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The state of asylum: democratization, judicialization and evolution of refugee policy in Europe

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Introduction[1]

In May 2001, at the very start of the UK election campaign, the British Prime Minister Tony Blair wrote an article in *The Times* outlining his government's intention to seek reform of the 1951 Geneva Refugee Convention. 'The UK is taking the lead in arguing for reform', he stated, 'not of the convention's values, but of how it operates'. Reform was necessary, according to Blair, in part to ensure, that 'those who are entitled to benefit from the provisions of the 1951 Convention are dealt with swiftly through quick decisions and an effective system for returns.'[2]

For many observers, Blair's statement, which reiterated earlier calls by the British Home Secretary[3], and controversial proposals mooted by the Austrian government in 1998[4], represented the inevitable culmination of the restrictive practices towards asylum that had emerged across Europe since the mid 1980s. Reform of the Convention was widely viewed as the end point in a teleology of restriction: a single, common thread ran from visa controls, to carrier sanctions, on to safe third country arrangements, to airport liaison officers and, ultimately, to the emasculation of the Refugee Convention itself.

There is certainly something to this view. Since the late 1970s, all Western states[5] have resorted to increasingly restrictive measures in an attempt to reduce the number of asylum claims they receive. In particular, they have used a range of common practices – such as visas, carrier sanctions, airport liaison officers and international zones – to prevent asylum seekers from arriving at frontiers where they could claim the protection of the 1951 Geneva Refugee Convention and 1967 Protocol. The effective use of these practices has in turn exacerbated disparities in the burdens of individual states, as states of first asylum, particularly in the South, unable to insulate themselves from refugee flows, have attracted a disproportionate number of the world's refugees. Where these measures have been ineffective in reducing asylum claims (as has recently been the case with Britain), even more restrictive and punitive measures have been mooted to prevent and deter claims[6].

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[1] This paper was originally presented to the workshop, 'The Refugee Convention 50 Years On: Globalisation and International Law' organised by the Castan Centre for Human Rights Law, Monash University, Melbourne, Australia 8-9th June, 2001. I am indebted to Susan Kneebone for organizing the Workshop and to Chimène Bateman, Randall Hansen, Jim Hathaway, Andrew Shacknove and David Turton for helpful discussions on the issues raised in this paper. Research for this paper was assisted by a grant from the Canadian Department of Foreign Affairs and International Trade in association with the Foundation for Canadian Studies in the UK under the "Sustained Studies in Contemporary Canadian Issues" programme.

[2] Tony Blair, 'Immigrants are seeking asylum in outdated law', *The Times*, May 4 (2001), p. 18.

[3] *The Times Online*, 'Straw calls for asylum change', June 2001 at http://www.the-times.co.uk/onlinespecials/britain/asylum

[4] Austrian Government, "Strategy paper on immigration and asylum policy", July, 1998. Copy on file with author.

[5] In this paper I use the terms 'liberal democratic states' and 'Western states' interchangeably.

[6] In the British case this has been evident in the proposal in 2001 by William Hague's Conservative opposition to introduce mandatory detention for all asylum seekers. The opposition subsequently lost the election.

Plausible as the teleological account may appear, however, it provides an incomplete and somewhat misleading picture of recent developments in Europe in relation to asylum. Less than two years before his article in *The Times*, Blair's government had orchestrated another key development: the incorporation into domestic British law of the European Convention on Human Rights (ECHR). The Human Rights Act of 1998 effectively brought to British law a written bill of rights and significantly a duty on the state, under Article 3, to refrain from inhuman or degrading treatment.

In practice this duty has created amongst European states a potentially wide-ranging and non-derogative extension of the principle of *non-refoulement* beyond the obligations of Article 33 of the 1951 Refugee Convention. In *Chahal* v. *UK* in 1996, the ECHR found this obligation constrained the removal of an individual even when they could, under other circumstances, have been excluded from the protection of the 1951 Convention on national security grounds. Here was a new and significant development in limiting the sovereign power of the British state to exclude foreigners, albeit one to which the UK and other European states had freely consented.

