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**THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AFTER THE WAR:  
SOME ARE MORE RIGHTS THAN OTHERS**

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The sixtieth anniversary of the quasi-unanimous adoption in December 1948 of the Universal Declaration of Human Rights by the General Assembly of the United Nations gives me the opportunity to use it as a launching pad for speaking of the topic I was assigned, namely that of tracing from a legal perspective the story of human rights after the war.

I would like to single out the fate of the right to asylum which the UDHR consecrates. Article 13 of the Universal Declaration states that any one has the right to leave his country and to return to it, while Article 14 only declares the right of the individual "to seek and to enjoy" asylum, the original wording which referred to the right to be "granted" asylum having been discarded. I would like to argue that some rights in the UDHR are more rights than others – the right to asylum unlike other individual rights proclaimed in the UDHR never became a true subjective right of the individual. The right to asylum will be approached within the framework of Europe, more particularly its impact on the question of European identity. The EU political agenda has not only prioritised immigration and asylum questions but has given them a security dimension since they have become inextricably linked with Europe's responses to global security questions such as drug trafficking, terrorism and other international crimes. The key question is whether policies directed at exclusion in the name of preservation of a mythical European identity and defence of its security are not paradoxically resulting in a dilution of this identity.<sup>1</sup>

An international law perspective in approaching such issues is illuminating: For on the one hand the assumption of international legal obligations inevitably sets constraints on states who have constructed their identity on such foundations as democracy and the rule of law; such obligations - despite realpolitik arguments to the contrary - do have an

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<sup>1</sup> This contribution draws from the following article by the author: "European Asylum Policies and the Search for a European Identity", in *Constructing Europe's Identity. The External Dimension*, Lars-Erik Cederman (Ed.), Lynne Rienner Publishers, 2001, pp. 213-229.

impact on and the tendency to colour policy decisions. On the other hand, or because of commitment to international obligations, international law has also been used by these same states to legitimate policy designs: in the field of immigration and asylum the creation of new legislative barriers has been used to reinforce policies aimed at exclusion.

## **I THE EVOLUTION OF THE UDHR UNDER THE IMPACT OF A SEQUENCE OF WARS**

### *The Second World War*

In part the UDHR was a response to a holistic war scarred by the large-scale crimes perpetrated against individuals which the 1946 Nuremberg Charter was to qualify as crimes against peace, war crimes and crimes against humanity. It was also the concretization of the core idea at the heart of the Charter of the new world organisation, which itself emerged from the ashes of the war, that peace was not only the absence of war but the longer-term creation of the conditions for peace, and which therefore gave a broad place to human rights, as well as to social and economic development, both in its preamble, its purposes and principles as set out in its first two articles and in other provisions throughout the Charter.

Eleanor Roosevelt, the first chairperson of the newly created Commission on Human Rights which ended up adopting the Universal Declaration of Human Rights (though by no means the only protagonist<sup>2</sup>), predicted that word of the UDHR would be carried out throughout the world through what she called the “curious grapevine”: Information “may seep in even when governments are not so anxious for it”. This curious grapevine did indeed seep not only into the constitutions of the world but into the customary international law of States and even became part of the so-called “dictates of the public conscience”. But it was also to be the first building block of a vast network of regional and universal instruments for the protection of individual human rights, as opposed to the minority group rights of the interwar period. It also challenged the up to then quasi-exclusively internal or domestic nature of the treatment by a State of its nationals. This explains the communist abstentions. Vishinsky the Soviet representative had burst out: “This is outrageous; you can't infringe the rights of governments; they're the things that matter.” And Eleanor Roosevelt had turned to him and said “Mr. Vishinsky, we're not dealing here with the rights of governments, they're far too much already. We're dealing here, Mr. Vishinsky, with the rights of people, of men, of the right of man to be free. Man, Mr. Vishinsky, not governments.”<sup>3</sup>

But the subsequent trials and tribulations to which the UDHR was to be subjected was also largely the product of the other wars which have punctuated world history since

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<sup>2</sup> The framers of the Universal Declaration included the Lebanese Charles Malik, the French René Cassin, Nobel peace prize in 1968 for human right, and in particular John Humphrey the member of staff responsible for drafting.

