groups whose very presence in Turkey would threaten the dominant myth of a homogeneous Turkish nation, is an important part of this equation. It is logical, therefore, for Turkey to come to an informal arrangement with UNHCR, which comprises no obligations, and which can be ignored if national security so demands.

#### *5.4 1994 Regulations*

In 1994 the Turkish authorities introduced new regulations which further reduced UNHCR's already limited influence over the status determination of non-European asylum-seekers. The new regulations, yet again, reflected the overriding security concerns of the Turkish state, and, yet again, these concerns have had a huge impact on levels of refugee protection.

Non-European asylum-seekers must now present themselves to the Turkish police first, who conduct the asylum interview, and not UNHCR (Frelick 1996: 2). Both Amnesty International and the U.S Committee for Refugees have reported that such 'asylum interviews' often involve more questions about terrorist groups in Turkey than about the details of the individuals' claim (Amnesty International 1994: 23; Frelick 1996: 5). Clearly, giving the police control of these interviews was intended as a way to acquire information which could be important to national security: i.e., Kurdish asylum-seekers from Iran are interrogated about the PKK, etc. Obviously, the police are unlikely to have expertise in international refugee law and so Amnesty International has, understandably, expressed concern that 'an interview by the police does not provide a fair and satisfactory asylum procedure' (Amnesty International 1994: 23). Importantly, even if the Turkish authorities approve the asylum seeker's claim, they still accept no responsibility to protect this person against refoulement if UNHCR is unable to organise resettlement (Frelick 1996: 2-3).

Another new regulation is that asylum-seekers must file their claim within five days of entering the country, at the point (i.e. the border town/city) where they entered. This has two important consequences for refugee protection. Firstly, there have been reports of 'internal orbit cases', where Turkish authorities send asylum-seekers back and forth between different locations, often with the result that they miss the five-day deadline, and are deported (Frelick 1996: 4, 6). Secondly, forcing the asylum-seekers to lodge their claim where they crossed the border, can hugely disadvantage their claim: if, to use Frelick's example, an Iranian Kurd

crosses the border into a region of Turkey which has experienced PKK terrorism, then the asylum seeker is unlikely to receive a fair hearing (Frelick 1996: 4).

Crucially, the Turkish authorities themselves have confirmed that these regulations were motivated by national security considerations. According to the U.S Committee for Refugees, an official at the Turkish Interior Ministry confirmed that: ‘Our first consideration is the security of the country. As Turkish citizens, we live in an uncomfortable area. We have to consider the internal security of our country when implementing domestic law and regulations. All our regulations respond to the logic of stabilising the security of our country’ (Frelick 1996: 5).

Given such blatant prioritising of national security concerns at the expense of humanitarian obligations, it is extremely unlikely that Turkey will remove the geographical limitation in the near future; in 1994, Amnesty International reported that the Turkish government ‘has steadfastly refused to consider such an option’ (Amnesty International 1994: 4), and indeed UNHCR’s country report on Turkey for 2000 reports a similar attitude<sup>††††</sup>.

In 1994, Amnesty International declared that ‘conflict and national security issues [in Turkey] necessarily complicate the situation, but they cannot take away from the fact that individuals have a universally-recognised right to seek asylum and to protection against being returned to territories where their lives or freedom are at risk’ (Amnesty International 1994: 2). Here, Amnesty seems to be missing the point that, in the eyes of the Turkish state, the obligation to protect national security easily takes precedence over any kind of humanitarian obligation. Turkey is not necessarily denying the existence of such rights, but it feels that these rights can legitimately be violated, or simply ignored, if there is any possibility that the exercising of such rights by asylum-seekers could possibly threaten the integrity of the Turkish nation-state. This prioritising is determined by the ‘terms’ of the Turkish social contract.

## **6. The German Social Contract**

This section of the paper will discuss those dimensions of German social contract notions which are of particular importance regarding refugee protection. In contrast to the Turkish example, there is considerable disagreement in Germany regarding the actual terms of the social contract. Different groups attach priority to different obligations, and even those who prioritise in the same way, often propose different methods to fulfil these obligations. The interaction between these differing notions of social contract was pivotal in the asylum debates of the 1990s.