It was also a challenge to a teleological account of increasing restriction. For here, in the midst of implementing and reinforcing a range of restrictive measures, the UK state committed itself to broader human rights protections against removal and deportation. How might one explain the seeming contradiction between government calls for reform of the Refugee Convention and the flourishing of other measures to restrict asylum on the one hand, and the government's consent to an expanding European human rights regime that extends the legal protections of asylum seekers on the other? To put the issue in more practical terms, how should one respond to the following question recently raised by an official from the Enforcement Section of the UK Immigration Service: Why is it that one day the Home Secretary orders the Service to increase the rate of removal of rejected asylum seekers, and the next supports the incorporation into law of human rights legislation that places new legal barriers to the return of these same people? [7]

In this paper, I will examine the relationship between increasing government restrictiveness towards asylum seekers and the growing entanglement of states in human rights law that restrains their activities. The argument I will make about the relationship between the two applies best to European states, encumbered by European and EU human rights legislation, especially after the Treaty of Amsterdam. However, much of this paper is of broader relevance to other liberal democratic states, and the examples I use will draw freely from non-European countries.

This paper contains four parts. In the first, I will locate the roots of recent restrictive policies by governments over the last 15 years in the dynamics of electoral politics, and particularly in hostile public attitudes towards asylum seekers. In the second, I will argue that the consequences of restrictive pressures emanating from the political realm have been restrained in important ways by legal developments that begin to acknowledge asylum seekers as rights-bearing subjects and vest them with important new legal

[7] Interview with an official of the UK Immigration Service conducted in May 2001.

protections. Third, I will argue that this contradiction between a restrictive politics and inclusive legal developments is best understood as reflecting a tension in the idea of the liberal democratic state. This tension manifests itself practically in the way that the growth of human rights protections for asylum seekers fuels the use by governments of restrictive and exclusionist measures designed to prevent asylum seekers arriving at their territory to access these protections. In the conclusion of this paper, I address the implications of this account of the evolution of asylum for the future of the values associated with the 1951 Geneva Convention fifty years after its birth.

The politics of restriction

In this section I aim to consider what has motivated governments across the European Union and beyond to put in place a range of restrictive measures to prevent the entry of asylum seekers to their territory since the mid 1980s. One reason is relatively obvious. Since the 1970s, there has been a sharp rise in asylum claims across European Union countries. Whereas the total number of asylum claims across Western Europe averaged no more than 13,000 annually in the 1970s, the annual totals had grown to 170,000 by 1985, and to 690,000 in 1992.

Between 1985 and 1995, more than five million claims for asylum were lodged in Western states. By 2000 the number of claims had dropped off somewhat to 412,700 for the states of Western Europe.[8] These rising numbers are related to changes in transportation and communication that enable intercontinental movement by victims of conflict and persecution, as well as those seeking improved economic opportunities in the EU. According to officials in Western governments, the links between asylum flows and what can generically be referred to as 'processes of globalization', are powerfully evident in the rise of so called 'mixed flows'[9] of immigrants: the intermingling of refugees and economic migrants. The increasing prominence of these flows has led some states to reconsider the adequacy of the 1951 Geneva Convention and to make insulation from refugee and asylum flows an appropriate option.

But rising numbers on their own fall short of providing an adequate explanation for increased restriction. To be sure, rising asylum claims may tell us what governments have been reacting to, but they do not tell us why governments have grasped with such alacrity measures designed to restrict and prevent rather than include and manage those striving for asylum. The emergence of these harsh measures appears even more difficult to understand because they seem to contradict the values by which Western societies claim to define themselves. Many scholars have pointed to a large (and growing) gap between liberal democratic values and the treatment meted out to men, women, and children desperate for entry – a gap so large that it may ultimately prove corrosive of these very values.[10]

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[8] UNHCR, *State of the World's Refugees,* 1997-1998 (Oxford: Oxford University Press, 1997) p. 145-185; UNHCR, *State of the World's Refugees 2000* (Oxford: Oxford University Press, 2000) p. 325.
[9] G. Van Kessell, 'Global migration and asylum', *Forced Migration Review*, 10, April, 2001, p. 10.
[10] For different examples of this genre, see J.H. Carens, 'The ethics of refugee policy: The problem of

Despite its importance, there has, in recent years, been relatively little systematic analysis of the motivations of European (or other Western) governments in constructing a restrictionist regime. That said, rough and ready attempts to explain state actions have not been rare. Most commonly, observers, particularly in fields of refugee studies and law, have pointed to the *character* of political leaders. Elites have been held to possess racist, conservative or unjustifiably alarmist attitudes towards the social disruption caused by the entrance of asylum seekers. Alternatively, the restictionist agenda has sometimes been seen not as a direct product of the views held by elites themselves, but of their failure to stand up to pernicious and xenophobic attitudes expressed in the media or the general public. Politicians are thus guilty of a failure of political courage or will.