<sup>3</sup> Harry Kreisler, “A Life in Peace and War”. Conversation with Sir Brian Urquhart”, Institute of International Studies, UC Berkeley, 1996 (<http://globetrotter.berkeley.edu/UN/Urquhart/urquhart0.html>)

1945: the Cold War, the colonial wars, the post-cold war and of course the so-called “war on terror”. These have had an impact on the nature of the rights, on the notable absence of some rights from subsequent key instruments and on their universality, thus subjecting the UDHR to severe testing.

### ***The Cold War***

The idea was that the Declaration which should be a relatively short and inspirational document in a non-binding form would serve as the foundation of an international bill of human rights. But although the Declaration was endorsed in December 1948, the two Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) that finally emerged to define the obligations of each state in a binding manner were not ready for ratification until 1966, some 18 years later. The UDHR had promoted the indivisibility of rights, including not only civil and political rights, the core of which is Article 3 on the right to life, to liberty, and to security of person, but also economic and social rights, at the centre of which is Article 25 which speaks of the right to an adequate standard of living, including the right to health and well-being, to necessary food, clothing, housing and medical care, and to social security. But some states, like the United States, argued that the latter were non-justiciable rights, progressive rights to be attained rather than immediately ensured, whereas the Socialist States were particularly suspicious of civil and political rights. So in the end, the ideological divide resulted in the drawing up of two Covenants. This ideological divide was also reflected in the 1950 European Convention on Human Rights adopted by a regional organisation - the Council of Europe – which was for long limited to Western States and which endorsed a right to property notably absent from the UDHR. Finally, mention should be made of the 1975 Helsinki Pact at the origin of the OSCE which, on the contrary, aimed at bridging the ideological divide between East and West or at least providing a basis for the West to intervene in the communist countries in the name of human rights.

### ***The Wars for National Liberation***

As the decolonization process reached its paroxysm in the 60s and 70s, another perspective on human rights was to be endorsed, that of group rights as opposed to individual rights. While this notion of group rights was ensconced in the Charter, namely in the principle of equal rights and self-determination of peoples, it was not, interestingly, incorporated into the UDHR. This right was to become the spearhead of the decolonization process under the aegis of a General Assembly resolution (GA Resolution 1514 (1960)) on the Declaration of Independence of Colonial Countries and Peoples which boldly stated that all peoples had the right to self-determination and called for the immediate end to their subjugation to colonial domination. This right in turn gave birth to a series of other rights: the right of national liberation movements to use force in self-defence and the right to observer status in the various organs of the United Nations – a right accorded, for example, to the PLO – and the right to development which became a rather mixed right of States, peoples and individuals. The end of colonialism did not end this evolution of the right to self-determination which was taken up under the banner of indigenous peoples’ rights, although confined to its internal aspect, that is a right to self-

government as opposed to independence. The African concept of human rights however not only emphasized group rights – reflected in the title of the African (Banjul) Charter on Human and Peoples Rights – but also the duty of individuals towards their community which the UDHR had endorsed but only in a couple of provisions (Articles 29 and 30). These issues have given rise to claims of cultural relativism on all sides of the ideological divide.

But this period in history also saw the splintering of the monolithic nature of the rights proclaimed in the UDHR (“Everyone has the right...”) by a plethora of legal instruments protecting particularly vulnerable groups - refugees, women, children - and this continues today - the disabled, HIV-aids victims, etc. This singling out of beneficiaries has raised the thorny problem of definitions – of inclusion and exclusion - and has ensued in a tug of war between different states and groups of states on such definitional issues (who is a refugee? when does childhood begin (the question of abortion)? When does it end (for purposes of recruitment of child soldiers, death penalty, voting, etc.)?) This in turn has raised the problem of what happens to those who fall outside the scope of this net of protection. We also witnessed a series of instruments emphasizing particular rights: prohibition of torture, racial discrimination, etc. Such instruments have sprung up both at the universal and regional levels, and have been bolstered by soft standards.