Firstly, this section discusses German citizenship notions, and the perception that the German state is obliged to protect German ethno-cultural identity. The second part examines the belief that the German state is obliged to assist the integration of migrant workers residing in Germany. Finally, this section discusses the impact which memories of the Nazi era have had upon perceptions that the state has a special obligation to protect human rights.

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<sup>††††</sup> UNHCR reported that, while the EU had called on Turkey to remove, ‘in the medium term’, the geographical limitation, ‘although Turkey did not contest this request, it is understood that it will not act on it for some time’ (UNHCR 2000b: 2).

## *6.1 Preserving an Ethno-Cultural Identity*

The defining characteristic of German citizenship notions is an emphasis on ethno-cultural unity - the 'limiting of full membership in the state to a culturally homogeneous, consanguineous group' (Barbieri 1998: 26). This has three main consequences which proved important in the 1990s.

Firstly, the dominance of the idea of *ius sanguinis*, means that, under Article 116 of the Grundgesetz (Basic Law), ethnic Germans born outside the boundaries of the national territory are automatically entitled to German citizenship (Mehrländer 1994; Steiner 2000). The corollary of this is that non-ethnic Germans, even if they were born in Germany and have been resident for many years, are not entitled to automatic citizenship.

Secondly, the nature of German citizenship notions has meant that German identity has often been defined 'in opposition to the groups of foreign workers and refugees now present in Germany' (Barbieri 1998: 14). Hence defining German identity has necessitated emphasising the differences between German citizens and foreign residents. This has accentuated the fear that foreigners, by their very presence in Germany, threaten the ethno-cultural unity of Germany. Hence opponents of multiculturalism, for example, view the acceptance of 'alien' ways of life as 'imperilling the very essence of the German people' (Barbieri 1998: 53).

The third important consideration is related to this fear. Historically, the idea that Germans are united by an ethno-cultural unity had served, in effect, as the legitimating basis of the German nation-state: 'the state was required as the expression of the organic unity of the people, its logical outcome; but the people were prior' (Barbieri 1998: 13). Clearly, therefore, an explicit priority of the German state would be the protection of this organic unity: the state would be obliged to uphold that very ethno-cultural unity which had been the reason for its inception (i.e. the very reason why Germans had entered into a social contract with each other).

This perceived obligation has been reflected in the ways the German state justifies its actions. Above all, this has provoked the maxim of numerous German governments that Germany is 'not an immigration country' (Mehrländer 1994): indeed, restrictive foreigner policies are usually defended as 'necessary to protect a homogeneous German national culture from an impending collapse into a multi-cultural society with minority problems' (Barbieri 1998: 56).

## *6.2 An Obligation to Integrate Foreign Workers*

A second important dimension of the German social contract is the perceived obligation of the state to assist the integration of foreign workers already in Germany. This idea is motivated largely by perceptions that such integration is beneficial for Germany.

In the post war era the large-scale immigration of foreign workers was perceived (and portrayed) as a temporary phenomenon. The arrival of migrant workers had originally been encouraged due to the labour shortages in the post-war years, but the economic recession after 1973 halted the recruitment of foreign workers, and indeed the government began to encourage the return migration of those already in Germany (Mehrländer 1994; Steiner 2000). This measure was unsuccessful, and the growing realisation that these workers would remain in Germany precipitated calls for measures to aid their integration.

Such measures were provoked by three considerations. Firstly, while the government wanted no more immigration, they realised that the migrant workers established in Germany had become indispensable to the economy. Secondly, there was a growing feeling that the state was obliged to aid this integration as a failure to do so would result in high levels of crime and social and political conflict (Esser and Korte 1985: 190-91, 198). Thirdly, there was a growing feeling that, as the migrants had put down roots in Germany, they had a certain moral claim to remain (Barbieri 1998).