It would be surprising if some of these factors did not play a role in feeding the development of recent asylum practices. Yet these explanations finding fault in the character of political leaders offer at best a partial explanation of the restrictive regime. Their limitations are revealed by the ubiquity of current restrictive practices. Every Western state faced with pressure from asylum seekers for entrance, including countries as diverse as Ireland, Sweden, Australia, Germany and the UK has implemented a common range of measures to reduce asylum claims. If one accepts character-based explanations, one seems committed to the idea that weakness of will is common to the diverse range of political leaders across these countries. This seems highly dubious.

The ubiquity of restrictive practices poses similar problems for the idea that party *ideology* explains the growth of restrictionism. Conservative governments, to be sure, have sometimes implemented harsher policies towards asylum seekers than their liberal, labour or social democratic counterparts. The Kohl government in Germany in the 1980s and 1990s and the current Howard government in Australia both introduced a raft of restrictive measures criticized by their left wing opponents. But this is hardly the rule. The Labour government in the UK has been at least as restrictive (and some would argue more so) than its Conservative predecessor[11] and Canada's Liberal government has used non-arrival measures with as much alacrity as any of its predecessors. The differences between Western governments in asylum policy have largely been rhetorical. Governments of all political hues have contributed to the establishment and consolidation of the restrictionist regime.

Explanations for the rise of restriction across the West that draw upon features of the international order offer a more plausible alternative. In a recent article, 'The Geopolitics of Asylum', B. S. Chimni argues that the growth of restrictionist practices by Western states is strongly correlated to the end of the Cold War.[12] Reiterating points previously

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asylum in Western states', unpublished manuscript on file with author (1998); H. Adelman, 'Refuge or asylum: A philosophical perspective', *Journal of Refugee Studies*, 1, 1, (1989); C. Boswell, "European values and the asylum crisis', *International Affairs*, 76, 3 (2000), pp. 537-557.

[11] On the consistency in UK asylum policy despite changes in government, see A. Bloch, 'A new era or more of the same? Asylum policy in the UK', *Journal of Refugee Studies*, 13, 1, (2000), pp. 29-42.

[12] B.S. Chimni, 'The geopolitics of refugee studies: A view from the south', *Journal of Refugee Studies*, 11, 4, (1998), pp. 350-374

made by Loescher[13] and Weiner[14] amongst others, he argues that with the demise of superpower conflict in the late 1980s, 'the refugee no longer possessed ideological or geopolitical value' for Western states, prompting these states to rethink refugee protection in a way that justified the implementation of the current 'non-entrée regime'.[15]

According to Chimni, in order to justify the movement towards a restrictive regime, states used a number of weak rationalizations for exclusion. In particular, they raised the spectre of huge numbers of Southerners making their way to the West in search of a better way of life. Furthermore, Western states claimed that refugees in the South were too numerous to be assisted through resettlement schemes and, in any respect, were not fleeing persecution and thus ineligible for protection under the Convention. These arguments were central components in what he calls the 'myth of difference: the idea that great dissimilarities characterized the volume, nature and causes of refugee flows in Europe and in the Third World.'[16]

Chimni's explanation appeals to a causal factor – the end of superpower conflict – whose impact reached far enough across states to address the ubiquity of restrictive measures. Moreover, he touches an important vein by identifying the end of the Cold War as a key turning point in the history of asylum in the West. But his explanation suffers from some important weaknesses. Notably, the onset of restrictive practices by Western states predates the end of the Cold War.

Germany, for example, was operating expedited asylum procedures and toughening up its asylum regulations by the beginning of the 1980s; Britain imposed carrier sanctions to prevent what it viewed as a rise in fraudulent asylum claims from Tamils in 1987 – a full two years before the fall of the Berlin Wall. Restrictive policies might have been given extra momentum by the changes in superpower relations, but they clearly had a life independent of these relations. Chimni concedes that restrictive policies began before the Cold War's end. However, he is vague about the effect of this admission on his account of why Western states reconceived their interests in the 1980s and early 1990s.