### ***The “war on terror”***

The euphoria of the end of the Cold War and the idea that we would finally achieve a reconciliation of different human rights at least between East and West was short-lived, as the so-called “war on terror” was proclaimed, not a war - at least not in the legal sense – but a state of affairs entailing war-like emergency measures such as extraordinary renditions, erosion of the absolute prohibition on torture, and indefinite detentions with no due process. All that was, and still is, going to take a severe toll on human rights. I will return to the “war on terror” and its challenge to the international protection regime set in place for refugees.

## **II THE RIGHT TO ASYLUM**

### ***The origins of asylum***

The institution of asylum has very old historical roots. It can be found in the major religions of the world: think of Moses who led his people out of Egypt, the people of Israel’s six cities of refuge, the Hegira – the flight of Mohammed from Mecca - and the tradition of Istijara, a form of territorial asylum, or the right of sanctuary, a fundamental principle of Canon law.

Hugo Grotius, the so-called father of international law, back in 1625, had regarded the “right of suppliants” to find refuge as a common duty of mankind and considered that the individual state in granting asylum acted as an agent of the world community: “A

permanent residence ought not to be denied to foreigners who, expelled from their home, are seeking refuge, provided that they submit to the established government and observe any regulations which are necessary to avoid strifes".<sup>4</sup>

### *The Second World War as the impetus for the institution of asylum*

The interwar period had seen the establishment of the first High Commissioner for Refugees, Fridtjof Nansen, and a series of instruments for the protection of various groups of refugees fleeing as a result of the demise of empires and the rise of Fascism in Europe. But the impetus for the establishment of the contemporary asylum regime was due to the Second World War which left millions of European displaced persons for whom solutions had to be found. Even here the cleavage between East and West was apparent. This was symbolized by the famous debates which took place between Eleanor Roosevelt and Andrei Vishinsky the leader of the Soviet delegation, in the General Assembly over the creation of the International Refugee Organization (IRO) established to resettle or repatriate the refugees, on the issue of whether these displaced persons should be forced to return to their countries of origin or be free to seek asylum. <sup>5</sup>

However, although the UDHR incorporated such a right in its Article 14, it was never to become a right to be vindicated by the individual but has been consistently upheld as the right of the State to grant it. After the UDHR it was not included in the major international human rights instruments, or, if it was, was qualified by reference to State sovereignty, and the several attempts to consecrate it were doomed to fail. The irony of the system lies therefore in the fact that while the right to leave any country including one's own is universally admitted there is no corollary of this right, namely an absolute right to enter another country.

### *The distinction between refugees and migrants*

It is important at the outset to underline the conceptual difference between migrants and asylum-seekers which have been consciously or unconsciously blurred in recent rhetoric and public perceptions. For it is the institution of asylum more than immigration that has posed the most important challenges to State sovereignty and to the pillars on which Europe has built its identity.

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<sup>4</sup> *De Jure belli ac pacis*, book 2, ch.XXI, sec.5

<sup>5</sup> As reported by Lord Beveridge in the House of Lords, Vishinsky had argued "that these individuals were forcibly prevented by means of political pressure, propaganda and terrorism from returning to their countries in the now communist east." Eleanor Roosevelt had countered that political changes in the countries of origin of the displaced persons had created fears in the minds of the million people who remain and that therefore that they should have a real opportunity of going elsewhere. "That is the issue which has come up again and again during the many weary months of discussion in the Assembly—whether a person who flies from his own country or dreads to return to it is for that reason something like a criminal who ought to be sent back, or is a refugee from arbitrary power who should have asylum." <http://hansard.millbanksystems.com/lords/1946/dec/19/displaced-persons>

While it is not easy in practice to determine which movements are coerced and which are not - and it is perhaps more accurate to speak of a continuum for there is a whole range of complex situations between voluntary and involuntary migration - nevertheless the status of refugees in its broad sense is based on the notion of "disfranchisement or breakdown of basic membership rights..." in the words of James Hathaway, since it pertains to groups of persons outside their state of origin who have been effectively deprived of the formal protection of their government and of their basic right to belong to their community. <sup>6</sup> The essential legal link - the umbilical cord - which binds an individual to his state is thus severed in the case of refugees.

The first consequence of this is that other states will be faced with claims for interim substitute protection. The second consequence is that it presents states with a conundrum, for unlike migrants, these individuals, even if unwanted, cannot be returned to their country of origin, at least not until the conditions which led to their coerced movement have been removed. Herein lies the dilemma confronting European states in their choice between inclusion and exclusion. For when faced with asylum-seeking populations this choice cannot be totally discretionary, since the response can no longer be based on intrinsic policy factors alone - i.e. domestic economic, political and social factors, or in the case of Europe, linked to the development of an internal market - but must be determined by extrinsic factors, i.e. response to external conditions and to the need to assume international obligations freely undertaken. This places tremendous pressures on the traditional basic premises of international law and relations, namely the sovereign rights of States to control admission into their territories.

### ***The 1951 Convention***

To address the major problem posed by those individuals who were coerced into leaving their country of origin, a universal system of protection was elaborated in the immediate aftermath of the Second World War. The main pillars of this system are the 1951 Convention on the Status of Refugees and its update the 1967 Protocol, and the Office of the United Nations High Commissioner for Refugees.

The 1951 Convention was initially very eurocentric as reflected in the states who gathered at the diplomatic conference and was also influenced by the onset of the Cold War. Thus the political interests of Western European states coincided with their humanitarian concerns. However, the Convention has now become universalised with some 146 states parties and the 1967 Protocol was adopted in acknowledgement of the changing membership of the international society to include the newly independent states emerging from decolonisation. Moreover, the changing nature of the refugee problem

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<sup>6</sup> See James Hathaway, "A Reconsideration of the Underlying Premises of Refugee Law", *Harvard International Law Journal*, vol.31, 1990, pp. 129-183; and by the same author, "Reconceiving Refugee Law as Human Rights Protection", in *Problems and Prospects of Refugee Law*, Vera Gowlland and Klaus Samson (eds.), Graduate Institute of International Studies, Geneva, 1992, pp.9-30.

has led to the divide between politics and humanitarian concerns.

The refugee definition which was incorporated in the Convention - i.e. a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...” (Article 1A(2)), corresponded well at the time to the image of the political opponents of Eastern European regimes. The liberal who jumped over the Berlin wall in search of freedom and democracy in the West, the Hungarian in 1956, or Czech in 1968, posed no threat to Western Europe, either physically or culturally. He or she was easily integrated. On the contrary, the greater the number of refugees, the more indication of persecution in the East, the more victory points scored in Western European rhetoric. The right to leave a country was also central to demands made of Eastern Europe in Western European cold-war rhetoric

However, this stereotyped and idealised image of a refugee was soon to change. The series of armed conflicts both internal and international which punctuated post-World War II history some of which were exacerbated by Cold War rivalries: the Arab-Israeli wars of 1948 and 1967 which left 5 million Palestinian refugees outside the net of protection, for those who drafted the 1951 convention made sure they were excluded from its ambit<sup>7</sup>, the decolonisation wars and other armed conflicts in Africa, the 5 million or more Afghan refugees who fled in successive waves, the Vietnamese boat people and so the list goes on.... transformed the refugee image from that of the political liberal to one of a mass influx of people fleeing from armed conflicts, generalised breakdown of states and mass violations of human rights. The post-Cold War after a short-lived euphoria brought its own lot of misery: the millions who fled from genocide or ethnic cleansing in Rwanda and former Yugoslavia, the internally displaced persons in Darfur, the million or more Iraqis fleeing the consequences of the disastrous war of 2003 and the boatloads of destitute people fleeing in small boats which capsize, or are thrown overboard by unscrupulous traffickers or taken by pirates off the coast of Somalia.

