

THE LINK BETWEEN SECURITY AND INTERNATIONAL PROTECTION OF REFUGEES AND MIGRANTS

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I. - CONTEMPORARY THREATS TO STATE SECURITY AND INDIVIDUAL RIGHTS

The growth of migratory movements, both regular and irregular, has been fomented by global networks of communication and transportation, and the acceleration of economic disparities between north and south. This has been accompanied by an increase in forced mass exodus resulting from political instabilities, massive violations of human rights, breakdown of States, and ethnic, religious and cultural intra-State conflicts.

States have traditionally been faced with potential threats to their internal order from mass influx of persons. Such influx can threaten the delicate balance between ethnic groups, or pose major social, economic and ecological problems which affect the socio-economic stability of a receiving State. Refugees can engage in individual or group internal acts of subversion which can threaten the political stability of a State or its societal values. In addition, the grant of asylum can also sour the relations between sending and receiving States, if, for example, refugees engage in subversive activities against their country of origin, or against neighbouring States.

Such traditional threats have however today been supplemented by the potential engagements of individuals allowed entry into a State in organized or large-scale criminal activities. The contemporary process of globalization, which has been accompanied by dramatic advances in communications and information technology, facilitating cross-frontier movements and revolutionizing financing and banking operations, coupled with the evident reduction of state authority, has resulted in increased as well as novel threats to State security, as organized crime in the form of the drug-trade, or the trafficking and smuggling in human persons, has created global networks able to evade state regulation and enforcement.

Undoubtedly, however, the events of 9/11, heralding the rise of global non-state sponsored terrorism, have had the greatest impact on States' perceptions of security, with the added fear of terrorist access to weapons of mass destruction. These events have ushered in an international system primarily centred on security concerns and have had widespread ramifications which have also permeated the field of migration and refugee protection. The measures adopted in the framework of the so-called "war on terror" have had far-reaching consequences for law and policy in the fields of immigration, asylum and race discrimination, which have had an impact on the legal status of immigrants and asylum seekers and on their human rights.

This contribution begins by briefly tracing the construction of the regime of international protection for refugees and, on a smaller scale, that for migrants. It then examines the link between security on the one hand and refugees and migrants on the other, from the perspective of two approaches to current threats: the first is the reinforcement of the international regime for the protection of individuals by placing the question of forced movements of populations within a collective security framework aimed at the maintenance and restoration of international peace and security; the second is the securitization of refugee and migratory movements, by placing these within a framework of policy and legal responses aimed at countering the perceived security threats to States of such flows.

II. - THE REGIMES OF INTERNATIONAL PROTECTION OF REFUGEES AND MIGRANTS

A normative framework of international protection has centred on so-called forced migration, that is on refugees within the narrow definition of the 1951 Convention on the Status of Refugees, as well encompassing all those who have been compelled for one reason or another to leave their country of origin. An international regime is also being forged (though not on a similar scale) for the protection of migrant workers - both regular and undocumented - and their families.

A. – *International legal protection of refugees*

The causes of forced exodus are mixed: persecution, armed conflict, massive violations of human rights and humanitarian law, or even minimum economic subsistence. The broad definition of a refugee stands in opposition to the definition of migrants used to cover "all cases where the decision to migrate is taken freely by the individual concerned, for reasons of "personal convenience" and without intervention of an external compelling factor" (2). It is not easy in practice to determine which movements are coerced and which are not, for the two are often intertwined in the minds of the public or in the actual challenges faced by States, as illustrated by the problem of trafficking or smuggling in human beings; it is thus 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 the broad sense has to do with groups of persons outside their state of origin who have been effectively deprived of the formal or *de facto* protection of their government. They are also characterised by the fact that this condition of breakdown of protection by the country of origin results in other States, international institutions and the international community being faced with claims for interim substitute protection. These coerced migrants, even if unwanted, cannot be returned to their country of origin, at least not until the conditions which led to their exile have been removed.

States have had a traditional right to control their borders and to design their immigration policies which have been geared to facilitate entry of the wanted and to deter the entry of unwanted foreigners. This right has traditionally been seen as one of the fundamental aspects of State sovereignty and today remains one of the last bastions of this sovereignty, in the face of increasing State loss of control over its internal economic and social set-up resulting from privatization of what were once considered public functions, and from transnational activities and permeability of borders. States have also been considered to have a right, and increasingly today, a duty or responsibility, to protect their citizens from harm both internal and external.

(2) See: "Measures to improve the situation and ensure the human rights and dignity of all migrant workers" (1998), *Report of the working group of intergovernmental experts on the human rights of migrants submitted in accordance with Commission on Human Rights resolution 1997/15*, Commission on Human Rights Fifty-fourth session, Intergovernmental working group of experts on the human rights of migrants, 10 March 1998, UN Doc. E/CN.4/1998/76, §44.

However, faced with the claims from peoples compelled to leave their countries of origin, a State's choice in the control of its borders cannot be totally discretionary, since the response can no longer be based on intrinsic policy factors alone – domestic, economic, political and social factors – but must be determined by extrinsic factors, *i.e.* response to conditions outside one's country and region. In addition, that discretion has been fettered by international obligations, freely undertaken, for a normative framework has gradually evolved to deal with the anomaly of individuals whose link with their State has been severed for one reason or another.

This normative framework was gradually built up. In the interwar period, a series of institutional and inter-State arrangements forged under the auspices of the League of Nations and under the impetus of the first High Commissioner for refugees, Fridtjof Nansen, centred in particular on the obtention of identity documents aimed at ensuring freedom of movement of refugees, as well as the acquisition of a legal status in the country of asylum. Post-war, the main impetus came with the adoption of the UN Charter which proclaims among its purposes, respect for human rights and fundamental freedoms and which found expression first in the Universal Declaration of Human Rights, which recognized a right to seek asylum from persecution, and later in the 1966 Covenants, reinforced by a web of regional norms and institutions on the European, American and African continents. This body of human rights law departed from its initial monolithic treatment of individuals (barring some distinctions between aliens and nationals), and came to recognise that the elaboration of normative regimes centring on specific vulnerable groups, such as minorities, refugees, migrants, women in particularly vulnerable conditions, children, or the indigenous, were required in order to facilitate the access of these groups to universal human rights law.

Thus a universal system of protection for refugees has been built up over the years, initially based on two pillars. The first was normative, grounded in two universal instruments: the 1951 Convention on the Status of refugees and its 1967 Protocol. These were centred on a narrow definition of a refugee based on the notion of persecution (see Article 1 (1) of the 1951 Convention) and their primary purpose was protection from *non-refoulement* (Article 33 of the 1951 Convention) as well as the grant of refugee status giving rise to durable asylum, as well as rights and benefits, in a third country

of asylum or resettlement, hence their exilic basis. The second pillar was an institutional mechanism offering international protection, the main institution being the UNHCR, established as a subsidiary organ of the General Assembly, and created to succeed the International Refugee Organization in 1951.

The 1951 Convention regime has been supplemented by norms and standards evolving at the regional levels which have broadened the category of individuals requiring substitute protection and expanded on their substantive protection (see, for example, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees).

In addition, in the face of the sheer magnitude and complexity of the contemporary refugee problem, responses to refugee flows have moved out of the confines of the traditional regime with its narrow base of international protection focussed solely on the receiving State, by widening the concerned actors, thus implicating also the State of origin as well as the international community as a whole, and by efforts to address the entire spectrum of the problem, from prevention to facilitation of, and enhancement of the durability of return.

One development has been the permeability of and linkages between fields of international law which had formerly been mutually exclusive – namely human rights and refugee law – thus enriching and reinforcing traditional refugee law. Emphasis on such individual human rights, as, *inter alia*, non-discrimination, the right to leave and to return, the right to freedom of movement, the right to a nationality, the prohibition of torture and cruel, inhuman and degrading treatment, the right to due process, and the corresponding responsibility of States to ensure such rights, has particular relevance and importance in the refugee context. This is particularly the case in respect of the absolute prohibition of torture to be found in universal and regional instruments which either expressly (3), or implicitly (4), guarantee *non-refoulement* to places of torture.