A more important limitation of Chimni's account is that he explains the reconstruction of the regime almost exclusively through the changing interests of state elites.[17] Elites did play a key role in ushering in the new, more restrictive paradigm (if that is indeed an accurate way of describing recent practices). But to see them as the originators this paradigm is to overlook a deeper transformation in the balance of power within Western states that occurred in the 1980s as a result of the rise of jet age asylum seekers and the

[13] G. Loescher, *Beyond charity: International cooperation and the global refugee crisis*, (Oxford: Oxford University Press, 1993)
[14] M. Weiner, *The global migration crisis: Challenge for states and for human rights*, (New York: Harper Collins, 1995)
[15] Chimni, op. cit., at 351.
[16] Ibid, at 356.
[17] Ibid, at 357. In a slightly conspiratorial way, Chimni also sees some academics as colluding with elites to propagate the "myth of difference".

end of the Cold War. This shift made domestic political actors, not least the general public, increasingly influential participants in asylum policy.

During the Cold War refugee admission was primarily a foreign policy matter for Western states. The widespread view that accepting refugees took the glitter off communist regimes made their entrance central to the goals of controlling Soviet expansion and avoiding nuclear annihilation. By portraying refugee admission as an issue of *raison d'état*, Western elites were able to carve out a significant degree of autonomy from the domestic politics of their states. Such autonomy was necessary because post War public opinion in Western states was generally xenophobic and favorable to tight entrance restrictions on both refugees and immigrants.

However, the autonomy won by elites was never complete. Even at the height of the Cold War, they often struggled to convince their electorates that accepting refugees was truly in the national interest and thus should be consented to. Public support for even the most ideologically favored entrants became highly precarious when movements of refugees began to be perceived by electorates as 'uncontrolled' or particularly large in volume, and thus a threat to border control. This was evident even in the home of the Cold War refugee, the United States. Cuban refugees were welcomed by successive US administrations from Eisenhower to Carter. Nonetheless, generous admissions policies could not withstand the rising public, media and Congressional discontent that emerged in the 1970s and climaxed with the movement of thousands of Cubans during the controversial Mariel boat lift in 1980. The tightening of Cuban entrance policy in the 1980s and 1990s was driven primarily by a *domestic* political backlash rather than any change in the ideological and strategic interests of the US state.[18]

The Cuban example speaks to a general point. The inclusiveness of Western responses to communist refugees during the Cold War period did not only depend on the preferences of state elites. The limited number of escapees from communist regimes and, crucially, the fact that most Western states incorporated refugees through resettlement programmes, were indispensable features of the inclusive regime. When, in the early 1980s, these states became first asylum countries (by virtue, *inter alia*, of 'jet age asylum seekers'), domestic discontent became difficult for governments to ignore.

Chimni is probably right to stress that after the Cold War ended, Western political elites no longer had self-interested reasons for operating inclusive asylum policies. But the end of the Cold War also did something else: it deprived state leaders of the most powerful argument they had for constraining highly restrictionist public attitudes. With the demise of communism, any government supportive of maintaining inclusive policies had to rely

[18] J. I. Dominguez, 'Cooperating with the enemy? US immigration policies towards Cuba' in C. Mitchell (ed.), *Western Hemisphere immigration and United States foreign policy* (University Park: Penn State University Press, 1992) pp. 66-67. Dominguez offers a superb analysis of the twists and turns in US entrance policy towards Cuba. See also, C. Joppke, *Immigration and the nation state: The United States, Germany and Great Britain* (Oxford: Oxford University Press, 1999); M. J. Gibney, *The ethics and politics of asylum: Liberal democracy and the response to refugees* (Cambridge: Cambridge University Press, 2002, forthcoming).

on humanitarian claims, economic needs or global security considerations to justify the entrance of refugees. None of these arguments had anything like the force for galvanizing public opinion or neutralizing domestic political opposition that the danger of nuclear annihilation or capitulation to communism did.

The rising numbers of 'jet age' asylum seekers and the end of the Cold War in the 1980s led to a *democratization of asylum policy* in Western states, with domestic political actors (the public, the media, and opposition parties) increasingly calling the tune. As democratization occurred, the springs of asylum policy shifted from *high politics* (matters of national security) to what one might call *low politics* (matters of day to day electoral politics, including employment, national identity and the welfare state). The results were not pretty. As asylum became part of the cut and thrust of domestic politics, government leaders found themselves facing more pressure to restrict entry. With little incentive to resist (for reasons I shall explain below), governments implemented an increasingly retrograde set of control measures to prevent and deter the arrival of asylum seekers.