But it is important to bear in mind that the definition given in the 1951 Convention is one which is meant to serve strictly the purposes of the Convention, i.e. the grant of durable asylum on the territory of a State party. Someone who is not considered a refugee for purposes of asylum in European States bound by the 1951 Convention may nevertheless be recognized as such by States parties to the broadened refugee definition given in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which extends to those fleeing from armed conflict situations.

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<sup>7</sup> See Article 1D: “This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.” This concerned only the Palestinians, who were receiving assistance from UNRWA.

### *Europe's conundrum*

As a result of their international obligations European States are pressured into at least considering asylum applications for the purpose of determining which refugees fall within the ambit of the 1951 Convention. But the adoption of policies of exclusion, as a result of numerous political and sociological factors, has meant presenting the debate as one between *bona fide* refugees and fake ones – the “free riders”. There has been a noted tendency to apply the 1951 Convention definition, already a narrow one, in a very restrictive fashion, the net result being that the percentage of asylum-seekers deemed to be *bona fide* refugees has dropped dramatically in all European countries., in some cases it dropped to as low as 3-5% of asylum-seekers. The huge and costly edifice of refugee determination procedures set in place is therefore relevant to increasingly smaller segments of the asylum-seeking population. States are then faced with the question of what to do with the large majority of those who are determined not to be Convention refugees and who nevertheless cannot be returned to their countries of origin because of the insecure conditions prevailing there. In some cases, these individuals are granted temporary protection which, even if institutionalized in national law, remains a protection which can be and has been ended at the host state's discretion; in other cases they disappear underground. The fact that the majority of asylum-seekers may well not fit the Convention definition of a well-founded fear of persecution should not mean that individuals fleeing from armed conflict situations or a combination of root causes should automatically be assimilated to the category of economic migrants, drug traffickers or other unwanted category.

This dilemma in refugee protection has determined policy responses which consist in significantly reducing the chances of the asylum-seekers accessing national territory, or once on national territory, of accessing refugee determination procedures, by means of the erection of physical and legal barriers, and downgrading revisions of asylum laws. A series of conventional arrangements reached within the inner and outer circles of Europe - the Schengen Agreements and the 1990 Dublin Convention assimilated into the “Schengen Acquis”, the parallel agreements with non EU member states, the conclusion of readmission agreements with neighbouring and distant states are now all part of the institutional law of the European Union. Under the Dublin scheme for example, the responsibility for processing asylum claims has been narrowed down, on the basis of enumerated criteria, to one State alone out of all EU member States, though the latter are all parties to the 1951 Convention and 1967 Protocol and hence bear individual responsibility under those instruments. Even EU nations have seen their right to apply for asylum in another member state restricted to certain exceptional situations. In parallel with the adoption of such measures, European states have attempted to cope with the refugee dilemma by other means: promotion of concepts such as “protection in the region”, or “in-country protection” (so-called “safe” havens or “protected” areas – one will remember the massacres of Srebrenica).

### *The security conundrum*

Add to this erosion of refugee protection, a security dimension which the events

of September 11 2001 and the so-called open-ended “war on terror” have exacerbated. The increasing "securitisation" of refugee flows and the link between refugees, drug traffickers and terrorism, establishment of vast information systems providing little guarantees for human rights protection and the implementation of UN Security Council terrorist resolutions by the European Union, have been cause of great concern and have resulted in a serious erosion of refugee protection.<sup>8</sup>

Yet security concerns with respect to refugees is nothing new. One can trace historically the attempt to distinguish between those deserving of protection and those who were considered unworthy. In pleading that "a permanent residence ought not to be denied to foreigners who, expelled from their home, are seeking refuge", Hugo Grotius the so-called father of international law, writing in 1625, underlined that asylum is "for the benefit of those who suffer from undeserved enmity not those who have done something that is injurious to human society".<sup>9</sup>