This combination of factors created the perception that the German government had an important obligation to aid the integration of migrant workers. It is important to note, however, that this move to aid integration was to be combined with a strict restriction on subsequent immigration. This restriction was seen as essential if the integration was to succeed: 'the integration of the migrants living here is said to be only possible if a further influx could be stopped' (Mehrländer 1994: 9; Barbieri 1998: 56).

In post war Germany, therefore, there has been an increasing perception that one of the obligations of the German state is to assist the integration of migrant workers already present, while simultaneously preventing the inflow of additional immigrants. This perception would be evident in the asylum debates of the 1990s, and would have an important impact on levels of refugee protection.

### *6.3 Obligations stemming from the Nazi Era*

Joppke has argued that, on a normative level, 'the humanitarian practice and its institutionalisation in an international human rights regime arose out of the experience of Nazism and the Second World War' (Joppke 1998: 111), and this seems especially true in the case of Germany, which feels that its horrific past imposes a special obligation to uphold human rights principles. This feeling of an obligation, a responsibility to atone for past wrongs, was especially evident in the evolution of Germany's asylum laws, and indeed it has manifested itself in debates about immigration in general.

Arguments in favour of the integration of foreign workers (see above), were also marked by references to a 'need to respond to past injustices against foreign workers, most notably under National Socialism' (Barbieri 1998: 31). These feelings of obligation are reflected in German constitutional law (in particular the Sozialstaats Principle<sup>\*\*\*\*</sup>), which 'enshrines fundamental human rights, independently of citizenship, to be aggressively and expansively protected by independent constitutional courts' (Joppke 1998: 123).

## **7. The Impact of Social Contract Notions on Refugee Protection in Germany**

In examining the impact of competing social contract notions upon refugee protection in Germany, this section will discuss German asylum policies both before and after the 1993 constitutional change. The first part of this section will examine the impact of Article 16 of the German Basic Law, the reasons for its existence, and the impact it had upon refugee protection. Secondly, the circumstances which precipitated the constitutional amendment of the right to asylum, will be discussed. The third part of this section will focus on the 1993 asylum debate, and examine some of the arguments put forward in light of the different social

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<sup>\*\*\*\*</sup> This principle of German constitutional law sets as a government goal a just social order which, as was affirmed by the Constitutional Court in the late 1970s, applies regardless of nationality (Guiraudon 1998: 300).

contract notions that were outlined above. Finally, this section will outline the impact of the 1993 change on refugee protection in Germany.

### *7.1 Article 16 of the Basic Law*

Drawn up after World War II, Article 16 of the German Basic Law had stated that the ‘politically persecuted enjoy the right to asylum’. This was a unique law in that, instead of giving the state the right to grant asylum, it had given political refugees a subjective right to be granted asylum; as Joppke argues, this represented ‘a unique limit on state sovereignty, with unique implications’ (Joppke 1998: 122). The ‘unique implications’ were that asylum-seekers, irrespective of the legitimacy or otherwise of their claim, had an inviolable right to access German territory, and a range of legal protection once they entered Germany.

Importantly, both the underlying premise of this law, and the way it was framed, resulted from the perception that, as a result of the Nazi past, Germany had specific obligations towards refugees. This fact had been reinforced time and again during the asylum debates of the 1970s and 1980s, with numerous politicians, across the political spectrum, making comments like: ‘Article 16 of the constitution is rooted in the events and experiences of the Nazi period that bring us special obligations’ (cited in Steiner 2000: 74).

Article 16 was conceived as ‘an asylum law that went far beyond existing international law as a conscious act of redemption and atonement’ (Joppke 1998: 122), and indeed its incorporation into the constitution was a conscious effort to limit the power of the executive over border control – again, this was inspired by the experiences of 1933-45 (Bosswick 2000: 44).