The democratization of asylum policy also had another effect. As asylum seeking became more salient as an electoral issue, governments strove to control it through bilateral, regional and international agreements. Paradoxically, despite its move into everyday domestic politics, asylum emerged from the late 1980s as an increasingly important international issue for states. It thus achieved a new prominence in regional and global fora.[19]

This leads to my explanation of restrictive asylum policies across liberal democratic states in recent years. Most Western governments, I suggest, have enacted these policies because they perceive that it is in their interests to control (and to minimize) the number of asylum seekers their country faces. The reason why they see their interests in this way is primarily an institutional matter. Political elites believe that if they fail to control asylum, it will contribute to or cause their electoral defeat. They make this presumption because they perceive, often with good reason, that key sections of the electorate are highly restrictive and intolerant of rising numbers of asylum entrants.[20] The roots of restrictive asylum policies, then, lie in a perception by elites that the conduct of asylum policy risks exacting political costs from them. This risk has increased with the rapid growth in the number of asylum seekers seeking entry to Western states (in particular, 'jet age asylum seekers'[21]) since the early 1980s and the demise of a cogent national interest justification for accepting refugees after the end of the Cold War.

[19] In this respect, asylum has shown a different trajectory from other aspects of immigration that, according to Weiner, have shifted in recent years, from being the sole concern of ministries of labour and immigration to matters of 'high international politics, engaging the attention of heads of states, cabinets, and key ministries involved in defense, internal security and external relations.' (M.Weiner, op. cit, at 131). Asylum has remained a prominent international issue since the early days of the Cold War to the present; what has changed are the reasons for its salience.

[20] Or at least extremely volatile and likely to be inflamed by a perception that border control is lax.

[21] And "boat people" in the case of Australia, Canada and, to a lesser extent, the US.

This explanation is, admittedly, quite underwhelming.[22] It places the blame (if indeed there is blame to be placed) for the rise in restrictionism overwhelmingly on the incentive structure of electoral politics, thus offering an institutional alternative to elite-based explanations reliant on the character, political party or, *à la* Chimni, the ideological interests of elites. But it begs the question of why the pressures from the *demos* favour exclusion to the point of being hostile, indifferent, or only weakly responsive to the needs of refugees and asylum seekers.

One answer is obvious. Those seeking asylum cannot vote in the countries they wish to enter or remain in, so their preferences are unlikely to count for much in the calculations of politicians. For the preferences of asylum seekers to be represented, they usually have to be registered indirectly through the votes of citizens or, perhaps what is more common, through the activities of lobby or interest groups. To a limited extent, refugee advocacy groups, such as Pro Asyl in Germany, the British Refugee Council in the UK, the Refugee Council in Australia, and the UNHCR globally, do manage to give these interests a voice and representation they would not otherwise have.[23] However, in contrast to immigration lobby groups, who, as Gary Freeman has recently argued, can often, through 'client politics', exercise far greater influence on immigration policy than their numerical support would justify[24], refugee lobby groups are generally weak, poorly funded, short-staffed, and lack concentrated bases of electoral support. Their views and perspectives are often brushed aside by political elites with relative ease.

Now, if what I'm saying is right, the challenge for a more inclusive politics of asylum is clear, if daunting: it is necessary to reorder citizen preferences so that they take more seriously the needs of asylum seekers and, by doing so, provide governments with an incentive to implement political change. The public response to Kosovo in early to mid 1999 showed that restrictive public attitudes towards refugees are not set in stone, fixed and invariable. Within a few days of the mass exodus of Kosovars in March, a tremendous wave of sympathy of a kind unseen since the crushing of the Hungarian revolt in 1956, emerged across much of the West. The force and immediacy of the public response goaded some reluctant governments into a campaign that enabled the resettlement of over 100,000 refugees from Macedonia. Such was the strength of the public reaction across Europe that many people offered to take Kosovar refugees into their own homes.

But if the case of the Kosovars shows us the contingency of restrictionism, it is unclear what lessons it offers for a more inclusive politics. Primarily this is because it is difficult

[22] I don't believe that this is the only reason for why highly restrictive policies have emerged; simply that it is a sufficient reason for such policies. In this paper I do not address the issue of how much of a role governments play in whipping up hostility towards asylum seekers. However, I think that critics of current policies often risk exaggerating this role, and thus skimming over the institutional and ideational difficulties of creating more inclusive asylum responses.

[23] The degree of influence they exert is of course partly determined by the legislative system of the state in which they act, and, in particular, the avenues it provides for the input of advocacy organizations.