Security considerations were in fact already built in to the international refugee protection system. This is understandable in the immediate aftermath of the Second World War in a Europe rampant with quislings and war criminals, not to speak of the common criminal offender. From the start it was accepted that the 1951 Convention should also filter out the deserving from the undeserving. It thus contains its own self-contained balancing mechanisms. These security concerns are reflected in the various provisions of the 1951 Convention. Firstly, the so-called exclusion clauses ensured that certain categories of asylum-seekers would remain outside the ambit of refugee protection. Are excluded from the benefits of the Convention, those who have committed crimes against peace, war crimes or crimes against humanity, those who have committed a serious non-political crime prior to admission, and those who are guilty of acts contrary to the purposes and principles of the United Nations ( Art. 1(F)). Moreover, even in its formulation of the principle of non-refoulement, the main pillar of refugee protection embedded in Article 33 (the obligation of a state not to return a refugee to a territory where her/his life or freedom would be threatened on certain defined grounds), the Convention excludes from its application a "refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country..." (Article 33(2)).

Despite the ambiguity and scope of these provisions, they are intended not only to

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<sup>8</sup> The Security Council has established lists of presumed terrorists some of whom may be refugees, calling for the freezing of their funds, without ensuring proper due process, while Resolution 1373 has called on States to: “3(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts; (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists; such as Resolution 1373 (2001)

<sup>9</sup> *De Jure belli ac pacis*, book 2, ch.XXI, sec.5

provide safeguards for the asylum State but to contain balancing mechanisms, which in contrast to the individual and regional measures taken by states weigh the interest of the individual refugee in obtaining protection from persecution against the interest of the receiving state in maintaining security and public order; in short, weighing humanitarian against security concerns.

Vattel once said that a Nation "has the right, and is even obliged, to follow in this matter (admission of refugees) the rules of prudence. But this prudence should not take the form of suspicion nor be pushed to the point of refusing an asylum to the outcast on slight grounds and from unreasonable and foolish fears. It should be regulated by never losing sight of the charity and sympathy which are due to the unfortunate".<sup>10</sup>

### **III REFUGEE LAW AND HUMAN RIGHTS**

While protection of refugees would seem to fall squarely into the realm of human rights, and in fact the 1951 Convention was often referred to as the first international human rights instrument, refugee law developed separately from human rights law in so far as it was premised on the crossing of borders and hence interlinked with questions of state jurisdiction.

Current European and other exclusion policies, in some respects the outgrowth of a perceived need to preserve homogeneity and identity, have resulted in the development of asylum law, intended originally as a complement of human rights law, as an exception to or tangentially to the evolution of regional and universal human rights law. The net result is that asylum-seekers may find themselves outside the orbit of the expanding protection given by international human rights law to individuals in general.

It is precisely because of the strengthened protection and judicial procedures afforded by human rights law, that the European Court of Human Rights has been faced with a growing number of asylum cases in recent years which it has examined from the perspective of its mandate to protect the European Convention of Human Rights.

The contrast between the positive developments in human rights law and developments in the treatment of asylum-seekers is illustrated below in a few examples.

#### ***The spatial restriction of refugee protection***

Recent developments in international human rights law have acknowledged extension of the state's obligations to protect human rights beyond its own borders to everyone within

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<sup>10</sup> Emerich de Vattel, *Le droit des gens ou principes de la loi naturelle appliquée à la conduite aux affaires des nations et des souverains*, 1758.

its jurisdiction, i.e. under its actual authority and responsibility (Article 1 of the European Convention of Human Rights, Article 2 of the International Covenant on Civil and Political Rights). This term has been defined as not being limited to “national territory”. This principle has been applied for example by the European Court of Human Rights in asylum cases by extending states’ obligations under Article 3 to non-return of an individual to a place where he/she faces torture and inhuman and degrading treatment.<sup>11</sup>

Yet what is remarkable is that despite this extraterritorial extension of human rights obligations, when it comes to asylum-seekers states are effectively extending their jurisdiction in order precisely to deny it and with it the obligations which flow from it. This produces a very interesting phenomenon, in that while current discourse centers on the demise of the nation-state - the shrinking of the sphere of domestic jurisdiction, erosion of state sovereignty, the strengthening of supranational and universal institutions, globalisation of international economic relations and the consequent freedom of movement of goods and services across borders - asylum-seeking in Europe has been marked by a reinforcement of that last bastion of state sovereignty which is the right of the state to decide who to admit and who to expel. In short, in seeking to restrict their obligations towards asylum-seekers, states, far from extending their protection to areas within their jurisdiction, have on the contrary narrowed the spatial application of the very principle that lies at the heart of human rights protection of asylum-seekers - namely the principle of non-refoulement.