(3) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Article 3.

(4) European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS, 5, Article 3. See also: ECtHR, *Soering v. The United Kingdom*, 7 July 1989, Series A, N° 161 and ECtHR, *Ocalan v. Turkey*, N° 46221/99, 12 March 2003. See also: ECtHR, *Chahal v. United Kingdom*, 15 November 1996, *Reports of Judgement and Decisions* 1996-V, in which the Court upheld the absolute nature of Article 3, as opposed to the qualified *non-refoulement* provisions of Article 32 and 33 of the 1951 Convention.

The linkage between human rights and refugee law also includes the ability of refugees to have access to the remedies provided by these fields, such as seeking redress before the European Court of Human Rights, the Human Rights Committee, and the Committee established by the 1984 UN Convention against Torture. This has resulted also in an evolutionary approach: for example, the notion of persecution at the heart of the 1951 Convention definition of a refugee, must at present take into account the concept of indivisibility of human rights, *i.e.* serious or systematic violations not only of civil rights but economic, social and cultural rights as well, encompassing a category of individuals commonly branded as economic migrants. In addition, linkages have been made between the rights of particular categories of individuals – refugees and migrants (as will be seen below), but also women refugees, refugee children, *etc.* Thus while human rights and refugee law initially developed tangentially, the segregation between the two fields has gradually been overridden, while nevertheless preserving the specificity of these categories of individuals for particular purposes.

In addition, an international legal platform has been forged by the United Nations to ground action by the international community. Thus issues such as the root causes of mass exodus, expulsion, forcible transfers of populations, as well as internal displacement, have found their way into the United Nations human rights agendas, and humanitarian organisations have broadened their mandate to promote global responses requiring coordination between agencies.

B. – International legal protection of migrant workers

While it may be said that the international regime for addressing and managing migratory movements is not comparable to that for refugees, migrant workers, particularly those in vulnerable situations, have gradually also come under the umbrella of general instruments protecting the rights of migrants as a whole.

Traditionally, these have been the precinct of the ILO and such rights have been ensconced in particular in two ILO Conventions: the Migration for Employment Convention N° 97 of 1949 and the ILO Migrations in Abusive Conditions and the Promotion of Equal-

ity of Opportunity and Treatment of Migrant Workers (Supplementary Provisions) Convention N° 143 of 1975.

However, the institutional focus shifted as the UN increased its attention towards migrants' human rights beginning with the 1985 UN General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live (Res. 40/144, Annex). The 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families broke new ground in standard-setting. Because of its outreach States, in particular those most affected by the phenomenon of migrant workers, were reluctant to come on board and it only entered into force on 1 July 2003. Moreover, its 34 ratifications to date do not include countries of destination. The Convention, after defining a migrant worker in article 2 (1) as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national", seeks to ensure the protection of the human rights of migrant workers, including that of members of their families, as well as migrants in irregular situations. The Convention aims to prevent and eliminate their exploitation, in particular by putting an end to illegal or clandestine recruitment and trafficking of migrant workers. It calls for inter-State cooperation and State harmonization of domestic legislation which will adopt international human rights standards in their respect. UN concern continued to be manifested by the appointment of a Special Rapporteur on the Human Rights of Migrants (Resolution A/RES/54/166 of February 24, 2000).

In its 2003 Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants, the Inter-American Court of Human Rights considered "that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws". As a result all States were to guarantee this principle also to all aliens on their territory regardless of the regularity of their status (5). It decided:

(5) Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, requested by the United Mexican States, §§101, 118.

"7. That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.

8. That the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature".

While refugees and migrants remain separate categories of persons under international law, as stated above, the linkages between asylum and international migration, especially irregular migratory movements, have nevertheless increasingly become evident. This asylum-migration nexus has been summarised in the following manner (6):

"First, many migrants who are looking for work and who are not in need of international protection submit asylum applications once they have arrived in another country, hoping they might be granted refugee status because they have no other legal means of entering and remaining in that state, even on a temporary basis. Second, population movements from a single country may include some people who have a genuine claim to refugee status and others who do not, especially when that country is simultaneously affected by persecution, armed conflict, political instability and economic collapse. Third, many refugees and asylum seekers are obliged to move from one country to another irregularly because they are unable to obtain the passports, visas and tickets they need to travel in an authorized manner. Such phenomena are often referred to collectively as 'mixed migrations' or the 'asylum-migration nexus'".

III. – THE INTERNATIONAL PROTECTION OF REFUGEES AND MIGRANTS WITHIN THE FRAMEWORK OF COLLECTIVE SECURITY

The first aspect of the link between security and movement of persons is the way in which the international protection regime outlined above has become securitized, in other words has become also a part of the collective security framework. This has been the result *inter alia* of the development of a broader notion of a threat to international peace and security which goes beyond classic cases of aggression, as well as encompassing the concept of human security.

(6) UNHCR, *The State of the World's Refugees 2006, Human Displacement in the New Millennium*, Oxford, Oxford University Press, 2006, Ch. 2. See also: Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action*, Global Commission on International Migration, Geneva, October 2005, p. 40.

The latter means that security, ultimately destined for the protection of individuals, now takes into account the human cost of conflicts and seeks to protect the rights of persons in conformity with a new collective duty – the responsibility to protect (7). In this way, Article 1 (1) of the UN Charter relating to collective security can be given a new meaning which embraces the security of individuals as much as that of States. This evolution of the international agenda which has given a new slant to the protection of refugees and displaced persons must also be set against contemporary developments in the international legal system, in particular the emergence of an international public policy; refugee issues can now be viewed as of concern to the international community as a whole, giving the latter a broad platform for action.

A. – *The Security Council and the link between threats to the peace and mass exodus*

This 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 as threats to the very security of the international legal order. The problem of mass exodus has found its way into the agenda of the Security Council which has linked determinations of a threat to the peace under Article 39, Chapter VII of the Charter, and mass exodus, and promoted return of refugees and displaced persons as a way of restoring international peace and security.

This linkage is a notable development in the strengthening of the regime of international protection of refugees. In certain of its resolutions relating to Iraq (in the case of the Kurds), Haiti, Rwanda and Kosovo, the Security Council has determined under Article 39, that particular policies of massive and systematic violations of human rights, humanitarian catastrophes and grave violations of humanitarian law, even if emanating from intra-State conflicts, which engender mass exodus or refugee flows, constitute threats to

(7) See: ICISS, *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, Canada, December 2001; *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the UN Secretary-General Kofi Annan, 21 March 2005, UN Doc. A/59/2005; and *A More Secure World: Our Shared responsibility*, Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc. A/59/565.

international peace and security (8). On the basis of these determinations, the Council has acted under Chapter VII in adopting enforcement action to put an end to such State policies – economic sanctions, or authorizations to States and regional organizations for the use of force; it has mandated peacekeeping forces to use force beyond self-defence to protect safe havens or humanitarian convoys within countries of origin as alternatives to exodus; and established complex peacebuilding operations endowed with sweeping powers of governance, including legislative and executive.