The existence of Article 16 clearly had a huge impact upon refugee protection in Germany. On the one hand, it meant that, even when the number of asylum applications increased drastically from the late 1980s, there were consistently low levels of deportations (on average only 1 – 2% of denied asylum applicants) (Joppke 1998: 126). At the same time, however, the fact that Article 16 specifically referred to political persecution, served to create two levels of refugee protection in Germany: those who enjoyed protection based on the German right to asylum, and those who were protected under the terms of the 1951 Convention (Bosswick 2000: 46; Goodwin-Gill 1996: 22n). While both categories were protected against refoulement, those who fell into the second category were nonetheless statistically recorded as ‘rejected applicants’, and the consequently high rate of asylum ‘rejections’ (almost 90% by the late 1980s) would be used by critics of Article 16 to support their calls for constitutional amendment (Bosswick 2000: 47). While the direct impact of Article 16 upon refugee protection was hugely positive, therefore, it could be argued that, by creating two levels of refugee protection, Article 16 contributed to its own downfall. The resulting constitutional change would have huge consequences for refugee protection.

### *7.2 A Call for Change*

Despite the importance attached to Article 16 and the rationale behind it, three developments in the early 1990s would provoke ever increasing calls for a constitutional amendment. This paper would argue that notions about social contract were important in each case.

Firstly, that which motivated the German public to call for a change to Article 16 was primarily the huge increase in the numbers of migrants entering Germany in the early 1990s.

Between 1989 and 1992 the Federal Republic of Germany had to absorb a total of 3 million new migrants (Joppke 1998: 127). Not all of these were asylum-seekers, however, although it is true that by 1992, Germany was receiving 80% of all asylum-seekers in Europe. At the same time, the end of the cold war led to greater freedom of movement throughout Eastern Europe, and thus to a huge number of ethnic Germans migrating to (West) Germany. This included over 100,000 who crossed over from East Germany in the year following reunification (Steiner 2000: 62). Under German citizenship law, of course, these ethnic Germans were entitled to automatic citizenship. Moreover, they were to be given priority ahead of the asylum-seekers, who would be competing for the same resources: as one conservative declared, ‘the coming home of Germans [...] has priority over the reception of aliens’ (Cited in Joppke 1998: 127). The majority of public and political opinion favoured prioritising ethnic Germans, and felt that something had to be done about the numbers of asylum-seekers.

A second important development was a wave of xenophobic attacks on foreigners throughout Germany. The turning point was when right-wing arsonists in Mölln burned down the house of a Turkish guest-worker, killing the father and two children: this illustrated that all immigrants in Germany, including the long-term residents, were in danger (Joppke 1998: 48-49). Given the widespread perception that the state must ensure the smooth integration of long term migrant workers (see above), it is hardly surprising that, as *Der Spiegel* reported, ‘The murders in Mölln have transformed public opinion like few other events since 1945’ (Cited in Steiner 2000: 65).

The attitude of the SPDs, which had long opposed any constitutional amendment, was affected by a third factor. As a two-thirds majority was required for a constitutional change, Kohl’s governing coalition had offered to ease the laws governing naturalisation of foreign nationals residing in Germany for more than 15 years (Bosswick 2000; Steiner 2000). Given the emphasis placed on the integration of long term nationals, and the widely held belief that ‘full integration is only possible -if at all- through naturalisation’ (Esser and Korte 1985: 191), it is unsurprising that Kohl’s offer encouraged the SPD to change its position and support the amendment. It could certainly be argued, therefore, that many German politicians effectively prioritised the integration of long term foreigners, above the need to assure the protection of refugees. Such prioritising was clearly influenced by social contract notions, and indeed would become still clearer during the debates in 1993.

### *7.3 The 1993 Debate*

The 1993 debate on the amendment to Article 16 was one of the most heated in post war Germany. Bosswick has presented the debate as a clash between ‘two mainstreams of the German political tradition’: on the one hand those who upheld Germany’s special obligation towards refugees as a reaction to Nazi horrors; on the other hand those who considered Article 16 an ‘unacceptable limitation’ on the state’s right to control its borders (Bosswick 2000: 56). This paper would argue, however, that the debates were more nuanced, and that even among those advocating the change, many different dimensions of German political tradition were evident. Specifically, the debates highlighted many different ideas about the ‘terms’ of the German social contract.