Europe is defending access to national territory not only through reinforcement of the outer borders of fortress Europe, but even in areas outside of or increasingly remote from these borders, such as the country of origin itself, for instance through control at foreign airport departure points. The attempts to restrict access to national territory and to refugee determination procedures, through particularized asylum practices or concepts, include artificially created “international” airport zones which extricate national territory from the ambit of protection, the imposition of visa requirements, sanctions on carriers carrying undocumented aliens, interception at sea, where paradoxically the state exercises its jurisdiction in order to return potential asylum seekers to the country from which they are fleeing,<sup>12</sup> and the expansion of Europe’s borders guarded by electrified fences in the Spanish enclaves of **Ceuta and Melilla** in Morocco, all of which in spirit if not in black letter law serve to restrict the spatial dimension of refugee protection.

### ***The restriction of the beneficiaries of refugee protection***

The whole idea of human rights is that they pertain to everyone by virtue of his/her nature as a human being. It follows that the international measures to secure their protection must be anchored in the principle of universality and cannot be limited in their effect to the citizens of one country or of a group of countries but extend to everyone

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<sup>11</sup> See e.g. *Chahal v. UK*, ECHR, Series A, No.22 (1996-V).

<sup>12</sup> See the 1993 United States Supreme Court decision in *Sale v. Haitian Centers Council Inc.* regarding interception of Haitian boats on the high seas (*International Legal Materials*, 1995, p.575).

within the jurisdiction. This is reinforced by the prohibition of discrimination which is the central core of many human rights treaties, including the 1951 Refugee Convention. The general trend has been to seek to reinforce the protection of human rights instruments in respect of non-nationals.

On the contrary, policy and legislation in respect of asylum-seekers have sought to create a particular category of aliens in an "irregular" situation which is singled out for particular treatment and which is removed from the pale of both human rights law and refugee law. The term "irregular" has been given an extensive scope, encompassing not only those who enter the territory illegally but covering also a wide variety of situations, in some cases even including those asylum-seekers who are in the process of awaiting the outcome to their appeal from a negative asylum decision. This so-called "irregular" situation entitles asylum states to ignore the general reach of human rights law by resorting to such practices as detention and penalization of illegal entry, leading in some cases to outright inhuman and degrading treatment of asylum-seekers and on some dramatic occasions to their death, as well as disregard of the rights of refugee children or of the concept of family unity.

***The restriction of the notion of persecution at the hands of non-state actors***

The obligation not only to respect but also to guarantee the human rights laid down in the international instruments imply positive obligations on the part of the State even where this concerns violations of human rights by individuals acting in a non-official capacity. That human rights law has come to recognise the responsibility of the State for the acts of non-state entities acting within its jurisdiction where the State fails in its obligations of "due diligence", has been reflected in the case-law of regional human rights courts. But this evolution of human rights law is again not reflected in developments in asylum law. For evident reasons in order to restrict the field of application of the 1951 Convention, a number of states have refused to consider as falling within the purview of the definition of persecution central to the determination of refugee status, persecution carried out by non-state agents. As a result, refugee status in a number of European countries, with certain exceptions, has been denied for example, to individuals fleeing persecution at the hands of militias, or to women fleeing societal persecution.

Moreover, governments, confronted with new manifestations of racism fuelled by private parties and the rise of xenophobic and neo-Nazi tendencies which have been particularly aimed at certain groups of foreigners and asylum-seekers in Europe, have shown reluctance to assume responsibility for the prevention of such acts on grounds of freedom of expression. This is contrary to the obligations undertaken under the Convention on the Elimination of Racial Discrimination (CERD), in particular Article 4 to which some states continue to append reservations.