The Security Council has also promoted the return of refugees and displaced persons based on a right of return which it affirmed, for example, in its resolutions 361 (1974) concerning Cyprus and 820 (1993) concerning Bosnia-Herzegovina. Finally, it has worked for the political resolution of conflicts and has actively sought to establish a multilateral framework for the conclusion of peace set-

(8) See, for example: SCR 688 (1991) on the Kurds in Iraq, in which the Security Council declares itself "Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross border incursions which threaten international peace and security", and in para. 1. "*Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region"; and SCR 841 (1993) on Haiti which links the threat to international peace and security with the humanitarian crisis in Haiti, including mass displacements of population, following on "a climate of fear of persecution and economic displacement" as a result of the failure to reinstate the legitimate Government of President Aristide. Regarding the conflict in Yugoslavia, Security Council resolutions condemned the grave and systematic violations of human rights and fundamental freedoms – including against ethnic minorities – and the grave violations of international humanitarian law such as the practices of ethnic cleaning and obstructions to the delivery of food and medical products to the civil population. In SCR 771 (1992), the Security Council expressed "*grave alarm* at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians..." In SCR 752 it "Calls upon all parties and others concerned to ensure that forcible expulsions of persons from the areas where they live and any attempts to change the ethnic composition of the population, anywhere in the former Socialist Federal Republic of Yugoslavia, cease immediately" and "Emphasizes the urgent need for humanitarian assistance, material and financial, taking into account the large number of refugees and displaced persons". In SCR 787 which established economic sanctions against the federal Republic of Yugoslavia (Serbia and Montenegro), the Council "Reaffirms that any taking of territory by force or any practice of 'ethnic cleansing' is unlawful and unacceptable, and will not be permitted to affect the outcome of the negotiations on constitutional arrangements for the Republic of Bosnia and Herzegovina, and insists that all displaced persons be enabled to return in peace to their former homes". In the preamble of its resolution 819 (1993), the Security Council stated that it was "Aware that a tragic humanitarian emergency has already developed in Srebrenica and its surrounding areas as a direct consequence of the brutal actions of Bosnian Serb paramilitary units, forcing the large-scale displacement of civilians, in particular women, children and the elderly". For similar concerns, see on Kosovo: SCR 1160, 1199 and 1203 (1998), as well as the numerous Security Council resolutions on specific African conflicts, such as in the Democratic Republic of Congo and the Sudan.

tlements which give a central place to the solution of the problem of refugees and internally displaced persons, as illustrated by the peace settlements relating to Cambodia, Bosnia-Herzegovina or Darfur (9). Such solutions include human rights monitoring by international bodies, embedded, for example, in Annexes 6 on human rights and 7 on refugees and displaced persons which are integral parts of the Dayton Agreement and which include a mechanism for restitution of or compensation for property.

The significance of these developments in the context of international protection of refugees should be underlined, for it has led the Security Council to act in situations of mass influx, either through its responses to imminent coerced movements of populations, or through action to put an end to their root causes.

B. – *NATO and the link between security and mass exodus*

Regional organisations such as NATO have also redefined the context within which they can legitimize collective action, such as the 1999 NATO bombardments of the Federal Republic of Yugoslavia, by broadening the notion of security to include human security. NATO's 1999 Alliance's Strategic Concept has thus considered that :

"20. [...] The security of the Alliance remains subject to a wide variety of military and non-military risks which are multi-directional and often difficult to predict. [...] Ethnic and religious rivalries, territorial disputes, inadequate or failed efforts at reform, the abuse of human rights, and the dissolution of states can lead to local and even regional instability. The resulting tensions could lead to crises affecting Euro-Atlantic stability, to human suffering, and to armed conflicts. [...]"

24. [...] The uncontrolled movement of large numbers of people, particularly as a consequence of armed conflicts, can also pose problems for security and stability affecting the Alliance. [...]" (10).

(9) See: Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991, available at: http://www.usip.org/library/pa/cambodia/agree_comppol_10231991.html; The General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, available at: http://www.ohr.int/dpa/default.asp?content_id=380; and Security Council resolutions on Darfur, e.g. 1590 (2005). There are of course many other agreements settling the conflicts in Mozambique, Afghanistan, Kosovo, etc. which include provisions on return of refugees and displaced persons.

(10) "The Alliance's Strategic Concept, Approved by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Washington, D.C. on the 23rd and 24th April 1999", NATO press release NAC-S(99)65, 24 April 1999, available from: <http://www.nato.int/docu/pr/1999/p99-065e.htm>.

C. – *The link between individual criminal responsibility and population displacement*

The securitization of the regime of international protection of refugees is also to be seen in the link which has been established between threats to international peace and security and the core crimes giving rise to individual criminal responsibility under international law, such as ethnic cleansing and genocide – the root causes of major refugee outflows. This linkage was underlined by the Appeals Chamber of the Yugoslavia Tribunal, in the *Tadić Case* (11), in which it upheld the view that the legality of its creation rested on Article 41 of the UN Charter, its establishment thus constituting one measure for the restoration and maintenance of international peace and security; it is also sustained by the 1998 Rome Statute of the International Criminal Court which recognizes "that such grave crimes threaten the peace, security and well-being of the world". The situation of Darfur which has been referred to the ICC by Security Council 1593 (2005) is a vivid illustration of this linkage between such core crimes, including sexual violence, leading to mass exodus and displacement of populations, and the need to bring to justice those responsible.

D. – *The link between security, development and migration*

In respect of migrants, it is interesting that the broadened notion of human security has been linked also with development, particularly in the framework of the Millennium development goals of the United Nations. Thus the 2005 World Summit Outcome states :

"9. We acknowledge that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing".

This has been but a short step in leading to linkages between migration and development, reflected in General Assembly resolution 58/208 of 23 December 2003, in which the Assembly decided to devote a high-level dialogue to international migration and devel-

(11) See: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *The Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §§32-36.

opment in September 2006. The emphasis is both on a human rights dimension – enhancement of the human rights of migrants, principle of non-discrimination, combating of racism and xenophobia, prevention and combating of migrant smuggling and trafficking –, a policy approach which insists on the management of migration, and inter-State and inter-organizational partnerships in so doing.

IV. – THE SECURITISATION AND CRIMINALISATION OF REFUGEES AND MIGRATORY FLOWS

The second aspect of the link between security and refugees and migrants is the securitization of refugee and migratory movements by means of responses to the perceived threats posed by these movements to the security of the State, resulting in the creation of a piecemeal and reactive set of policies and rules operating at all levels – national, regional and international. Such responses, increasingly aimed at containment of such population flows through criminalization – penalization, detention and incarceration – have been adopted outside the framework of the international protection regimes, overlooking prior existing mechanisms which balance security and humanitarian and individual concerns.

A. – *Security concerns in refugee and human rights instruments*

Security considerations have in traditional international law served as limitations on the international obligations undertaken by States and the national security exception is familiar to international lawyers. The normative frameworks which have been built up for human rights and refugee protection have therefore also been balanced by public order and security concerns.

The 1951 Convention, for example, is replete with references to the security of the asylum State. From its inception, it was accepted that it should also filter out the deserving from the undeserving, by providing its own self-contained balancing mechanisms.

The Convention includes so-called “exclusion clauses”: Article 1 (F) (a) for example, excludes from refugee status those who have committed crimes against peace, war crimes or crimes against humanity. This provision, unlike a similar clause in the UNHCR

Statute, was intended to be evolutionary and today encompasses the crimes which figure in the Statutes of the international criminal tribunals, the latest being the ICC. Article 1 F (b) concerns those who have committed a serious non-political crime prior to admission, while 1 F (c) refers to those who are guilty of acts contrary to the purposes and principles of the United Nations. This latter provision is not entirely theoretical, although intended to be applied in a restrictive fashion where Articles 1F (a) and (b) are inapplicable and, in accordance with the interpretation given by the UNHCR, to those persons forming part of the government apparatus. At any rate, this article also must be read in the light of the evolution of the Charter.

Even in its formulation of the principle of *non-refoulement*, the main pillar of refugee protection, 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)).

At the same time, Article 2 declares that each refugee has the obligation to comply with the laws of the country of asylum, including general measures for the maintenance of public order; Article 9 refers to the taking of provisional measures essential to national security in time of war, or other grave and exceptional circumstances; while Article 32 on expulsion likewise refers to grounds of national security or public order.