Firstly, there were those who supported the change, yet specifically accepted that Germany’s past gave it special obligations towards refugees. These supporters of the amendment argued that the tighter laws ‘would help ‘real’ refugees by weeding out asylum abuse and [...] by replenishing the willingness of the citizens to help’ (Steiner 2000: 95).

Hence these politicians used an argument which accepted that Germany's 'special obligations' were a priority of the state, though they proposed a new way of fulfilling these obligations.

Secondly, there were those who supported the change and denied that these 'special obligations' should take priority. Such arguments took different forms. There were some who viewed the obligation towards refugees as being counterbalanced by the obligation to integrate the guest workers, and who argued that the high levels of asylum-seekers was having such a negative effect on this integration that the change was justified. Schaüble (CDU), for example, argued that the government's obligation 'does not call for only pursuing the lofty goals' of helping refugees, but it must also be vigilant against the dangers of xenophobia (Steiner 2000: 92). Others specified the importance of protecting German culture, expressing concern that the rising numbers of asylum-seekers would 'over-foreignize' Germany, and declared that 'our people are scared that they will one day no longer live in the Germany that they want to live in' (Steiner 2000: 88). Thirdly, a large group of those favouring the change explicitly stated that the obligation towards refugees was a secondary consideration, that 'every state [...] has to serve its own citizens first, and only secondarily the rest of the world [...] Germany cannot become everyone's country' (Dregger, CDU – cited in Joppke 1998: 128).

In sharp contrast were those who, in opposing the change, specified that the obligation towards refugees had to take precedence. As Joppke explains, these politicians 'saw the state in the first place obliged to human rights principles, and only secondarily to the people who constituted it' (Joppke 1998: 128). Indeed, some supporters declared that the overwhelming public support for constitutional change was not reason enough to ignore Germany's obligations towards refugees: a certain Gerhard Schroeder, for example, refused to become 'the instrument [...] of popular sentiment', and warned that 'domestic considerations must not influence asylum policy' (Cited in Joppke 1998: 128).

Given the existing paradigm which this paper aims to challenge, it needs to be emphasised that, despite the range of political tendencies represented in these debates, international humanitarian norms played 'almost no role in the arguments of parliamentarians on either side of the issue' – when mentioned at all, international principles 'came up more in passing rather than being analysed, quoted and praised' (Steiner 2000: 81, 90). Importantly, this had also been the case in the asylum debates in 1976, 1980 and 1986.

Contrary to the existing paradigm, therefore, this paper argues that differing notions of what the priorities of the state are, that is, differing social contract notions, were pivotal in the crucial 1993 debate. A certain perception of the state's obligations was evident in arguments made by both sides, and often these perceptions were the explicit focus of the debate.

#### *7.4 Consequences of the Amendment*

The 1993 change saw Germany introduce two limitations to the right to asylum: a 'safe country of origin' measure, and a 'safe third country' clause. Firstly, the former is a clear violation of Article 3 of the Refugee Convention, which states that refugees shall not be discriminated against on the basis of nationality. Moreover, together these measures have hugely restricted the possibilities for asylum-seekers to gain access to the asylum process in Germany. Of course, this was exactly what was intended, but the result has been that only those asylum-seekers arriving by air have any chance of receiving protection in Germany. Furthermore, the introduction of 'extra-territorial space' within the airport, where those without valid documents are subjected to a speeded-up recognition procedure (Joppke 1998:

129), can clearly be seen as a violation of Article 31 of the Refugee Convention and has further reduced the chances of asylum-seekers receiving adequate protection in Germany.

In sum, the 1993 changes have had the result that ‘in more than 98% of all cases, access to the right of asylum is only possible by entering illegally and concealing the access route’ (Bosswick 2000: 51). Clearly, in so obstructing the access to asylum, the 1993 change has had a considerable negative impact on refugee protection in Germany.

## **8. Similar Orientation, Fundamental Differences**

The two examples studied in this paper were similar in many ways. For both countries, ideas regarding the ‘terms’ of the social contract have been shaped both by long-standing political theories, and also by certain traumatic historical events (the Nazi era and the collapse of the Ottoman Empire, respectively). Moreover, the citizenship notions held by both countries have seen returning co-ethnics (ethnic Turks in Bulgaria; ethnic Germans from eastern Europe) prioritised ahead of asylum-seekers.

Nonetheless, even if both nations are creating ever-lower standards of refugee protection, it must be emphasised that the reasons for this evolution - i.e. the underlying social contract notions - are fundamentally different. Turkey’s overwhelming emphasis on national security has no parallel in Germany, where the tendency is to attempt to balance different obligations, instead of subordinating all to one overriding priority. While many German politicians were adamant that citizens must be considered before asylum-seekers, and despite the fact that Germany was receiving per capita far more asylum-seekers than Turkey, there was virtually no mention of national security interests in the German debates (Steiner 2000).

Differing historical experiences help explain this. Nonetheless, the difference in underlying principles was evident in the fact that, while Turkish policy subordinates both human rights and democratic principles for the sake of national security, the German debates saw a substantial group proposing a ‘delicate bracketing of democracy in favour of human rights’ (Joppke 1998: 128).

## **9. Conclusion**

The dominant paradigm in refugee studies seems to be to present asylum debates with the ‘simple tug-of-war image of national interests pulling to tighten asylum and international norms and morality pulling to loosen it’ (Steiner 2000: 94; Joppke 1998: 140). Based on the results of the two case studies carried out, this paper finds such an image hugely problematic. In approaching the issue of standards of refugee protection from the perspective of social contract notions, this paper has found ample evidence that asylum debates (and hence levels of refugee protection) are guided almost exclusively by the priorities of the state in question.

Such debates are guided not merely by considerations of national interests, but more by perceptions of the state’s obligations. In the German example, few of those opposing the 1993 amendment argued that providing asylum served Germany’s national interests (Steiner 2000: 90). Instead the emphasis was on national obligations, and much of the debate focused on differing ideas about which obligations took precedence. Equally in Turkey, the protection of national security is presented as a fundamental obligation of the state, and is frequently used to justify grossly un-democratic and un-humanitarian actions. Again, such ideas regarding the state’s obligations are determined by the notions of social contract: in the

German example, competing notions were played out and guided the asylum debates, and indeed differing ideas of how best to fulfil the state's obligations led to different attitudes towards asylum reform. In Turkey, the existing Kemalist notions of social contract have retained almost hegemonic status, and this explains the notable continuity in the approach of successive Turkish governments (from 1951 to the present) to the issue of refugee protection.

In a further challenge to the existing paradigm in refugee studies, this paper has found that international humanitarian norms have had almost no impact on levels of refugee protection in Germany and Turkey in the 1990s. On the one hand, Turkey's numerous human rights violations, and its repeated violation of some fundamental principles of international law (not least that of non-refoulement) shows that it is little concerned with 'humanitarian norms'. At the same time, the German asylum debates contained virtually no references to international humanitarian law and principles, and certainly no attempt to justify policy changes on the basis of such principles. Moreover, both countries have shown some continuity in this regard: international norms got equally scant attention in the German asylum debates in 1976, 1980 and 1986, and Turkish violation of international principles has been evident at least since the first military coup in 1960.

The existing paradigm, therefore, seems inadequate, and this could have consequences for attempts by civil society (or indeed the international community) to encourage reform of asylum policy in either country. This paper argues, for example, that the only way Turkey might increase the amount of protection it offers to refugees, is if it believes that such actions would be beneficial to its national security.

Whether this is true on a normative level, of course, is something that can only be determined through further research. If the conclusions of this paper are born out on a broader level, questions will also need to be asked about how (or if) changes to the international state system will affect the prevailing tendencies. That is, will the forces of globalisation make social contract notions less important with regard to asylum policies and levels of refugee protection, or will the social contract itself assume a new form but maintain its influence on asylum as states struggle to assert their sovereignty in the face of trans-national forces? If the conclusions of this paper are true on a normative level, then this will surely give a different dimension to current debates regarding the impact of globalisation upon forced migration.

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