## **CONCLUSION**

The refugee problem has to be seen against the backdrop of contemporary developments in international law, one of the most significant of which has been the creation and

expansion of a domain of general or public interest and the development of an international public policy or *ordre public*. This has seen the emergence of a core of legal norms which have been considered to be fundamental to the international community as a whole in the sense that they are directed to the protection of certain overriding universal values, or indispensable for the functioning of a highly complex and interdependent international society. These norms include the basic principles of human rights law.

In terms of refugee law, this development is reflected in the way certain gross violations of fundamental norms of human rights and humanitarian law at the origin of mass exodus have come to be considered by the Security Council in numerous resolutions adopted under Chapter VII of the Charter as threats to the very security of the international legal order. It is reflected in the development of international criminal responsibility and the call for accountability before the International Criminal Tribunals for Former Yugoslavia and Rwanda of those responsible for ethnic cleansing and genocide, the root causes of the major refugee outflows from these countries. It is also apparent from the multilateral framework for the conclusion of peace settlements, a component part of which deals with the safe and free return of refugees and displaced persons, including compensation and continuing human rights monitoring (the prime example is the Dayton accords).

We are thus beginning to see the emergence of a protection regime for refugees which regulates not only the obligations of the country of asylum, but also those of the country of origin which has to respect the right of return of its nationals and to create the conditions for safe return by ceasing the violations at the root of the exodus, as well as the responsibility of international humanitarian organisations and the international community as a whole on the basis of burden-sharing.

Yet refugee issues continue in some respects to be treated within a traditional bilateral framework of international law concerned only with the subjective interests of States. This is poignantly illustrated by the case of Palestine, currently in the throes of violence where the singular absence of the international community in the resolution of the Palestinian question since the end of the Cold War is notable and has resulted from the removal of the peace process from the multilateral UN framework where it belongs.

As concerns Europe, if there is one certifiable aspect of European cultural identity - of European belongingness - it is the discourse based on the "rule of law" and "enjoyment of human rights and fundamental freedoms" which has been upheld as the basis of "genuine democracy". This underlies all institutional development in the region, from the preamble to the 1949 Statute of the Council of Europe to the 1990 OSCE Charter of Paris for a new Europe. There is in addition a much vaunted common understanding of what is meant by these terms which have not just remained at the level of rhetoric but have been given substance through the jurisprudence of regional courts.

However, the issue of how to cope with asylum-seekers is placing Europe in a quandary. In the name of preservation of Europe's heritage and common values the States

of Europe have been forced into policies of cultural exclusion. But by the development of what has been termed a two-tier human rights system, i.e. one which while granting citizens the most sophisticated protection from human rights abuses, excludes from full human rights protection unwanted aliens, branded as “illegal”, or in an “irregular” situation, Europe faces the risk of undermining this very identity. The result is a striking dissonance between on the one hand the values which lie at the core of European identity, and on the other, developments in European policy and legislation concerning asylum-seekers.

In fact, Europe may be in the process of creating a form of cultural relativism in reverse - not in the sense of the rejection of universal values which do not conform to cultural particularities, which is the discourse of some third world States, but in the implicit denial of the application of universal values to certain third-state nationals who seek entry.

To conclude on the question of European identity, it has been said that

[I]mmigration laws are about as central to a nation’s mission as anything can be. They are central because they literally shape who we are as a people. They are central also because they function as a mirror, reflecting and displaying the qualities we value in others. For both reasons, decisions on immigration policy put us to the test as no other decisions do. They reveal, for ourselves and for the world, what we really believe in and whether we are prepared to act on those beliefs.<sup>13</sup>

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<sup>13</sup> Stephen H. Legomsky, “Immigration, Equality, and Diversity”, *Columbia Journal of Transnational Law*, vol.31, 1993, pp.319-335, at p.335.