But the 1951 Convention weighs the interest of the individual refugee in obtaining protection from persecution against the interest of the receiving state in maintaining security and public order: humanitarian against security concerns. This is the way the Convention is read in for example the UNHCR Handbook which limits the definition of a “serious crime” to a “capital crime or a very grave punishable act”, and also includes the principle of proportionality which refers to mitigating and aggravating circumstances, *i.e.* balancing the seriousness of the crime against the severity of persecution in the country of origin.

To take another example, the OAU convention on the Specific Aspects of Refugee Problems in Africa, is particularly sensitive to the potential threats posed this time to the security of the States

members of the OAU. The preamble to the OAU Convention recalls this, as does Article 3 which adds to the provisions of the 1951 convention relating to the duties of the refugee, the prohibition to carry out subversive activities or attacks against OAU member States, although action against apartheid States was to be legitimized. This is strengthened by Article 2 (6) which requires refugees to be placed at a reasonable distance from the frontier of their State of origin.

The OAU convention, in addition, supplements the cessation clauses of the 1951 convention by including, as grounds for cessation, the commitment of a serious non-political crime outside the country of asylum after the grant of refugee status, or the serious infringement of the purposes and objectives of the Convention (Art. 1, §4 f) and g)). This withdrawal of refugee status would authorise the expulsion of such refugees regardless of whether there has been cessation of persecution in the country of origin. Finally, Article 1, §5 c) supplements the exclusion clauses of the 1951 Convention by adding as a motive for exclusion, the commission of acts contrary to the purposes and principles of the OAU Convention. On the other hand, the OAU Convention does not qualify the principle of *non-refoulement* (Art. 2 (3)). These security clauses are prevalent in other regional conventions and instruments.

The provisions of the human rights conventions are also carefully balanced against the imperatives of State security. They contain both limitation clauses attached to particular rights, as well as give the possibility to States of derogation. In the ICCPR, for example, certain rights which are relevant to refugees may be subjected to restrictions: for example freedom of movement which in the ICCPR "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant" (Art. 12 (3)). Article 4 also provides for derogability in time of public emergency except for those rights specifically labelled as non-derogable, such as the right to life, freedom from torture, etc. Equally, in both the ECHR and the American Conventions, rights may be suspended if, in the words of the latter, the "independence or security of the state is threatened" in time of war, public danger or other emergency. Moreover, aliens are

subject to distinctions: Article 13 of the ICCPR provides that an alien lawfully in the territory of a State Party may nevertheless be expelled if it is "in pursuance of a decision reached in accordance with law" and can have his case reviewed before a competent authority "except where compelling reasons of national security otherwise require".

Such security concerns in the human rights instruments are nevertheless contained: limitations are defined and conditioned, non-derogable rights have been interpreted expansively by human rights bodies, and the conditions in which States may derogate from some of their obligations strictly specified (12).

It is obvious that State application of these provisions may be restrictive and the rights of individuals not always carefully balanced against security imperatives. Domestic provisions may consider other crimes of a less serious nature, may ignore the principle of proportionality, or override individual fears of persecution (13). Nevertheless, although references to national security or *ordre public* may be vague and interpretation can only be left to the State authorities, once they are incorporated into human rights treaties they transform such discretionary choices of States into ones to which outer limits have been set. It is evident therefore that the edifice of international legal protection of individuals has reduced the "margin of appreciation" of States in determining questions of national security or *ordre public* (14).

(12) See: UN Human Rights Committee, *General Comment n° 29, States of Emergency (art. 4)*, 2001; FISHER D., MARTIN S. and SCHOENHOLTZ A., "Migration and Security in International Law", in ALEINIKOFF T.A. and CHETAIL V. (Eds.), *Migration and International Legal Norms*, The Hague, TMC Asser, 2003, pp. 87-120.

(13) See, for example, in a comparison of US law with the 1951 convention: ABRIEL E.G., "The Effect of Criminal Conduct upon Refugee and Asylum Status", *Southwestern Journal of Law and Trade in the Americas*, 1996, pp. 359-372.

(14) The European Court of Human Rights while recognising that the European Convention of Human Rights leaves the contracting parties an area of discretion, stated with reference to the emergency powers of States: "It falls in the first place to each Contracting State, with its responsibility for 'the life of (its) nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. [...] Nevertheless, the States do not enjoy an unlimited power in this respect. The Court [...] is empowered to rule on whether the states have gone beyond the 'extent strictly required by the exigencies' of the crisis [...]. The domestic margin of appreciation is thus accompanied by a European supervision", ECtHR, *Ireland v. The United Kingdom*, 18 January 1978, Series A, N° 25, §207. See also: ECtHR, *Handyside v. The United Kingdom*, 7 December 1976, Series A, N° 24; ECtHR, *The Sunday Times v. The United Kingdom*, 26 April 1979, Series A, N° 30, and ECtHR, *Christine Goodwin v. The United Kingdom*, [GC], 11 July 2002, ECHR 2002-VI.

Moreover, as Emerich de Vattel once said, 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" (15).

*B. – Domestic and regional security
provisions forged outside the context
of the refugee and human rights regime*

Immigration flows are being increasingly "securitised". The events of 9/11 in particular have had a direct impact on immigration and asylum law and policy, though sometimes used as a trigger to consolidate previous policies, measures or legislation (16). Recent migration policies, particularly in the framework of the European Union, have linked migration and refugee issues to measures against drug trafficking and terrorism, at the risk of eroding guarantees for human rights protection and affecting the legal status of immigrants and asylum-seekers. Such policies have had in particular two notable effects on the asylum regime which have been at odds with recent developments in human rights law.

The first is to restrict the scope and spatial application of the very principle that lies at the heart of human rights protection of asylum-seekers – namely the principle of *non-refoulement* – by restricting access to territory and hence to asylum-determination procedures. This has taken the form of imposition of visa and transit visa requirements, sanctions against airlines, the creation of fictions such as international airport zones, interdiction at sea, the application of measures of deterrence, including economic and detention measures, safe third country concepts, summary removal based on manifestly unfounded applications, expulsion, extradition, and accelerated refugee status procedures.

(15) DE VATTEL E., *Le droit des gens ou principes de la loi naturelle appliquée à la conduite aux affaires des nations et des souverains*, 1758.

(16) See: BROUWER E., "Immigration, Asylum and Terrorism: A Changing Dynamic. Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09", *European Journal of Migration Law*, 2002, pp. 399-424.

This is most notable at the regional European level where a process of harmonisation of laws and the construction of a special regional regime is in progress which is not entirely consonant with the universal regime, although it pays lip service to it. A series of conventional arrangements reached within the inner and outer circles of Europe – the Schengen Agreements, the 1990 Dublin Convention, the assimilation of the "Schengen *Acquis*" in the Amsterdam Treaty, the 1998 Protocol on asylum for nationals of Member States of the European Union (or "Aznar Protocol") (which states that all EU Member States constitute safe countries of origin) – reinforced by a series of European Council Regulations and Directive (17), and bilateral and multilateral readmission agreements concluded with transit States and countries of origin, have institutionalised these *ad hoc* attempts to restrict access to national territory and to refugee determination procedures. At the same time, enlargement of the European Union has expanded eastwards and southwards the frontiers requiring policing, while controls have been set up at points of origin of refugee flows. Thus in 1996 the EU, but also the United States and other countries, have adopted a policy which allow them to post airline liaison officers abroad for purposes of verifying travel documents (18). This is a paradoxical extension of territorial jurisdiction, intended precisely to limit jurisdiction and hence international obligations.

Interdiction of ships suspected of carrying illegal migrants has also taken on particularly dramatic proportions. While entitled to do so on the basis of certain conditions under the Law of the Sea in their contiguous zone and territorial waters, States have had to increase their cooperation in guarding against unauthorized entry by sea by taking measures on the high seas. Prohibited from unilaterally accosting the ships of other States, with the exception of

(17) See, *inter alia*: Council Regulation (EC) N° 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("Dublin II"), *Official Journal*, 2003, L 50, p. 1; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal*, 2004, L 304, p. 12. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *Official Journal*, 2005, L 326, p. 13.

(18) See: FISCHER D., MARTIN S. and SCHOENHOLTZ A., "Migration and Security in International Law", *op. cit.*, pp. 92-93.

pirate ships or ships without a nationality or flying several flags, *ad hoc* consent from the flag States of the vessels concerned has had to be sought or bilateral treaties or memoranda of understanding drawn up. International regulation of such refugee-related protection issues as stowaways, rescue at sea, disembarkation, or application of principle of *non-refoulement*, has been piecemeal and unsatisfactory (19).

The United States has asserted certain unilateral claims to interdict ships suspected of carrying terrorists. Its Courts have also given it backing in restricting access of asylum-seekers to its territory. In the United States Supreme Court decision in *Sale v. Haitian Centers Council Inc.* (20) the Court narrowed the spatial scope of the 1951 Convention in condoning the interception on the high seas by US customs authorities of Haitian stowaways or boat people, on the basis that: "[...] a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it though no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions". This was not the interpretation given by UNHCR to Article 33 in its *amicus* brief in this case. A foremost human rights authority, Theodor Meron, while recognizing that: "Most of the provisions of the Refugee convention, in contrast to those of the political Covenant, may be primarily territorial in character, in the sense that they apply to claimants who have reached the soil of the state of asylum", nevertheless concludes that "keeping in mind Article 33 of the Refugee Convention – when a state undertakes to exercise its jurisdiction to enforce its laws on the high seas by returning potential asylum seekers to the country they are fleeing, the Convention, and not only its spirit (as the Court suggested) is breached" (21).

(19) Apart from UNCLOS, the IMO has promoted a number of somewhat relevant conventions: the Convention on Facilitation of International Maritime Traffic (FAL Convention), the International Convention for the Safety of Life at the Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR). UNHCR has produced a series of background notes and EXCOM conclusions on the issue.

(20) United States Supreme Court, *Sale v. Haitian Centers Council Inc.*, 113 S.Ct.2549, 1993, p. 2565; and *International Legal Materials*, 1993, p. 1039.

(21) MERON Th., "Extraterritoriality of Human Rights Treaties", *American Journal of International Law*, 1995, pp. 80-81.

Interdiction at sea which prevents potential asylum-seekers from accessing refugee determination procedures has resulted in particularly dramatic instances. One will remember the Tampa with its 460 refugees trapped aboard a Norwegian container cargo ship in the most inhumane conditions offshore from Australia in September 2001. But as a result of interdiction at sea, refugees are taking increasingly greater risks to reach the shores of asylum countries. The stories of African refugees drowned when their unseaworthy vessels capsized or forced to jump into the sea at gun point by unscrupulous crew members and smugglers are countless. Only weeks after the Tampa, and the events of 9/11, 353 men, women and children mainly from Afghanistan and Iraq, drowned seeking refugee on Christmas Island in Australia, in the middle of an election campaign in which one of the main issues was the protection of borders through draconian new anti-refugee measures, and the deployment in the area of a sizeable Australian navy to intercept refugees.

Policies of containment have also included the building of walls: around the two Spanish enclaves at Ceuta and Melilla, at the frontiers of the EU, or along the Mexican/US border, the establishment of refugee detention centres such as that of Sangatte positioned at the point of entry of the Channel, or the debatable on-going proposals concerning "in-region asylum processing", "regional protection zones" and "transit processing centres". These are all part of the new realities of the refugee condition (22).

These measures which lie outside the network of international protection or in a restrictive application of the 1951 Convention, have not been balanced against the needs of individuals for asylum. They go against recent developments in international human rights law which have acknowledged extension of the State's obligations to protect human rights beyond its own borders to everyone within 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), a term which has been defined as not being limited to "national terri-

(22) See: SCHUSTER L., "The Realities of a New Asylum Paradigm", *Migration, Policy and Society Working Paper N° 20*, University of Oxford, 2005.

tory" (23). Nor have they always respected the conditions for limitations of such rights such as non-discrimination, freedom of movement, *etc* (24).

A second notable development of such measures has therefore been to exacerbate the traditional distinction between aliens and nationals, which had been gradually narrowed down in human rights law, leading to the erosion of international human rights law's basic premise of universality which extends to all individuals. Recent policy and legislation in respect of asylum-seekers have sought to create a particular category of aliens in an "irregular" situation singled out for particular treatment and removed from the pale not only of refugee law but also of human rights law. 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 to disregard of the rights of refugee children or the concept of family unity.

The events of 9/11 in particular have directed State policies and legislation against aliens, eroding even further the immigration and asylum regime. But it has also particularly affected the principle of non-discrimination which lies at the core of human rights and refugee law by basing such distinctions on race, religion and ethnicity as opposed to nationality alone.

This has been most notable in the United States where the Patriot Act of 2001 and other policies and legislative measures in response to 9/11 have had dire legal and social ramifications, targeting specific American and foreign communities of Arab and South Asian descent, curtailing such constitutional rights as those concerning free speech and association, search and seizure, right to due process, including access to legal counsel and attorney-client

(23) See: EComHR, *Cyprus v. Turkey*, 26 May 1975, *Decisions and Reports*, N° 2, 1975; ECtHR, *Loizidou v. Turkey*, 23 March 1995, Series A, N° 310, p. 24; *Vlastimir and Borica Bankovic and Others v Belgium et al.*, N° 52207/99, 12. December 2001, 41 *International Legal Materials* 517, 2002 and UN Human Rights Committee General Comment 24, *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 1994, U.N. Doc. CCPR/C/21/Rev. 1/Add. 6 (1994), §12.

(24) BROUWER E., "Immigration, Asylum and Terrorism: A Changing Dynamic. Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09", *op. cit.*, pp. 399-400.

privilege, detention of suspects for specified periods without charge or even indefinitely, and introducing secrecy provisions preventing detainees from having access to the evidence, as well as confiscation of property of any foreign person, including a resident alien, or organization that has been determined to plan, authorize or aid in attacks against the United States (25).

In the field of immigration and asylum the Patriot Act has also had far-reaching effects. It adds new categories of non-citizens prohibited from entering the US or subject to removal from the United States by amending the Immigration and Nationality Act. It thus prohibits the entry into the US of any non-citizen who represents or is a member of "a political, social, or other similar group whose public endorsement of acts undermines United States efforts to reduce or eliminate terrorist activity" (Section 411). Terrorist activity has been defined as including any crime that involves the use of a "weapon or dangerous device", while the term "terrorist organization" includes groups of "two or more individuals, whether organized or not" who are engaged in specified terrorist activity.

The Government has used immigration procedures such as preventive detention under harsh conditions to pursue criminal investigations and prosecutions, in ways which are not permitted in either immigration law or international law, on the basis of immigration charges which include even minor visa violations, the use of criminal databases in the application of immigration laws, *etc* (26). It is significant in this context that the Immigration and Naturalization Service has been relocated to the Department of Homeland Security in 2002.

(25) See: SEKHON V., "The Civil Rights of 'Others': Antiterrorism, The Patriot Act, and Arab and South Asian American Rights in Post-9/11 American society", *Texas Forum on Civil Liberties and Civil Rights*, (2003), pp. 1-32; AKRAM S.M. and KARMELEY M., "Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States. Is Alienage a Distinction without a difference?", *UC Davis Law Review*, 2005, pp. 609-699, particularly at 632-635 on the effects of the Patriot Act.

(26) See: U.S. Department of Justice, Office of the Inspector General, "The September 11 Detainees: A review of the treatment of aliens held on immigration charges in connection with the investigation of the September 11 attacks", April 2003; Amnesty International, "United States of America: Amnesty International's concerns regarding post September 11 detentions in the USA", March 2002. The UK, amongst others, has also increasingly used detention and curtailment of due process rights in response to perceived threats post-September 11. See: *A(FC) and others (FC) v. Secretary of State for the Home Department*, House of Lords, 2004, in which the Lords held that section 23 of the *Anti-Terrorism Crime and Security Act 2001* (ATCSA), which permitted the indefinite detention without trial of foreign nationals suspected of international terrorism, was incompatible with the Human Rights Act and the ECHR.

One pernicious effect is that policies of racial profiling have targeted persons on the basis of their ethnicity not nationality, as illustrated by the case of Maher Arar, a Canadian citizen, transiting through New York, who was detained and interrogated then deported to Syria, a country he had originally left, where he was imprisoned and apparently tortured (27). Under disparate provisions the government has targeted both citizens and non-citizens of Arab descent (28).

It has been stated that :

"A number of the post-9/11 provisions and policies have significantly altered detention procedures and practices in the immigration context. These policies have exacerbated a trend toward criminalizing immigration law, expanding the categories of mandatory detainees, reducing administrative discretion in determining release, and curtailing the immigration and federal courts from review of detention decisions".

The logic of this is claimed to be that extreme national emergencies require extreme measures which clearly outweigh the opposing interests of civil liberties (29).

C. – *The universal normative framework to address the new security threats*

To address the new threats on the international scene, an international – as opposed to a national or regional – normative framework is also being elaborated which is not necessarily refugee specific but has had a notable impact on refugee and migrants' rights, by imposing obligations on States, such as requiring the criminalisation of certain acts in their domestic law, the tightening of border controls, and inter-State cooperation, information sharing, the development of extradition rules and extraterritorial enforcement of immigration controls. What is new about these measures is that they are targeted at prevention of movement across borders of potential criminals and terrorists, tightening the controls on travel and identity documents.

(27) This has led Canada to advise citizens of Arab and Muslim countries that they should not travel to the US because they risked being removed to their countries of origin. For an overview of the story of Maher Arar, see: MAYER J., "The Secret History of America's 'Extraordinary Rendition' Program", *The New Yorker*, 14 February 2005.

(28) See on racial profiling: AKRAM S.M. and KARMELY M., "Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States. Is Alienage a Distinction without a difference?", *op. cit.*, pp. 658-672.

(29) *Ibid.*, pp. 645, 669.

These measures to enhance international security have thus come to set limitations on the rules governing migration and refugee and human rights protection. Two such developments will be referred to – that concerning the trafficking and smuggling of aliens, and measures to combat terrorism. The measures relating to narcotics trafficking, such as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, of 1988, should be mentioned in this context although it will not be elaborated on.

1. *The criminalization of trafficking and smuggling*

A normative framework has been developed to deal with migrant smuggling and trafficking in persons, especially women and children as transnational crimes. Such measures are not new and can be traced back to the slavery conventions, as well as found in the recent Convention on Discrimination against Women, and the Convention on the Rights of the Child. Two protocols now dealing specifically with this issue, supplement the 2000 United Nations Convention Against Transnational Organized Crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which entered into force on December 25, 2003, and to date has 93 Parties, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, which entered into force on January 28, 2004 and currently has 82 Parties (30).

Both criminalize the conduct in question, although definitional problems have arisen (for example in respect to the term trafficking for the purpose of exploitation, the latter encompassing sexual exploitation, forced labour, slavery, servitude or the removal of organs, and impose obligations on States for the prevention, investigation and prosecution of such acts within their borders). They include also the promotion of international cooperation for law enforcement, mutual legal assistance, and exchange of information. Finally, extraterritorial enforcement includes border controls, a framework for cooperation among the states parties in boarding and

(30) MUNTARBHORN V., "Combating Migrant Smuggling and Trafficking in Persons, Especially Women: the Normative Framework Re-Appraised", in ALEINIKOFF T.A. and CHETAIL V. (Eds.), *Migration and International Legal Norms Migration and International Norms*, *op. cit.*, pp. 151-166; FISHER D., MARTIN S. and SCHOENHOLTZ A., "Migration and Security in International Law", in *ibid.*, p. 94.

searching suspected vessels and the imposition of sanctions on carriers if caught in violation.

One of the biggest hurdles has been the protection of the rights of the victims, for it was important to ensure that migrants not be liable to criminal prosecution for the fact of having been trafficked or smuggled, as well as to protect refugee rights under international law. The balance to be struck between the objective of eradicating smuggling and the protection of the victims proved to be one of the thorny problems to be resolved during the drafting of the conventions. The Protocol on Trafficking goes further than the Protocol on Smuggling with specific provisions in that respect. Such protective measures include the right of the victims, in appropriate cases, to remain in the territory of the transit or destination country, and their access to legal assistance and counselling. There is also a guarantee for the rights of refugees in Article 14 (1): "Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights and in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of refugees and the principle of *non-refoulement* as contained therein". This would imply their access to determination procedures. But such commitments have been seen as weak ones and the victims of trafficking and smuggling come within the net of domestic legislation and immigration laws which have no adequate provisions for their protection. As undocumented aliens, they are classified as illegal migrants subject to fines and imprisonments, may be subjected to domestic anti-prostitution laws or seen as infringing juvenile justice legislation. They are also liable for prosecution under the laws of their countries of origin if for example, they have infringed exit visa requirements (31).

These conventions have been reinforced by a series of regional instruments (32).

(31) See: MUNTARBHORN V., "Combating Migrant Smuggling and Trafficking in Persons, Especially Women: the Normative Framework Re-Appraised", *op. cit.*

(32) *Ibid.*

2. Measures to combat international terrorism within the United Nations framework

Terrorism is not new. A series of conventions had been adopted outside the framework of the United Nations in relation to offences against aircraft and ships, but normative efforts in the field of terrorism subsequently shifted to the UN, bringing the total number of universal conventions on terrorism to 13 (there are a further seven regional treaties). The General Assembly has adopted numerous declarations on terrorism (33). Its Ad Hoc Committee established in December 1996 is also currently working on a comprehensive Convention on international terrorism which aims, *inter alia*, to provide a definition of terrorism.

a) The adoption of Security Council Resolution 1373

The events of 9/11 triggered new approaches to international terrorism and placed the question squarely on the agenda of the Security Council. In previous years the Council had dealt with State terrorism in its resolutions on Libya, Sudan and Afghanistan. However, Security Council Resolution 1373 (2001) on the prevention and suppression of the financing of terrorist acts (34) departs

(33) See, for example: GA Res.49/60, Declaration on Measures to Eliminate International Terrorism; GA Res.51/210; GA Res.54/164; GA Res. 56/261, Plan of Action against Terrorism, A/RES/57/27, A/RES/58/81; A/RES/59/46.

(34) In SC Res.1373 (2000), §1, the Council decides, *inter alia*, that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

from traditional sanctions resolutions. The measures laid down may be seen as preventive measures, and are treated as administrative measures in some countries, but they also have penal connotations, since they impose not only a duty to freeze all funds and other financial assets of persons who commit or attempt to commit terrorists acts or support such activities, as well as prohibit funds from being made available for the benefit of such persons, but also provide for the criminalization of certain acts in the domestic laws of States. The target is general and impersonal, and, apart from the lists drawn up by the sanctions committee established by Resolution 1267, leaves it to implementing States to designate the entities that are targeted and, in the absence of a definition of terrorist acts, to improvise around their own particular brands of terrorism. The legislative nature of the resolution is evident from its general and open-ended nature and from the fact that States are called on to implement provisions similar to those found in conventional instruments, such as the UN Convention on the Financing of Terrorism, outside of any conventional obligations.

The Resolution has a potentially serious impact on asylum and migration law. It calls on States to take appropriate measures, in conformity, *inter alia*, with relevant human rights standards, to refuse the grant of refugee status to those who have "planned, facilitated or participated" in terrorist acts. It requires States to "Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents and through measures for prevent counterfeiting, forgery or fraudulent use of identity papers and travel documents" (35).

(35) Paragraph 2(g). Paragraph 2(c) reads as follows: "Decides also that all states shall [...] Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens".

Paragraph 3 reads as follows: "Calls upon all States to:

(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".

See also: § 5 (f) of the Declaration on Terrorism annexed to GA Resolution 49/60 which also concerns the granting of asylum – this resolution is of course not mandatory as such.

This resolution is mandatory for UN member states and hence for States parties to the 1951 Convention. If they are to act in conformity with the Charter, they will also have the obligation to interpret the exclusion clauses of the Convention as also the measures to be taken to grant refugee status in such a manner as to put into effect the resolution of the Council. This is not necessarily positive in so far as there is as yet no universal definition of terrorism and that the link which is made between asylum and terrorism is open to abuse. In declaring in paragraph 5 that acts of international terrorism are contrary to the purposes and principles of the United Nations, the Council appears to settle a debate as to where and how the exclusion clauses should take terrorism into account. In any case, any conflicts between the resolution and the 1951 Convention can only be resolved in favour of the primacy of the former in accordance with Article 103 of the Charter. The resolutions of the Security Council therefore may have a decisive impact on the application and interpretation of the exclusion clauses of the convention. The Security Council has followed Resolution 1373 with a whole series of other terrorism resolutions (36).

b) Implementation of Resolution 1373 and individual rights

States also have an obligation to implement the resolution in their domestic order to enforce its provisions by national legislative, executive and judicial bodies. Moreover, SCR 1373 has been used as a justification of, even as an obligation to adopt, extra measures to safeguard internal security. At the same time there are wide disparities in the domestic definitions of terrorism and acts of international terrorism.

It is greatly difficult to disentangle the various strands of the measures to combat terrorism adopted in domestic legal systems: those in implementation of Resolution 1373 (2001), measures taken more specifically against Al-Qaida and the Taliban under Resolutions 1267(1999), 1333 (2000), and 1390 (2002), obligations undertaken under treaties within the framework of a UN international strategy against terrorism, or of regional organisations, such as the web of EU Common Positions and EC Regulations on the combating of terrorism, the 1999 OAU Convention on the Prevention and

(36) See for example: S/RES/1566 (2004), on strengthening efforts to combat terrorism.

Combating of Terrorism, or the Declaration on Combating Terrorism and Action Plan adopted at the November 2001 regional meeting of Heads of States of Central, Eastern and South-Eastern Europe. States have also adopted measures independently, either in the immediate aftermath of the terrorist attacks of September 11, 2001 or to combat particular domestic forms of terrorism. The measures adopted by the United States to combat terrorism have not been the direct result of implementation of Security Council resolutions, but were adopted well before. These measures cover a wide range of legislative measures, including in the fields of information, money-laundering, drug-trafficking, illegal migration, nuclear and chemical/biological proliferation.

For EU Member States, implementation has been the result of co-ordination by EU member States over a range of measures. Security Council Resolution 1373 was implemented within the EU on the basis of a Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism and EC Regulation 2580 (2001) on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, adopted on the same day. Both of these have been subsequently updated or amended. The EU has adopted its own definition of the term "terrorist act" under the Council Framework Decision of 13 June 2002 on combating terrorism (thus filling the vacuum left by Resolution 1373 (2001)).

The link between terrorism and refugees is made in Council Directive 2004/83/EC of 29 April 2004 on Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection, and the content of the protection granted. Thus in Recital 22, the EU confirms the position of UN resolutions relating to measures combating terrorism that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations"; acts of terrorism are thus included by implication in Article 12. 2 c) on exclusion from refugee status of persons committing acts contrary to those purposes and principles.

The EU has also drawn up its own lists of "persons, groups and entities involved in terrorist acts" targeted by its measures, which

may include lists of names designated by the Security Council and Sanctions Committee, and provided its own measures calling for the freezing of funds and economic resources belonging to such persons, groups and entities. The measures relating to the freezing of funds called for in Security Council resolutions were implemented by EC Regulation 2002/881/EC based on Common Position 2002/402/CFSP, both adopted on 27 May 2002.

A detailed picture of the way in which Member States have implemented Resolution 1373 may be found in their reports to the Counter Terrorism Committee (CTC) (37). These reports portray vividly the extent of the web of measures – executive, legislative, judicial – in which individuals may now find themselves entrapped with no possibility of recourse. Major problems and controversies have also arisen in relation for example to the far-reaching extension of powers of intelligence agencies and police in data gathering which threaten the right to privacy, and many of the due process rights.

Security Council Resolution 1373 (2001) has raised important questions of due process which have rekindled the debate over the limits to the powers of the Security Council. The consolidated lists of individual targets of sanctions measures, drawn up by the 1267 Committee and based on designations by the intelligence services of particular member States, lack transparency and have raised a serious debate over the safeguard and protection of individual rights in sanctions implementation, such as the right to a fair and public hearing for those who are listed, and the lack of legal procedures for de-listing.

The need to protect human rights in the struggle against terrorism has been highlighted by the UN Secretary-General and the UN High Commissioner for Human Rights (38). Other human rights bodies at the United Nations have also drawn attention to the dangers inherent in the indiscriminate use of the term "terrorism" and expressed alarm at the consequent threats that anti-terrorism legislation and policies poses to the enjoyment of virtually all human rights – civil, cultural, economic, political and

(37) See: http://www.un.org/Docs/sc/committees/1373/submitted_reports.html.

(38) See: UNHCHR, *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, 2003, <http://www.unhcr.ch/html/menus6/2/digest.doc>.

social (39). The Human Rights Committee, in reviewing individual State reports under the ICCPR, has stressed that legislation enacted pursuant to Security Council resolution 1373 must be in conformity with the Covenant. The Policy Working Group on the United Nations and Terrorism established by the Secretary-General in October 2001 (40), has warned United Nations organs that:

"counter-terrorism can be used to justify acts in support of political agendas... Labelling opponents or adversaries as terrorists offers a time-tested technique to de-legitimize and demonize them. The United Nations should beware of offering, or be perceived to be offering, a blanket or automatic endorsement of all measures taken in the name of counter-terrorism".

The problems arising under the pretext of combating terrorism that have been identified by United Nations bodies include:

- (i) the targeting and discrimination of vulnerable groups on the basis of origin and socio-economic status, in particular migrants, refugees and asylum-seekers;
- (ii) the infringement of non-derogable rights and the non-respect of the conditions for measures of derogation;
- (iii) the extradition of terrorist suspects to countries where they might be subject to torture or capital punishment;
- (iv) legislation based on designations made by foreign countries of organizations as terrorist organizations, without examining that designation on its merits.

The particular rights identified as being particularly under threat (41) include:

- (i) liberty and security of the person;
- (ii) freedom from torture and other inhuman or degrading treatment;
- (iii) freedom of expression and of peaceful assembly and association;
- (iv) a fair trial and right to a judicial determination on the lawfulness of detention;

(39) See *supra*, note 5; Report of the chairpersons of the human rights treaty bodies on their fifteenth meeting at Geneva, 23-27 June 2003, *Effective Implementation of International Instruments on Human Rights, including reporting obligations*, <http://www.unhcr.ch/html/menu2/finalreport15th>; Report of the Secretary-General on *Protection of Human Rights and Fundamental Freedoms while countering terrorism*, UN Doc. A/58/266, 8 August 2003.

(40) UN Doc. A/57/273; UN Doc S/2002/875.

(41) See: "A Human Rights Framework for Responding to Terrorism", Open statement to the 2002 Commission on Human Rights, by, *inter alia*, Amnesty International and the International Commission of Jurists, <http://www.fidh.org/justice/lettres/2002/opnstat2703a.htm>.

(v) to seek and to enjoy asylum and not to be forcibly returned to countries where people are at risk of suffering serious human rights abuses.

This exercise of the powers conferred upon the Council under Chapter VII raises a serious problem of accountability of the activities of a political organ of the United Nations which has been under debate for some time. Moreover, it underlines the possibility of conflicts between Security Council resolutions and human rights which are considered non-derogable or *jus cogens* rights, where deportation of individuals suspected of terrorist activities to countries where they may face torture may infringe the prohibitions under Article 3 of ECHR or Article 3 of the UN Convention on Torture.

c) Remedies for individuals

At the same time, there is little opportunity under human rights mechanisms, to review such measures. The High-Level Panel on Threats, Challenges and Change stated: "The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions" (42).

Implementing Security Council resolutions in domestic law may therefore raise important constitutional problems and issues of incompatibility with fundamental rights and freedoms. Nevertheless, individuals have not easily found remedies in domestic and regional courts. While Courts have had to address the tensions which have arisen between the mandatory nature of Security Council resolutions and fundamental rights, particularly those of due process, there is an increasing perception at the international and regional levels (evidenced, for example, in the decisions of the European Court of Justice (43)), that Security Council resolutions are aspects of international public policy in fulfilment of community objectives and this is likely to be reinforced with the increase in ter-

(42) Report of the High-Level Panel on Threats, Challenges, and Change, *A More Secure World, Our Shared Responsibility*, 2 December 2004, UN doc. 1/59/666, §153.

(43) See: ECJ, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and others*, Case C-84/9530, 30 July 1996, *ECR*, 1996, p. I-3953.

rorist threats. So far, therefore, courts have not been willing to challenge head on the legitimacy of the Security Council resolutions. This situation may change in the near future to the extent that targeted sanctions and the resolutions concerning terrorism may lead to more individual challenges before domestic and regional courts since the universal nature and scope of recent Council resolutions now affect individuals the world over.

Cases brought before the Court of Justice of the European Community illustrate the reluctance of judicial bodies to challenge the measures implementing Security Council resolutions. An action against the Council was brought before the Court of First Instance by Jose Maria Sison (44); the applicant, who had been granted asylum in the Netherlands, sought the annulment of Council Regulations and Decisions pursuant to which he had been black-listed, as a past member of the communist party of the Philippines. His complaint related to the refusal of the Council to allow him to access documents relating to Council decisions concerning the fight against terrorism. The Court dismissed his application as unfounded, stating, *inter alia*, that (§77):

"it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains relevant and enables effective action to be taken. Consequently, disclosure to the public of the document requested would necessarily have undermined the public interest in relation to public security".

The cases of *Kadi* and *Yusuf* before the European Court of First Instance (45) demonstrates even more strikingly, the lack of legal remedies for individuals, in particular aliens, caught up in the mesh of terrorist legislation. Both Yusuf and Kadi, whose assets were frozen as a result of being listed by the 1267 Sanctions Committee, challenged the legality of the EC regulations implementing the Security

(44) See: European Court of First Instance (Second Chamber), *Jose Maria Sison v. Council of the European Union*, Joined Cases T-110/03, T-150/03 and T-405/03, 26 April 2005; the case is on appeal.

(45) European Court of First Instance, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, *Yassin Abdallah Kadi v. Council and Commission*, Case T 306/01 and 315/01, 21 September 2005. In the previous related case of *Aden and others v. Council and Commission* before the European Court of First Instance, the requested provisional measures were refused in a decision of 7 May 2002; Aden and Ali, the two individuals concerned, were however then struck off the list at the request of Sweden in August 2002. See: DE WET E. and NOILKAEMPER A., "Review of Security Council Decisions by National Courts", *German Yearbook of International Law*, 2002, pp. 169 and 177-178.

Council resolutions, on the grounds that these violated their human rights, particularly their right to property, their right to a fair trial and their right to an effective remedy. The Court however dismissed their complaints on the basis of the primacy of Security Council decisions under Article 25 of the UN Charter under which member States were bound to carry out the decisions of the Security Council and Article 103, under which the obligations of the member States under the Charter prevail over any other international agreement. Nevertheless, the Court did look into the question of whether the decisions of the Council infringed norms of *jus cogens* – the only limits which could be brought to bear – although it found that the Council had not infringed any such norms. The Court also balanced individual rights against the importance of the measures taken to counter terrorism. Finally, the Court considered that the 1267 Committee had itself provided for certain procedures for delisting, although these were not judicial procedures and more akin to diplomatic protection.

While certain moves have been made to introduce a modicum of due process for targeted individuals at the international level (46), these remain at the level of diplomatic and political initiatives.

V. – CONCLUSION

Two contradictory developments have emerged from the link which has been forged between security on the one hand and refugees and migrants on the other.

The first has to do with one of the most significant developments in international law – the creation and expansion of a domain of general or public interest, underlying which has been the emergence of a core of legal norms, including basic principles of human rights, 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. It is also accepted that their violation may create responsibility *erga omnes*, which implies a deviation from the bilateralism and consensualism characterizing traditional rules of international law. This develop-

(46) See, for example, Swiss and Swedish initiative in: *Strengthening Targeted Sanctions through Fair and Clear Procedures*, Watson Institute, Brown University, March 2006.

ment has been reflected in the way the notion of security has been widened to include the concept of human security. Thus gross violations of fundamental norms of human rights and humanitarian law at the origin of mass exodus have come to be considered as threats to the very security of the international legal order. It is also illustrated 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 plain therefore that the international protection of refugees and other vulnerable groups has been placed within a collective security framework and become, as a result, a matter of concern for the international community as a whole.

However, at the same time as the concept of human security calls for the erosion of the concept of state sovereignty – at least in terms of countries of origin – and opens the way to intervention by States and the international community to protect individuals at the mercy of their own governments, the movements of peoples towards destination countries has been met by a reinforcement of that last fortress of State sovereignty which is the right of the State to decide who to admit and who to expel. Faced with the novel threats posed by globalization, in particular organized crime and terrorism, States have focused on enhancing their security through the development of a piecemeal security framework, both policy-oriented and normative, operating at the national, regional and international levels, including through international organisations. These recent measures adopted outside the international protection regimes for the individual, and in the name of State, as opposed to individual, security, have resulted in an international legal system based on reaction and coercion, encroaching on, and seriously threatening the erosion of, these protection regimes. This is particularly evident in the “war” against terrorism where, paradoxically, the actions of non-state actors have triggered responses which have impeded the move toward what the International Criminal Tribunal on Former Yugoslavia, in the *Tadic* case, referred to as a “human-being-oriented approach”. Thus the developments since 1945 to make States accountable for the treatment of individuals on their territory or within their jurisdiction, through the limitations of human rights law or refugee law have been stalled and individual remedies have become slim or non-existent.

This has led us back to a world dominated by (some) States in which the rights of individuals in their various capacities, including as refugees, migrants or ethnic minorities, have been superseded by the imperatives of State security. The tension between the need for security of States and the need for protection of individuals has been exacerbated and the balance which the international human rights protection regimes have sought to maintain between the two sets of interests risks being tipped in favour of the former.

Current State policies towards aliens, be they refugees or unwanted migrants, in particular those taken in the context of the “war” on terrorism, are leading to a very disquieting paradox. The fight against international terrorism has been proclaimed to be not just a matter of security, but one of upholding universally shared values: these include respect for the dignity of the human being and respect for those rules which are necessary to uphold the very fabric of international society. But through 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, or as potential terrorists, this very platform is being eroded; the net result being that certain individuals may find themselves outside the orbit of the expanding protection given by international human rights law to individuals in general.

In its recent Advisory Opinion on the Wall, the ICJ has addressed this contemporary challenge. In countering Israel’s justification of the construction of a wall in the occupied Palestinian Territories on the grounds of self-defence against terrorism on the basis of Security Council resolutions 1368 and 1373, the Court stressed that:

“The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law” (47).

This echoes the Security Council itself which has underlined that in implementing the measures it has outlined, States are nonetheless to remain within the bounds of international law, including human rights and refugee law.

(47) ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 9 July 2004, §141.