[24] Gary Freeman, 'Modes of immigration politics in liberal democratic states', *International Migration Review*, 29, 4, (1995), pp. 881-902.

to understand just what led to this outpouring of public support. I have argued elsewhere that a range of factors, including the location of the refugees in Europe, the sense of implication in their plight created by the NATO bombing, and the presence of strong cultural affinities, all played a role in connecting the Western public to this particular group of refugees.[25] However, even if we accept this diagnosis of what made Kosovars more popular than Afghans, Bosnians, or Liberians, it remains unclear how the factors enabling this sense of connection – what Richard Rorty has called, 'imaginative identification'[26] – can be replicated for other groups of refugees; or whether it is possible even in principle to replicate them.

But there is an even more daunting problem facing more inclusive asylum policies exposed by the Kosovo crisis: the fact that public support for refugees often proves to be so fleeting. In the history of European asylum policy, the response to Kosovar Albanian refugees was like a shooting star that lit up the entire night sky for a few moments, then fizzled into nothingness. Within weeks of the end of the bombing, the inclusive attitudes towards refugees had disappeared. Moreover, they had gone without leaving a trace on policy responses to refugees in general. The Kosovo crisis came and went without deep or lasting questions being raised about the adequacy of asylum policies based on restriction and exclusion.

The capriciousness of its response would appear to make the *demos* an unreliable ally in the search for more inclusive policies. And it is not surprising, then, that advocates have looked to the courts rather than the general public to seek reform of (or constraints upon) the harshest aspects of government policies. However, before turning to consider the legal realm, I want to say a little more about why the European public remains such an inhospitable base for undermining the current restrictionist regime. One major reason why inclusive public responses to asylum seekers have proven so difficult to sustain is that these responses conflict with a conception of responsibility deeply rooted in the modern state.

The bulk of the public within and beyond Europe view their state (and, derivatively, the electoral politics in which they participate), as something that exists (or at least rightly *should* exist) to advance their interests *qua* individuals and citizens rather than those of foreigners. In this account of responsibility, states are perfectly justified in implementing asylum policies that attach more weight to the potential costs to citizens associated with the entrance of refugees than the benefits accruing to those seeking asylum. This is not to say that the interests or needs of asylum seekers are of no consequence for citizens in Western states; they normally have some weight in the construction of their preferences. But when these interests or needs are in direct conflict with their own, citizens generally believe that the state is justified in giving priority to members.

How might we explain this systematic downgrading of the interests of asylum seekers and or refugees? There is good reason to see it as an essential feature of the modern state

[25] M. J. Gibney, 'Kosovo and beyond: Popular and unpopular refugees', *Forced Migration Review*, 5, September (1999) pp. 28-30.
[26] R. Rorty, *Contingency, Irony and Solidarity*, (Cambridge: Cambridge University Press, 1989) p. 190.

as political form. Historically, state leaders have taken an active role in promoting a particularistic understanding of responsibility. In order to win the support of those that they have striven to rule, elites have looked for ways of convincing reluctant, divided and diverse peoples that they have an interest in consenting to their rule. This has been the process of creating the state, in John Dunn's words, as 'ideological fiction' – of constructing a relationship of 'assumed intimacy' to replace the reality of the 'massive social distance' that separates rulers and ruled.[27] There have been many aspects to this process.[28] But all of them involve (in one form or another) attempts by the state to convince its members that it exists to further their interests and goals.

This is a difficult claim for any state to make plausible.[29] State leaders often do not have the interests and needs of their citizens at heart. And even when they do, there will always be neglected and disenchanted sections of their populations who, quite justifiably, feel that their interests do not receive the attention they deserve. How, then, can a state make this claim credible? At a very minimum, any state must convince a substantial section of its citizenry that even if their interests are not particularly high in the state's calculations, they are at least more important than those of foreigners. No less acute an observer of politics as Jean-Jacques Rousseau expressed the dynamics of this insider/outsider relationship succinctly:

> Do we want people to be virtuous? Let them start by making them love their fatherland. But how are they to love it if the fatherland is nothing more for them than for foreigners, and accords them only what it cannot refuse to anyone?[30]

States thus have a constitutive interest in demonstrating partiality to the interests and needs of their citizens and, moreover, encouraging an expectation of this partiality in those they rule over. Until we move beyond the state as the dominant form of political organization, we can expect the interests of asylum seekers to be at best a secondary consideration for electorates and governments alike.[31]

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[27] J. