The concept of "asylum," now woven back into discussions of the U.N.H.C.R. mandate, has been helpful in overcoming the initial isolation of the U.N.H.C.R. in an international legal world, an isolation which was itself originally achieved by the appropriation of "refugee" for and the exclusion of "asylum" from mandate discussion.

E. Conclusions About Jurisdiction

The U.N.H.C.R.'s institutional identity and the distinctiveness of jurisdictional inquiry have been achieved and sustained in part by differentiating the identification processes for refugees and potential asylees not merely temporally, but also conceptually, as law and politics, international and national, cooperation and autonomy. This modern conceptual effort contrasts sharply with earlier historical visions of the relationship between the institutions and doctrines of refugee and asylum. Indeed, the disjuncture between refugee and asylum appeared as international institutions began to develop what were seen as special competencies to deal with refugees. Although this change has strengthened the hand of the U.N.H.C.R. and other institutions, it has simultaneously implied a national license with respect to asylum which takes solution to the plight of refugees ever further from the U.N.H.C.R. competence just as the legalization of jurisdiction, with its focus on refugee as a legal status, removed the U.N.H.C.R. from the causes of refugee flows.

There is, then, a reciprocal relationship between the U.N.H.C.R.'s expanding competence and separation from issues of cause and solution, and its use of asylum.

As might be expected, the broadening of the U.N.H.C.R. mandate in recent years has been accompanied by new approaches to asylum which have begun to overcome its segregation in national discretion. These efforts have drawn upon asylum's historical association with international law, sovereign cooperation and mutual respect. Woven back into discussions of the U.N.H.C.R.'s mandate, asylum has been helpful in overcoming the U.N.H.C.R.'s isolation in a Eurocentric and legalistic institutional world. As a result, the U.N.H.C.R. mandate can now be said to apply to asylum situations, in the sense that an opportunity has been generated for the U.N.H.C.R. to develop a more extensive partnership with states in this area so long as that does not mean attempting to legalize or internationalize the institution of asylum.

To say that the U.N.H.C.R. mandate now extends to asylum situations is to recognize that mandate discourse never produced an institutional identity as exclusively legal and universal as might have been suggested. Asylum was never as uniformly national, political or discretionary as it may have been seen to be. Merely saying this suggests a willingness to get around the constraints of those sharp distinctions to provide new partnerships between na-

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tional and international protection. These new roles will not roll back the achievements represented by the internationalization of refugee law any more than they will capture sovereign discretion and legalize national policies. They suggest, rather, a determination to operate flexibly in different situations and national contexts, to participate in formation of comprehensive solutions, to continue protection after the granting of asylum and commence inquiry before the putative withdrawal of national protection by flight.

By way of illustration, we might consider the current U.N.H.C.R. response to the problem of orbit refugees in Europe which represents one form that such a new protection role might take. Oversimplified, "orbit refugees" are people who seek asylum in one country after another, never being returned to their country of origin but never being durably resettled either.⁸⁵ Under older visions of the U.N.H.C.R. mandate, one might have contrasted two divergent strategies. On the one hand, these people seem outside the mandate: they are in no danger of being returned to a country where they fear persecution and their difficulty results from divergent national asylum practices and matters of exclusive national political competence. On the other hand, those wishing the U.N.H.C.R. to get involved would seek to bring these situations into the international legal world of the U.N.H.C.R., perhaps by legalizing or internationalizing asylum. Efforts to help these individuals would be turned into a struggle against the otherwise of asylum. The new approach recognizes these two visions as insufficiently flexible. The U.N.H.C.R., by working with governments to promote harmonization of asylum procedures, either by mutual recognition, or adoption of uniform criteria, has extended its mandate of protection to a situation which involves a mixture of law and politics, at the international level. Recognizing that the problem is neither too little international law nor too much national discretion, but rather a failure to agree upon a way of ascertaining who will bear the burden for asylum seekers in Europe, the U.N.H.C.R. can and has worked to assist and achieve protection for these individuals.⁸⁶

This new role for the U.N.H.C.R. was acknowledged, although not warmly embraced, by the Executive Committee in 1980 when it stated:

that while there was a need to develop legal concepts relating to international protection in the light of the special conditions prevailing in different regions, this


should not detract from the absolute character of the fundamental principles already established in the field. 87

The dilemma posed for the U.N.H.C.R. protection officers is to develop access to asylum without toppling the Protection Division’s legitimized identity. That can be and has been done. To do so, however, the tendency to develop the mandate by alternately excluding and co-opting asylum will need to be overcome.

IV. SOLUTIONS FOR REFUGEES

A. Asylum Law, Refugee Law and U.N.H.C.R. Solutions

The progressive development of a distinctive competence for the U.N.H.C.R. was associated with a growing disjuncture between refugee and asylum—the former appearing increasingly to be an international legal status, the latter a national discretionary political status. Although this disjuncture has diminished as the U.N.H.C.R.’s institutional identity has changed, the elaboration of a distinctive legal mandate for the U.N.H.C.R. has tended to limit consideration of both asylum and solution. Although the attempt to facilitate solutions for mandate refugees, to the extent it has been a Protection Division function, seems always to have involved the protection officer in considering the terms of asylum granted, the disjuncture between refugee and asylum, like the split between discussions of the mandate and of solution, has tended both to diminish the U.N.H.C.R.’s input into the formulation of solutions for refugee problems and, more importantly, to channel their remaining input into solutions which are procedural, legal and universally applicable. These constraining and Eurocentric tendencies were most characteristic of early U.N.H.C.R. work. They reflect neither the historical and doctrinal nature of asylum nor the Protection Division’s capacity for participation in providing solutions. As discourse about solutions has shifted from a primarily European focus, legal scholars and United Nations lawyers have come to treat asylum in a more creative fashion. 88

In a way, the odd thing is that international scholars and lawyers should ever have elaborated the rights and duties triggered by refugee status and the content of “asylum” so disparately. 89 Both discussions concern the results

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for displaced persons of being “protected,” either by recognition as a refugee or by grant of asylum. Still, these two topics are generally discussed separately and, more importantly, differently. Discussion of the protection due refugees sounds legal and international: one speaks of “rights” and “duties” triggered by international recognition of one’s refugee status. The prerequisites of being a refugee are legal claims which derive from recognition of a legal status. 90 By contrast, the prerequisites of the asylee are diverse and depend upon the particular constellation of municipal prerogatives which conspired to grant asylum. 91 To define asylum has been to describe a condition of little uniformity while to discuss refugee status has been to elaborate a body of international norms.

The difference between these two discussions about solutions is in some ways similar to the difference between asylum and refugee concepts in mandate discourse. Protect on officers discuss solutions, as they discuss the mandate, on two distinct levels: one international and legal; the other national and political. In another sense, however, the difference between asylum and refugee discourse is not as great here. Rather than opposing a jurisdictional discussion on one level with a remedies discussion on another, lawyers engaged in the international protection of refugees pursue two different discussions addressing the same subject: what happens to people who have been refugees. It should not be surprising that these two discourses blend into one another, or that protection officers, in pursuing solutions, should hesitate far less to bring asylum within their ken. In solutions discourse, institutional identity is far less dependent on the exclusion of asylum than in mandate discourse. That the conditions of asylum receive attention in this way does not indicate, however, that the basic distinction between the two levels has been abandoned. Indeed, one might even say that the ability to blur the boundary when considering solutions depends upon its strict observance in mandate discourse.

In any case, the difference between asylum and refugee takes a different form in solutions discourse. In mandate discourse, both asylum and refugee were treated as legal statuses, granted at different levels, one within and one without the jurisdiction of the U.N.H.C.R. Although in solutions discourse, refugee and asylum are both seen to generate solutions, although on different levels, only refugee is regarded as a status, while asylum is more of a condition. These relations are confusing because mandate discourse differentiated refugee and asylum (for purposes of creating an independent U.N.H.C.R. legal jurisdiction) in part by treating them both as statuses,

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88. For a discussion of solutions in its historical context, see 1 L. Holborn, Refugees, supra note 3, at 321–556.
89. This disjuncture has often been recognized explicitly. See, e.g., C. Goodwin-Gill, supra note 2, at 207 (noting the “diﬃculty” between refugee status and asylum “in the sense of a lasting solution”). These are considered distinctly, not only by Goodwin-Gill, but by most commentators. See A. Grahl-Madsen, supra note 2 (devoting separate volumes to the two subjects).
90. See 1 A. Grahl-Madsen, supra note 2, at 73ff. Grahl-Madsen, like other commentators, concentrates almost exclusively upon the prerequisites of becoming a refugee and the loss of refugee status rather than upon the prerequisites of being a refugee. This emphasis reflects the difficulty of reconnecting an international doctrinal style discourse with solutions per se. Compare G. Coles, supra note 33; and D. Luca, supra note 33.
91. See 2 A. Grahl-Madsen, supra note 2; C. Goodwin-Gill, supra note 2, at 165ff, 205.
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legal personality, access to courts, exemption from reciprocity principles limiting treatment of aliens, conflict of laws, etc. This approach builds the substantive prequisites of refugee status from a vision of international protection which is grounded in a particular vision of the "refugee" and of the needs of refugees. One thinks of citizens of legally-oriented cultures who, when in exile, need reasignment to a legal fabric to regain their identities. One thinks, in other words, of individuals whose identity is constituted through their legal assimilation to a particular municipal structure of property and status. This first approach to solution is based conceptually, as well as historically, upon the experience of post-war European exiles.

When pursuing the high road to solution, beyond elaborating refugee status into recognition for international procedural protection, the protection officer typically seeks both to elaborate the boundary between refugee and asylum into substantive rights and to fashion obligations particularly suited to refugees from other duties of international law such as human rights and humanitarian law. All of these approaches to solution retain an international and legalistic flavor, attempting to posit uniform norms governing treatment of refugees. Being, as they were, reverse engineered from refugee status, all these approaches are directed at ending the conditions for international protection rather than resolving the plight of specific refugees. All exclude direct consideration of the conditions of asylum. From this international perspective, asylum appears as a void. The protection officer is concerned with access to it and departure from it but finds no way to relate directly to asylum as a condition. Indeed, the distinction between international and national becomes, in the asylum context, synonymous with the distinction between jurisdiction and solution.

To the extent refugee-based strategies seem the high road to solution, pursuing an independent international definition for asylum seems either impossible or conceivable only if one can put asylum back on the high road by internationalizing it or if one resists oneself to the low road of a purely pragmatic, case-by-case approach. Efforts of the first type, which accept the boundary between international law and national discretion, typically either fail or succeed only in relocating national discretion. Attempts of the second


94. Thus, for example, we find attempts to transform the recognition of refugee status into an international principle of nonrefoulement, and then into a municipal obligation of admission. See supra section V. See also G. Goodwin-Gill, supra note 2, at 138-140, 148, & 219ff; Garvey, "Toward a Reformulation of International Refugee Law," 26 Harv. Int'l L. J. 483 (1985); Young, "Between Sovereigns: A Reexamination of the Refugee's Status," 1982 Mich. Y.B. Int'l L. Stud. 339.

92. The most sophisticated development of this approach which I have seen is G. Goodwin-Gill, supra note 2; see also Aga Khan, supra note 31.
type seem unable to say anything more than that the asylee gets what states grant. Paradoxically, then, treating asylum systematically as the other of refugee-based approaches to solution has drained asylum of its uniqueness, rendering it dependent upon refugee status for definition, content and usefulness as a workable solution.

To the protection officer who thinks about solutions in this way, the International Law Commission’s (I.L.C.) 1950 definition of asylum sounds tautological and unhelpful:

The term “asylum” designates the protection which a state grants on its territory to a person who comes to seek it. 95

So long as one thinks of asylum as the low road to solution, this definition will suggest the absence of any substantive content to the idea of asylum and seems to reinforce the sense that international law and national discretion are implacably opposed. It will be interpreted as a sign that asylum belongs to national politics, immune from international law. Although this interpretation fits the protection officer’s sense of the U.N.H.C.R.’s jurisdiction, it distorts the notion of asylum, both historically and doctrinally. A reexamination of the doctrinal history of asylum suggests that the 1950 I.L.C. resolution be read as a sign of decentralization rather than of monolithic sovereign discretion.

B. Historical Precedents

The contingency of contemporary notions about asylum as a solution emerges sharply when contrasted with European notions of asylum before 1700 and during the late nineteenth century era of high positivism. Texts from the early period delimit no coherent doctrinal notion of asylum, let alone one of a particularly national, discretionary or political form. Scholars wrote of various hospitabilities and protections accorded by princes or other authorities to one another and to citizens in various situations, but there was no uniformly recognized status by the name “asylum” or any other name whose content could be assessed and whose attributes could be measured. 96 The protections and hospitalities of which they wrote were thought


96. One might collect bits and pieces of doctrine from various places in the work of Grotius or Gentili which described protections accorded people who might today be regarded as refugees and call this resulting collection the “origins” of modern asylum law, but such a collection would not do justice to these earlier scholars. See section III, supra notes 43–55. Neither Suarez nor Vitoria considered the issue. See Kennedy, supra note 44.
assistance in recovering property. Although the texts reflect a general sense that such requests should be granted unless it is unjust to do so, the crucial point is that these authors were not concerned about ascertaining an obligation but about elaborating the conditions of justice. Thus, the practice of protecting exiles from the claims of their home sovereign is discussed, not as an aspect of asylum but as one of a number of limits upon a sovereign’s ability justly to acquire and sustain rights over subjects.99 The granting of immunities to suppliants against prosecution is taken up in the elaboration of the justice of sharing punishments among rulers and ruled, that is, as a consequence of guilt, not discretion.100

In this early period, to define asylum as the “treatment accorded,” in the language of the I.L.C. resolution, would say nothing about whether that treatment was doctrinally obligatory or predictable. The early European tradition differed remarkably from the vision of asylum which we see through the lenses of an internationalized notion of refugee status. Neither defines “asylum” as a condition with specific international legal attributes. For moderns, this seems to be a failure, an absence of legal status, a deficiency in the elaboration of international law. It seems so because, in this modern vision, to be beyond legal status is to be nothing, to be whimsy or politics. In the early vision, however, this lack of a definition was not a deficiency. The need for a legal status simply did not arise in a world which neither placed the sovereign at its center nor distinguished law from politics and morality. Rather, a wider range of people received as a matter of their just due a wide variety of solutions in unfortunate circumstances.

The nineteenth century positivist typically viewed asylum as a sovereign right of states, a vision at odds with both our own and its predecessor.101 This notion developed progressively as scholars differentiated international from municipal law and positive law from morality and politics. As earlier, more integrated notions of international society were transformed into legal rights, capacities and statuses, asylum was classified in different ways. In the writings of Wolff, it appeared as a normatively obligatory, if modified, capacity of states. In those of Pufendorf it was viewed as a humanitarian obligation which states remained legally free to disregard.102 All these traditional texts reflected the sense that asylum, regardless of its legal status, was normally to be granted.

The development of a unified notion of a unilateral sovereign capacity to grant asylum did not reflect so much a hardening of attitudes about exiles as a reorientation of the vision of sovereignty. Attempts to square the practice of asylum with growing notions of sovereign independence and author-

99. Crotius, supra note 97.
100. Id.
102. See Weis, supra note 43, at 175. See also Wolff, supra note 98, §§ 145, 147, 303 & 1063.

104. This international condition, it should be noted, had nothing to do with admission of exiles or with nonrefoulement. In these days before the systematic regulation of borders, asylum referred to the protections available for foreigners within a territory, or in certain
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In this, asylum came to be defined in a way which was dependent upon international theories of sovereignty rather than responsive to the needs of refugees. Nevertheless, the positivist vision of asylum was based on an ongoing practice of hospitality and took a uniform shape in response to asylum’s internationalization, not to its exclusion from international law. The increasing tendency to consider asylum as something to be granted was associated with a regularization of the conditions under which it would be granted and a clarification of what it consisted of, both of which reflected its position in an international doctrinal structure. 105

Moreover, unlike both modern and earlier notions of asylum, nineteenth century asylum doctrine was completely unconnected to the notion of “refugee.” For earlier scholars, both the situation of the supplicant and his treatment were matters of justice. For the modern, even if asylum and refugee are imagined to be one another’s opposite, created and sustained on different levels, it remains true that the one is regarded as the response to the other. In high positivist literature, asylum grew as a protection separate both from uniform notions of its justice or injustice in particular situations and from a particular qualifying status. This independence of asylum in positivist literature poised it to become the discretionary other of a regularized international refugee status, but this later development was in no sense required by the doctrinal notion of asylum as a sovereign right. Thinking of asylum as dependent upon a set of jurisdictional boundaries instead of a set of notions about justice enabled asylum to take many forms, but did not at that time signify anything about a state’s ability to refuse to grant asylum or to grant it on any terms. In fact, as to the latter point, the dependency of respect for asylum upon international notions of jurisdiction suggested that the protection granted, to be respected, would have to be of a particular type, rather than of any type.

D. An Alternative Approach to Asylum and Solution

It has become difficult to imagine an asylum doctrine which is neither a matter of national discretion nor of international right. Of course, it is not possible to return to a pre-1700 conception of asylum as a disaggregated body of just responses to misfortune. Once the spheres of international and national and of law and morality were separated and the sovereign was placed at the center of our world order, calling asylum “a humanitarian duty of states” weakens rather than strengthens it. It is also not possible to return to a high positivist defense of asylum separated from a notion of an international refugee status which might trigger it. Once the supremacy of sovereigns over individuals has been legalized and transformed into a matter of reciprocal rights, duties and status, calling asylum a “sovereign right” tends to weaken, not strengthen it.

105. It is interesting to note that the essentially European system of refugee protection was extended beyond Europe by the Protocol simply by removing a geographic and temporal restriction on the work of the U.N.H.C.R. and by urging wider ratification of the original convention rather than by designing an approach to extra-European refugee situations particularly suited to their diverse character. See Weis, “The 1967 Protocol,” supra note 22, at 39.
It seems equally unpromising to seek to legalize or internationalize asylum status in the style of refugee status, because asylum has developed quite apart from refugee status, as an outgrowth of the mutual respect inherent in sovereignty. It also seems unpromising to treat asylum as a national discretion to be tamed by a convention specifying the minimum standards of treatment which asylum implies, because asylum is less a status to be conferred than a protection which results from other actions and which is constituted by the contours of territorial sovereignty. In general, it seems unpromising to treat asylum as an internationally uniform status, for asylum is grounded more in the diverse protection needs of individual asylum seekers than such a uniform approach would suggest. Nevertheless, acknowledging that asylum developed in response to changing visions of sovereignty in international life should permit us to stop overemphasizing its national discretionary, and hence, presumably unknowable quality.

In such an alternative vision, asylum might be seen as an international response to misfortune and dislocation. The language of Article 14 of the Universal Declaration of Human Rights illustrates this alternative approach. Article 14, paragraph (1) provides that: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” 107 Contemporary international lawyers tend to read this article as if the words “if granted” were placed before the words “to enjoy.” They read this article as if it confirmed the view that asylum can be withheld for any reason and granted on any terms by states. 108 If we suspend the sense that the only important question is the legal obligation of the “granting” sovereign and instead view the asylum to be sought and enjoyed as an international institution, we might read Article 14 so as to give asylum international content without interfering with its sovereign roots.

It is not at all clear, for example, that asylum must be granted to be enjoyed. As Oppenheim noted, to be abroad under a system of territorial jurisdiction is to enjoy an asylum. In this sense, Article 14 merely restates the limits on extraterritorial sovereign jurisdiction. This protection need not be granted and may, under normal circumstances, be withdrawn except in accordance with rules governing expulsion, including nonrefoulement. If the right to seek asylum is to mean more than the right to depart one’s country, it must mean that this preliminary protection continues while any procedure for reviewing the permanence of asylum is conducted. One could

granted, the reciprocal duty to grant asylum only in deserving or exceptional cases: to refugees or for political reasons.

In short, by seeing asylum as an institution developed in response to changing notions of sovereignty, it is possible to give asylum an international meaning which reconnects it to the protection required by an asylee and the conditions under which that protection must be respected by other states and will therefore be effective. Such an institution of asylum would permit protection officers to ask when territorial sovereignty deserves respect, when hospitality is just and what solutions are appropriate for the widest variety of refugees. Asylum would permit the protection officer to abandon his customary vision of a world of international obligation and national discretion with its legalistic approach to solutions and to discuss more flexible solutions which might be appropriate but which have not found their way into international elaborations of the entitlements of refugee status. In discussing asylum, the protection officer might think of himself sitting with host governments facing a refugee in need of a solution, not sitting face to face debating the granting of an international legal status.

E. Recent Doctrinal and Institutional Evolution

Although much of the recent international literature about asylum, particularly literature generated by the 1977 Conference on Territorial Asylum, has tended to focus rather exclusively upon attempts to legalize asylum as refugee status was legalized, there is some indication that an alternative approach has begun to enter protection discourse. This alternative international approach to asylum renounces the doctrinally and historically mistaken consignment of asylum to a discretionary void from which it needs to be legislated. It is based upon the notion of an effective protection that is responsive to an asylee’s needs and has been gaining ground based in state practice, particularly at the national and regional level, and in recent U.N. discourse.

In a very decentralized way, we can see in the various notions of “asylum elsewhere” which national immigration authorities use to allocate asylum seekers to countries of “first asylum” some common notions of the asylum which states are willing to respect, at least for purposes of refusing themselves to grant asylum. These practices indicate that, at a minimum, states respect an asylum which includes both physical security and protec-

109. See Gilbert, supra note 66.

110. Of course, any summary of these diverse practices of respect is bound to be incomplete and misleading, at least insofar as states may expect less elsewhere for these purposes than they might themselves be willing to grant with the exception that their asylum would be respected. See supra notes 36-47.

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tion against non-refoulment. As criteria for recognition of first asylum are harmonized internationally, one might become able to discern a clearer notion of a minimum “genuine link” between the asylee and the country of recognized first asylum that will ground asylum in the particular protection needs of an individual asylum seeker.

Whether cast in terms of “asylum” grants or refugee “protection,” regional asylum practice has consistently treated asylum as a status geared to specific situations and constituted to meet the reasonable and predictable protection needs of particular refugees without interfering with home country sovereignty. The Latin American conventions are firm in their orientation, making asylum an expression of sovereign authority shaped by the requirements of mutual respect. By approaching asylum in this way, they have created an institution particularly suited to provide acceptable and durable solutions to the protection needs of asylum seekers. In other areas, asylum is sometimes joined to recognition of refugee status and sometimes independent. In either case, at the regional level, asylum is a flexible institution which responds in different ways to international cultural, ethnic and political solidarities and is always associated with solving the protection difficulties of exiles and refugees.

Focusing upon these elements, rather than searching for doctrinal consistency, would allow protection lawyers to account for differential tendencies to treat protection as a formal or informal, and legal or political privilege or right. These distinctions matter if protection officers regard only a normative legal status as an international asylum. Seeing asylum as an international solution reveals much more diversity in what is regarded as a solution worthy of respect and allows protection officials to focus on whether the particular asylum is in fact suitable for the refugees concerned, accepting that different protection may be desired or acceptable in different situations, without fearing that this acknowledgment will erode some mystical uniform status called the “principle” or “institution” of asylum.

The more objective definition of refugee in regional documents, particularly those of the Organization of African Unity (O.A.U.), suggests a greater willingness to grapple directly with the causes and solutions for particular refugee problems internationally without abandoning political context. This flexible integration of the legal and the pragmatic is indicated by the post-independence tradition of differential treatment for refugees from liberated and non-liberated areas. If these disparate regional practices are seen through the lens of a European distinction between law and policy,

111. See A. Grah-Madsen, supra note 2, at 57ff; G. Goodwin-Gill, supra note 2, at 151ff.

their context specific notions of asylum seem “ politicized” and preclusive of any role for the international community. Seeing these approaches as part of a tradition of responding to situations with solutions rather than legal categories suggests a role for the U.N.H.C.R. in assisting governments to ascertain and provide appropriate solutions. In this light, the “best endeavors” clause in the undertaking by O.A.U. members to grant asylum may have more punch than a similar undertaking might in the European context where it would be regarded as the hortatory grant of a license to refuse asylum.\(^\text{113}\)

The association of asylum with a more flexible approach to solutions has also been gaining ground in the documents of the General Assembly, the Economic and Social Council and the Executive Committee relating to the work of the U.N.H.C.R. In the early post-war years these organs spoke of “assimilating,” “caring for” or “naturalizing” refugees rather than of granting asylum.\(^\text{114}\) The term “asylum” entered discourse about solutions in an ambiguous fashion. Sometimes asylum seemed to refer to a status of assimilation granted by states which had accepted refugees though the refugees still were in need of assistance.\(^\text{115}\) Sometimes asylum was used more narrowly to describe a condition alternative and perhaps antecedent to “repatriation” or “resettlement.”\(^\text{116}\) During this period, the term “durable” or “permanent” solution came to refer to asylum, repatriation or resettlement. This more limited use of asylum as something transitory or incomplete existed in tension with what has been termed “asylum in the sense of a permanent solution.” This ambiguity, in turn, seems to have been resolved in favor of a vision of asylum as the appropriate response to a refugee movement by more recent documents which speak of “integration into a country of asylum” or equate asylum with the term “host.”\(^\text{117}\)

Taken together, these developments suggest a terminological adaption. Asylum has come to be used to refer to an international solution which responds appropriately to a refugee situation. This internationalization of the term was obscured somewhat by attempts to conceal its meaning doctrinally: as a “temporary” solution, for example. But asylum need not pay the price of doctrinal constraint to be useful in describing and advocating complete solutions, consistent with the needs of hosts and hosted. This is par-

\(^{113}\) See Weis, supra note 112.

\(^{114}\) See, e.g., ECOSOC 11th Session E/1849/Supp.

\(^{115}\) See, e.g., A/32/45/16 December 1977.


particularly clear in documents which utilize asylum in connection with an international notion of burden sharing or assistance.

**F. Conclusions About Solutions**

In discussions of solutions for protected refugees, unlike in discussions of jurisdiction, international lawyers tend to use the concepts of refugee and asylum in ways which are related and overlap. Despite this overlap, however, the concepts remain different. In particular, “being a refugee” is discussed as a legal status entailing perquisites, while “having asylum” is discussed as a political condition which may have national legal consequences. By embracing both asylum and refugee while reinforcing the differences between them, the protection officer limits his ability to pursue solutions for refugees. Protection activity becomes separated from the conditions of solution by a veil of equality and the protection officer is forced to choose between what are imagined to be two distinct paths to solution: the one legal and legitimate, if somewhat constraining; the other political and somewhat suspect, if seemingly more responsive to diverse conditions. This forced choice impoverishes both paths to solution and limits the U.N.H.C.R.’s ability to imagine and pursue solutions which cannot be made to appear international, legal and universal. Partially in consequence, the U.N.H.C.R. has focused on formal reassimilation, a classically Eurocentric notion of solution.

The images of asylum used to sustain this crippling choice do not reflect the historical diversity of the asylum institution which developed as a diverse and broad series of protection practices, unified only in response to changing notions of sovereignty. Nor do they reflect asylum’s doctrinal dependence upon international notions of territorial jurisdiction. The conditions of asylum are not purely a matter of national discretion, if by that is meant that they can be altered, granted and withheld on any terms. Asylum is decentralized and diverse, but not capricious. Asylum is as bounded as the territorial jurisdiction that sustains it is bounded.

Continued attempts to view asylum as a legal status with a single doctrinal definition have created a great deal of terminological confusion: is asylum “resettlement” or “final refuge” or “assimilation” or “temporary care”? Asylum is, Oppenheim said, the protection which results from being abroad. In this sense, it is a condition rather than a legal status, with a variety of possible attributes. Sometimes asylum will seem too permanent, durable or legal. At other times it will seem too flexible and politicized. When international lawyers acknowledge that solutions will be based upon cultural, economic, racial and political considerations, from the point of view of both the host state and the refugee, asylum provides a place for discussing these factors.
Asylum can provide an acceptable discourse for considering the precise protection and hospitality appropriate for different situations. There is plenty of room for research into the specific types of solution which will meet the needs of refugees and states in various circumstances. Within the rhetoric of asylum, such discussion can come out of the national political closet.

There is a discernable trend in recent United Nations documents and scholarly writings toward a more flexible approach to asylum. Like the trend in jurisdiction discourse, this approach offers a partnership between states and international institutions in identifying and providing appropriate protections. One might think, then, of a request for asylum (in the absence of a more specific municipal definition) as a request that the government concern work in the tradition of territorial sovereignty, with the U.N.H.C.R. acting as the refugee’s advocate, to identify and provide appropriate protection. Advocacy of specific asylum terms, in this approach, should be grounded in the particular needs of a given refugee or refugee group rather than in the doctrinal elaboration of some imaginary legal status.

V. THE MERITS OF INTERNATIONAL PROTECTION

A. A Discourse Between Jurisdiction and Solutions

The preceding two sections of this article contrast discourse about the scope of international institutional competence in the refugee field with discourse about solutions to the difficulties encountered by refugees. Each of these discourses concentrates upon a different aspect of both refugee and asylum law. Jurisdictional discourse focuses upon the international definition of the term “refugee” and upon the corresponding absence of an international standard for identifying either a legitimate asylum-seeker or an asylee. Solutions discourse focuses upon the prerequisites of refugee status and asylum. Each of these discourses relates asylum to refugee in a distinctive way. Jurisdiction discourse tends to contrast the two sharply, while solutions discourse blends them more easily. These differences are in turn constituted by other, deeper differences, between law and politics, or by approaches which seem either international or national, obligatory or discretionary. In each case, asylum is used as the relatively more discretionary, national and political term.

I suggested that the international legal identity of the U.N.H.C.R. led to a separation of jurisdiction and solution discourse, in which only jurisdiction was understood to be primarily legal and international. This distinction and privileging of jurisdiction discourse accounted for the differing relations between the concepts of asylum and refugee in each field. Jurisdiction discourse sustained its distinctive international legal quality in part by excluding asylum as a threatening matter of national politics. Solutions discourse, by contrast, attempted to sustain itself within an international legal institution by reintegrating asylum. Each of these typical discursive patterns distorted the doctrinal and historical complexity of the concept of asylum and has been eroded as the U.N.H.C.R. has grappled with new approaches to a changing set of refugee problems.

Notwithstanding this distortion, the discourse of jurisdiction and solutions has, by pressing a distinction between two extreme visions of asylum and of its relation to international refugee law, defined the task for the discourse of protection. It must reconnect what has been rent asunder and rebuild a workable middle ground between a legal vision of jurisdiction lacking connection to solution and a pragmatic vision of solution lacking international consistency or normative power. Thus, most of the discourse about asylum, oddly enough, is about neither who gets it nor what they get, but about the doctrinal accommodation of sovereign discretion in its granting with international and individual interests in its content.

So far, however, attempts to mediate between absolute visions of asylum either connected to or separate from refugee law and as a matter of either international or national concern, have generated a set of arguments which doctrinally reproduce the choice between sovereign authority and discretion, international law and national politics. This has led protection lawyers to retreat from consideration of either institutional competence or solution into a series of debates whose resolution seems either impossible to achieve or simply a matter of preference. These classic debates about the “right to asylum,” “admission and nonrefoulement” or “temporary refuge” distract protection discourse from creative consideration of issues of competence and solutions in light of changing notions of “asylum” and inhibit response to current refugee protection needs.

From the outside, it seems perplexing that protection officers should concern themselves with debates that are not about who should be protected or how they should be protected; that is, issues other than those of jurisdiction or solution. The fact that an enormous amount of energy is spent discussing the “right to” asylum or the “relationship between nonrefoulement and admission” is difficult to explain. Although this work may fulfill the protection officer’s mandate to contribute to the progressive development of refugee law, it is difficult to understand why this subordinate institutional objective should press so persistently upon the more central protection issues of jurisdiction and solution.

Preliminarily, it seems that there is a relationship between the popularity of these debates and the structural differences between normal discourse about issues of jurisdiction and solution. As long as solutions discourse is thought too political to be consistent with the U.N.H.C.R.’s identity and jurisdiction discourse seems too legal or formal to generate either effective discussions about the causes of refugee flows or an accurate account of the U.N.H.C.R.’s diverse capacities, there will be a motive to search for an inter-
mediate way of discussing these problems which more skillfully blends elements of formalism and pragmatism but which retains the flavor of a legal discussion. In this, these debates seek to achieve what both jurisdiction and solutions discourse sought; to transform issues of causes and consequences into matters cognizable by an international institution with a particular legal identity. As a result, these debates combine the transformation of causes into jurisdictional categories with the transformation of results into solutions statuses, seeking to link jurisdictional categories to solutions statuses in a doctrinal fashion. These debates blend these elements in a particular legalistic way, transforming concerns about political flexibility and predictability, about sovereign cooperation and autonomy, into abstract triggers for duties and rights. As a result, these debates do not provide a useful middle ground between stale discussions of jurisdiction and solution. Rather, they succeed only in distracting attention from these issues and reinforcing a limited image of the institution’s legal basis.

The protection lawyer comes to these classic debates having learned the lessons of jurisdiction discourse about the distinctiveness of asylum law and the lessons of solutions discourse about its interdependence with other legal fields. Asylum is presumed to be distinctly national and political. Asylum law is distinguished from other branches of law affecting refugees: humanitarian law, human rights, immigration law, refugee law and the laws of extradition, statelessness and nationality. Once these differences have been firmly established, these debates deploy various mechanisms to overcome the disjunction between an international legal protection and a national political asylum.

118. This feature is common to those engaging in all three classic debates considered here. See, e.g., A. Grahl-Madsen, supra note 2; A. Grahl-Madsen, Asylum, supra note 24; G. Goodwin-Gill, supra note 2 (whose table of contents represents this quality in the debates over non-refoulement and admission most dramatically); Weis, supra note 43; Report of the Seminar on International Protection at Montreux 21 January 1980 HCR/120/580 - 1228; S. Krenz, supra note 38; Ricci, “Asile, Extradition et Terrorisme,” 21 AWR Bulletin 4:215 (1983); Weis, “International Protection,” supra note 93; Feliciano, International Humanitarian Law and Coerced Movements of Peoples Across State Boundaries (1983); Martin, “Non-Refoulement of Refugees: United States Compliance with International Obligations,” 23 Harv. Int’l L. 357 (1983); G. Colles, Problems Arising from Large Numbers of Asylum Seekers: A Study of Protection Aspects (1981) (unpublished manuscript). The distinctive divided nature of protection discourse which results from its acceptance of this distinction and its consequent position between but not of either jurisdiction solution can be seen in the following description of protection:

The UNHCR protection function has two basic aspects, namely the legal framework and the institutional arrangements . . . legal instruments and institutional arrangements which were basically the instruments of protection would be distinguished from direct or immediate protection itself, because direct protection is essentially a practical, pragmatic activity.


B. The Debate About “The Right to Asylum”

Most contemporary treatments of asylum begin with, and many are devoted exclusively to, consideration of a right to asylum.119 Scholars who think that this is an important question for investigation, carefully distinguish the right of asylum (or the “right to grant asylum”), which is acknowledged to be the sine qua non of the institution of asylum, from a right to asylum (or the “right to be granted asylum”) which, all acknowledge, is more controversial. These two rights are treated as compatible dimensions of an international law of asylum. Because one is seen to be a right of one sovereign against another sovereign and the other is seen to be an individual’s right against a sovereign, they do not seem inconsistent. Moreover, were the legal system “complete,” we would have both. The controversy about the right to asylum is, for both supporters and detractors, a “deficiency” in the legal fabric. It appears that a legal regime, properly articulated, could fulfill both the aspiration to protect sovereign autonomy (the right of asylum) and an international scheme of refugee protection (right to asylum).120 The two elements which neither jurisdiction nor solutions discourse could reconcile are reconciled here, as long as we accept the distinction between these two rights. Sovereign autonomy vis-à-vis other sovereigns is enshrined in the right of asylum. The needs of refugees are protected by their legalization as a right vis-à-vis the host sovereign.

However, this distinction has not been successfully translated into distinguishable legal categories. Rather, scholars have recognized that an individual’s right to be granted asylum can conflict with a sovereign right to grant asylum if that sovereign right is understood to imply not simply the expectation of international recognition of asylum granted, but also unfulfilled discretion to refuse to grant asylum.121 As a result, given the relationship between asylum and national sovereign authority, when these two rights have been seen to conflict, the right of asylum has prevailed. But international law scholars seem uncomfortable with a doctrinal corpus which contains only the right of asylum, understood to be the symbol of absolute discretion. A wholly discretionary right of asylum threatens the international legal character of that right by depriving it of any grounding in mutual sovereign respect. As a result, scholars have continued to discuss the right to asylum, seeking either to rehabilitate it within a regime dominated by the right of

119. See, e.g., A. Grahl-Madsen, supra note 2; G. Goodwin-Gill, supra note 2; Weis, supra note 43; S. Krenz, supra note 38; Weis, “The Right to Asylum,” supra note 108, at 1-8; Gilbert, supra note 66; Hyndman, “Asylum and Non-Refoulement – Are These Obligations Owed to Refugees under International Law,” 57 Philippine L. J. 43 (1982); Morgenstern, supra note 17; L. Green, supra note 24; M. Garcia-Mora, supra note 24.

120. See, e.g., A. Grahl-Madsen, Asylum, supra note 24, at 2, 11ff.

121. Id.
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capacity of its acknowledged exceptions to devour its position when confronted by the challenge of the other. Most importantly, neither alone is able to account for sovereign autonomy and cooperation simultaneously.

Taken together, however, the well-worn debate accomplishes what the independent discourses of jurisdiction and solution were unable to accomplish: finding a place for both sovereign autonomy and sovereign cooperation. So long as the debate continues, there is room for positivists and naturalists. Each is present in each line of commentary, whether as the dominant voice or as the voice of the exception.

It is not surprising that a debate in such equilibrium should seem both frustratingly irresolvable and an unimportant matter of preference. The importance of this debate lies in the agreement by both the majority and minority that a right to asylum would be a desirable addition to international law. Both sides are assessing the progress of international law to capture the institution of asylum, to legalize and internationalize the one place which in both jurisdiction and solutions discourse had been reserved for sovereign discretion. The goal of this project is to overwhelm the boundary between international law and national politics; the debaters merely disagree on the appropriate measure of their success. It is not surprising that their debate has stalled, for these commentators all accept both the distinction between international law and national politics and the characterization of asylum as a matter of sovereign discretion. They cannot overwhelm a distinction which they are not prepared to reject.

As a result, it seems inevitable that the “no right to asylum” school will remain the ascendant one, just as jurisdiction discourse will remain ascendant over solutions discourse. Moreover, so-long as this remains the structure of debate, attempts to storm the high ground of sovereignty by establishing a right to asylum either will fail or will relocate national discretion elsewhere, exactly as the minority school acknowledged the claims of the positivist majority in its exceptions and qualifications of the right it professed to describe. In this light, attempts to create a right which “has no remedy,” “lacks enforcement” or “may be a right against the international community as a whole rather than against any particular state” can be seen as continuations of this debate rather than resolutions of it.

Thinking of the debate about a right to asylum as an irresolvable repetition of the conflicts distinguishing solutions and jurisdiction discourse reveals how distracting the debate can be. If the task of protection is to get asylum for people, seeking a “right to asylum” distracts protection lawyers into either wishful thinking or resigned skepticism. Until there is a right nothing can be done and yet no right seems defensible or achievable which does not confront us with a new manifestation of sovereign discretion. Moreover, and most disturbingly, this debate, by accepting and reinforcing the disjuncture between international law and national discretion, prevents the U.N.H.C.R. from capitalizing on the new roles thrust upon it by chang-

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123. See, e.g., M. Garcia-Mora, supra note 24; Gilbert, supra note 66.

124. See, e.g., S. Krenz, supra note 38.
ing conceptions of its mandate for asylum situations and its ability to participate with states in developing flexible solutions for the divergent problems of refugees. To continue this debate places faith in an infinite legal process rather than institutional action.

C. The Debate about “Nonrefoulement” and “Admission”

In the battle to overcome the disjunction between jurisdiction and solution, the “right to asylum” debate, with its emphasis on the international legalization of asylum, is the heavy artillery. The boundary between national discretion and international obligation, however, has been resistant to conquest by force. More successful, if in the final analysis equally distracting, have been more subtle efforts to overcome this disjuncture, repeating it in various doctrinal forms whose conflicts can ostensibly be more easily resolved. One such effort has revolved around the concept of “nonrefoulement,” literally the “non-return” of a refugee to the country from which he is in flight.125

Like the debate about the right to asylum, discussion of nonrefoulement begins with an assumption about the distinctiveness of asylum and refugee law. In this way, nonrefoulement discussions resemble jurisdiction discourse. The nonrefoulement debate is also similar to the right to asylum debate in that discussion of nonrefoulement seems directed to reconnecting these two realms. In this, the nonrefoulement discussion resembles solutions discourse. The connection which is pursued in nonrefoulement, however, is more subtle than the legal takeover pursued by the right to asylum debate.

Legal scholars discussing nonrefoulement proceed in several stages. The first step is to develop nonrefoulement as an international legal obligation. International lawyers have devoted a great deal of energy to developing and strengthening the principle of “nonrefoulement,” not as the source of a right to asylum coterminous with it, nor as the source for asylum’s substantive content, but as an independent obligation of refugee law. As a result, the practice of nonrefoulement has, over the last hundred and fifty years, been transformed into the “principle of nonrefoulement,” which is seen by scholars as a “fundamental” international legal obligation forming the cornerstone of refugee law. Of course, there are exceptions, and state practice, particularly as to opinio juris, is anything but conclusive. Nevertheless, scholars continue to insist that the principle of nonrefoulement has become binding as a matter of both treaty and customary law if not also as a so-called peremptory norm or jus cogens.126

The important point is not whether these scholars are correct in their assertions about the status of the nonrefoulement principle, but the strength of their insistence and its consequences for the structure of further debate about nonrefoulement. Whether correct or not, these assertions reflect a strong sense that nonrefoulement, as opposed to other aspects of the treatment of refugees, is to be thought of as an international matter of law. Indeed, it is on the basis of this quality of nonrefoulement, regardless of its particular strength, status or content, that one thinks of refugee law as law at all on the international plane. If one manages to think that the key point about nonrefoulement is its international legal character, one can think of refugee law as a legitimate subspecies of international law even if one eventually concludes that nonrefoulement has not (yet) acquired binding force. Nonrefoulement, like refugee law as a whole, has taken a leap towards international legalization through the process of its transformation into a “principle.”

In the process, of course, other aspects of refugee treatment have been left behind or, more accurately, have come to be thought of as matters of national discretion. The various protections beyond non-return which add up to asylum now contrast starkly with the internationalized legal principle of nonrefoulement. Indeed, sometimes scholars develop the international legal nature of the “principle” of nonrefoulement in express contrast to the “institution” of asylum.127 This contrast helps preserve the notion that both national discretion and international cooperation can be preserved in the system of refugee protection as a whole. States will be required to do something— not return refugees— as a matter of international law, but their sovereign discretion to refuse asylum will not be disturbed.

The nonrefoulement discussion does not rest once states are thought to be under an international legal obligation not to return refugees. The next step is to formalize as doctrinal alternatives the various treatments which might form part of a refugee’s reception in a national culture and then to connect these formalizations to nonrefoulement by a process of definition, analogy, deduction or normative implication. Thus, people who discuss nonrefoulement contrast it with other categorical responses to refugees. This process has generated a large number of such “treatments,” the most important of which are: recognition as a refugee, nonrefoulement, admission, and asylum.

Being recognized or certified a refugee seems most often a matter of international law— even a specialty of the U.N.H.C.R. protection division—


126. See Hyndman, supra note 119.

127. Id.
although it is often done by national authorities. Once a refugee, one might be treated to an ever escalating assimilation process which might reasonably be expected to proceed through nonrefoulement to admission and, perhaps eventually, asylum “in the sense of a permanent solution.” Typical discussion of nonrefoulement begins by asserting the international legal obligation of states not to return certified refugees. This obligation is then used to imply some set of treatments—such as admission, perhaps on a temporary basis, or permission to apply for asylum, etc.

Lined up in this order, these four terms are reminiscent of the temporal movement of refugees from jurisdiction through international protection to solution. Like that movement, however, this temporal progression is not smooth. There is a disjuncture between nonrefoulement and admission which is like the disjuncture between jurisdiction and solution. The first two terms in this series are conceived as matters of international law, the last two as matters of national discretion. Thus, we again find the disjuncture between two levels of analysis as well as between two moments in a refugee’s journey from home to host country. Discussions which seek to link the nonrefoulement obligation to admission are thus directed to overcoming the same disjuncture which bedeviled the discussion about the right to asylum.

But here, the disjunction is spread out somewhat and does not seem as stark as the disjuncture between jurisdiction and solution or between the right to and the right of asylum. Recognition as a refugee seems the core international institutional jurisdiction. Nonrefoulement, while a matter of international law, is an obligation of states. Unlike asylum, however, nonrefoulement does not seem like a status to be granted, and can therefore be practiced by states without interfering with national political discretion to grant asylum. Similarly, while asylum seems both national and discretionary, the term “admission” seems to imply a formal process of legal entry which, although firmly within the national sphere, might be conducted in accordance with legal norms. Thus, nonrefoulement and admission reach out to one another. Nonrefoulement reaches out from the camp of international legal competence, admission from the camp of national discretion. If only nonrefoulement and admission could be joined, the refugee would slide smoothly from the international protection of refugee status to the national protection of asylum.

The two central terms could be joined if they were seen as corollary international legal obligations: if nonrefoulement implied admission. But this connection would threaten the fragile link between admission and asylum. Nonrefoulement and admission could also be joined if both were viewed as matters of national legal practice. But to do so would threaten the connection between nonrefoulement and refugee status. Either of these strategies of connection, legalization or decentralization, would be like the right to asylum debate in that they would overcome the disjuncture between national discretion and international law by transforming one into the other.

Like the right to asylum debate, these approaches would relocate the lost term elsewhere, failing to smooth the passage from one sphere to another. The debate over nonrefoulement, however, is far more sophisticated. The initial separation of refugee status and nonrefoulement split the sphere of international legal obligation from the competence of international institutions. The separation of admission from asylum split the legal treatment of asylum-seekers from the ultimate sphere of national discretion. This division made it easier to imagine admission as the logical complement of nonrefoulement because it could be legalized and yet remain within the national sphere. Such a link, achieved by dividing asylum and refugee status into stages which could be connected, is far more stable than merely suggesting that nonrefoulement, an international legal obligation, should “guide” admission, which remains a matter of national discretion. Once this doctrinal link has been established, nonrefoulement seems the consistent legal face of asylum, and asylum the variable national face of nonrefoulement. The two institutions, which seemed to inhabit different levels and to be understood as one another’s other, have been made to seem compatible by the link between admission and nonrefoulement, and yet neither international law nor national discretion has been eliminated from the scene.

Nevertheless, this link is also unstable. The doctrinal link between nonrefoulement and admission threatens the vision of a differentiated refugee and asylum which the debate inherited from solutions and jurisdiction discourse. Consequently, this debate proceeds by repeatedly splitting terms on either side of the disjunction, in a search for a more stable link.

Sometimes this occurs by introducing a new term between admission and nonrefoulement, such as “non-expulsion.”128 This approach makes it seem easier to retain the association between admission and asylum as matters of national discretion and is a standard of national treatment more easily linked to nonrefoulement. Thus, scholars who investigate the meaning of the principle of nonrefoulement distinguish between “expulsion” and “nonadmittance,” or further, between “administrative” and “legal” expulsion or expulsion of the “legally” and the “illegally present.”129 These distinctions constantly recreate the basic disjuncture between the international legal obligation and the sphere of national discretion. If refoulement is thought to mean extrajudicial expulsion, a state is legally obliged to pursue deportation procedures for refugees in their territory but retains the authority both of non-admission and of setting substantive terms for expulsion. Similarly, scholars split the term “admission,” rehabilitating a disjuncture between, for example, “mere presence” and “legal admission” to regain a sphere for na-

128. See G. Goodwin-Gill, supra note 2 (considering these various middle positions extensively at Chapter IV).
129. See, e.g., G. Goodwin-Gill, supra note 2, at Chapter IV; S. Krenz, supra note 38.
tional discretion once control over admission has been lost either legally to the international normative sphere of nonrefoulement or as a matter of fact. 130

If this debate were to stop at any point, the disjuncture would reappear. By continuing to split the difference and shift among such an array of similar terms one creates the illusion of a coherent legal fabric linking refugees to asylum however difficult it may be to pin down. The problem with continuing this debate, however, is that it distracts attention from both the causes of refugee flows and the terms of their solution. One focuses instead on an ever finer set of distinctions among terms which share something doctrinally with these two issues but do not address these issues. A discussion about the relationship between non-expulsion and non-admission is, in a way, a discussion about the balance of power between the international protection of refugees and the terms of their treatment by national authorities. But it is only in an oblique, associative way that this debate grapples with refugees or asylum. It is more accurate to say that it is at best a substitute for a more direct approach.

This debate is also fueled by a search for doctrinal precision and consistency, with choosing between “non-expulsion” and “admission” as the corollary of nonrefoulement, for example, rather than protecting refugees or assessing solutions. This is the cost of a doctrinal approach. First, one is drawn away from the substantive problems of jurisdiction and solution into an ever finer set of distinctions and, second, assessment of the distinctions of choice among their terms comes to be made out of fealty to the coherence of the doctrinal structure rather than out of concern for refugees or asylum conditions. Discussing the meaning of nonrefoulement or the implications of admission feels like getting to the bottom of the problem of asylum. On the contrary, however, it avoids confronting asylum, preferring instead to imagine asylum as the constantly receding repository of an untouchable national sovereignty.

On the one hand, this debate remains important. In given contexts, so long as people continue to imagine refugee protection in these terms, getting acceptance for one or another doctrinal correlative for nonrefoulement will be important. On the other hand, it is certainly true that neither logically, nor as a matter of practice, are any of these doctrinal connections particularly compelling. The only compelling aspect of the debate is its inability to achieve closure and its grounding in a fundamental disjuncture between international and national competences which cannot be overcome by an imaginative but doctrinal craft. The attempt to produce a single international doctrinal resolution seems even more unlikely to succeed. As a result, this debate, while central to much literature about asylum and refugee protection seems, finally, not to matter very much and, like the debate about a right to asylum, to be a matter of preference. It is not surprising, then, that the term of the debate remain murky, for not only does its resolution remain forever out of reach, there is no great incentive to clarify, for to do so would be to abandon the enterprise of doctrinal mediation altogether.

D. The Debate About “Temporary Refuge”

If the refoulement debate suffers from a tendency to drift into doctrinal distinctions removed from the sources and solutions to refugee problems, the third major debate within protection discourse about asylum is self-conscious about its return to realism. As such, it typifies a third type of response to the disjunction between refugee law and asylum. The debate about what has been termed “temporary refuge” frankly acknowledges what it sees as an inevitable disjuncture between the international legal exhortations of international institutions and the practice of national politics. 131 Refugees are one and asylum is the other.

To those who engage in this debate, the better part of valor is to confront this stubborn fact directly. Any attempt to bridge the gap seems calculated either to drift into wishful speculation or to threaten what these scholars think of as the legitimately exclusive domains of international law and national discretion. Thus, people who engage in this debate typically criticize attempts to link nonrefoulement and admission either for disdaining the purity of nonrefoulement or for ignoring the inevitably absolute national discretion associated with asylum. The key to this third approach is to turn the vice of this inevitable disjunction into a virtue. This is done by developing a middle term between nonrefoulement and admission which self-consciously distances them from one another.

This third approach encourages the international community to provide “temporary refuge” for refugees. By this international lawyers mean to suggest that states confronted with arriving refugees should allow them refuge until alternative arrangements can be made for their ultimate protection. “Refuge” is deliberately left vague, and is certainly not thought of as an internationally uniform legal status. The suggestion that refuge be “provided” is also typically left ambiguous, implying neither an international legal obligation nor a national political discretion. As a result, this approach represents


131. See, e.g., G. Coles, supra note 118; G. Coles, The Problem of Mass Expulsion (1983); Martin, supra note 14; Coles, supra note 115; Gilbert, supra note 66; G. Goodwin-Gill, supra note 2, at 114ff.
an institutional adaption to a more fluid protection environment than either of the distinctively normative protection debates.

Those who advocate "temporary refuge" appear to have given up the attempt to develop a normative link between international competence and national politics. Consequently, this approach leaves the disjuncture between nonrefoulement and admission intact. Nonrefoulement remains an international legal obligation compelling provision of refuge. The temporary nature of this refuge ensures that admission remains a matter of national discretion. Rather than interpreting nonrefoulement broadly, to reach out towards solution, this approach interprets it narrowly, to imply only that the cause of the refugee flow be acknowledged and provision be made for some international response. Similarly, this approach interprets admission and asylum narrowly, as matters of national political will disconnected from mere presence. Temporary refuge is thus neither asylum nor nonrefoulement. It is a middle position disjointed from both international law and national discretion.

The trouble is that this middle position is a hybrid of the two poles against which it distinguishes itself. Thus, to distinguish itself from asylum, and reassure us that its provision would not disturb national discretion, temporary refuge is treated as a temporary national obligation which implies some more permanent international response to the refugee's difficulties. Compliance with the international obligation is made to seem as costless as possible—eventually the international agency promises to support or relocate refugees given temporary refuge. Likewise, in contrast to refugee status or nonrefoulement, temporary refuge is treated as a matter of national decision to be achieved by negotiation between the international agency and the national authority. It cannot be granted or certified by the U.N.H.C.R. alone.

The defenders of temporary refuge rightly tout this hybrid quality for linking international solidarity with national solutions. It is even possible, in a variation of this approach, to view temporary refuge as the combination of nonrefoulement and admission, differentiated from refugee status and asylum. Whether seen as a way of avoiding the difficulties of the nonrefoulement/admission debate, or as a way of finally combining the two terms, temporary refuge offers the protection officer a way of responding to contemporary refugee problems without abandoning his institutional identity or sense of the international law doctrine of refugee and asylum law.

But although the distinctive nature of temporary refuge seems at first to protect the purity of both nonrefoulement (as a binding international norm) and asylum (as a sovereign discretion) this hybrid quality also raises difficulties. Perhaps it is understandable that advocates of temporary refuge have remained somewhat vague about its status, writing sometimes as if provision of temporary refuge were the essence of some legal obligation (like nonrefoulement) and at others as if it were pragmatic good sense when political conditions made fulfillment of more stringent international legal duties unworkable. But precisely because temporary refuge combines obligation and pragmatism, thereby protecting both nonrefoulement and asylum, it also threatens what have become the symbols of international cooperation and sovereign autonomy.

Thus, opponents of temporary refuge have argued that if it is to be pragmatic or grounded in the host state's peculiar capacity to comply, it threatens the absolute obligation of nonrefoulement. Similarly, it has been argued that if temporary refuge is binding (perhaps as nonrefoulement through time), it threatens the discretionary character of asylum and admission, especially if the link to international burden sharing cannot be established with equal normative and practical force. These criticisms rely, as did the defenses of temporary refuge, alternatively upon its claim to be different from both refugee law and asylum. As such, the debate about the validity of a notion of temporary refuge repeats the debate which seemed interminable in the context of a right to asylum and nonrefoulement.

Various responses, both doctrinal and practical, have been developed by advocates of temporary refuge to overcome this conceptual difficulty. Sometimes they suggest that temporary refuge need not mean assimilation nor respond to the full scope of a refugee's needs, as would asylum, or that it is a binding obligation only in cases of mass influx where there might, for other reasons, be no alternative but to comply. These resolutions, however, conspire to create a status for refugees which responds to an international conceptual problem rather than to the needs of refugees or governments. In the extreme, temporary refuge might seem to be better made as unpleasant as possible to protect the doctrinal link to international burden sharing. The temporary refugee debate, although billed as bringing a new realism to discourse about refugees, in fact results in refugee conditions responding to the conceptual disjuncture of refugees and asylum rather than in conceptual responses to the needs of refugees. The limbo which this new "realism" creates for refugees may be necessary to protect the image which international lawyers share of a national discretionary asylum and their vision of exclusive international legal and institutional competence to deal with refugees, but it is not necessary to respond to the needs of host sovereign and refugees.

E. Conclusions About the Discourse of Protection

Each of these debates represents a creative response to a difficult conceptual problem. They are important debates, and their short-term resolution, however unstable, affects the protection available to refugees in particular situations. Unfortunately, these debates perpetuate what is most damaging about the conceptual vision which generated them: the disjuncture between international legal competence and asylum. All search, moreover, for a doc-
trial solution to this disjunction which, in its generality, could be universal. This reflects the U.N.H.C.R.'s sense of its own role as an international legal institution. Only the cognitive control which such a universalizing resolution permits seems able to sustain the U.N.H.C.R.'s involvement so long as this basic disjunction is accepted.

The trends towards a more flexible approach to asylum present in contemporary discourse of jurisdiction and solution could be mutually reinforcing, together eroding the distinctions between the domains of jurisdiction and solution as well as between the legal and political activities of protection staff. It has not worked out this way. Instead, the two trends towards a looser notion of the U.N.H.C.R.'s jurisdiction and a broader approach to solutions are often seen to be mutually threatening, thereby reinforcing the difference between jurisdiction and solutions work.

As a result of the unwillingness to abandon a rigid doctrinal distinction between refugee and asylum and a rigid institutional distinction between international and municipal responses to refugee issues, protection discourse has not seized the opportunity to unite its treatment of asylum as a source of jurisdiction and solution. Instead, protection discourse accepts the disjunctions between asylum and refugee, solution and jurisdiction, political and legal, national and international, and goes on to pursue debates bent on reconnecting through normative discourse what it has differentiated conceptually. The resulting debates, of which the discussion of the right to asylum, nonrefoulement and temporary refuge are classic instances, are successful in their integration project only because they are interminable, continually deferring the moment of connection. No single position within any of these three debates satisfactorily permits a sustainable international normative involvement in national discretion.

In the meantime, these debates distract institutional attention from both causes (legally transformed into jurisdiction) and solutions, substituting a rhetoric of universalistic legal labels, competing with one another in an imaginary doctrinal world in which imputed interests and legal status take on the quality of real things to be balanced and resolved. The danger of continuing this distracting practice is that it makes doctrinal differences seem to be real differences, splitting protection work into specialized categories which are the result of conceptual distinctions rather than the divergent functional requirements of refugee situations. Moreover, once specialized, the debate between pragmatists and formalists can be continued indefinitely without becoming a difference about refugee treatment at all.

There is an alternative suggested by contemporary asylum discourse. Asylum offers the opportunity to establish a partnership with states in developing context specific solutions to refugee flows which take account of their causes, as well as the interests and needs of refugees and receiving populations. Seizing this opportunity will mean relinquishing the tendency to distinguish and prefer universal doctrinal approaches to refugee problems. Asylum, as a matter of U.N.H.C.R. competence, would be decentralized, differentially responsive to relatively legalized and nonlegalized cultures and refugees without fearing that one threatens the other. It would blend pragmatic and legal considerations relating to individuals and groups to assist states in providing an appropriate response to refugee flows.

By refusing the development of congealed doctrinal categories, protection officers would refuse the clandestine nature of their nonlegal work. Each point along the refugees' temporal route from flight to solution would be seen to involve international and national, legal and political concerns, and to be of legitimate interest both to states and to the international community. Asylum, in this vision, would be redeemed as it historically was: a process for relating divergent jurisdictions. The U.N.H.C.R., in developing and deploying its expertise, would seek coordination and harmonization of national asylum practices, rather than normative unification and licensed difference. In short, asylum presents the opportunity not for a clarified orthodoxy, but for an invigorating heterodoxy.

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132. This vision has also eroded the distinctions between the legal and political activities of the protection staff. Thus, for example, a protection officer whose solutions work seems to have to involve primarily political decisionmaking over solutions wants legal clarification of who is and who is not a refugee so that at least the mandate will provide the legal formality and legitimacy which he feels his other activities lack. By contrast, the protection officer whose solutions work with asylum occurs in a very formal and legalized culture, perhaps connected to the legal definition of a refugee, desires that jurisdictional discourse be expanded to absorb the pragmatic considerations which his solutions context cannot provide.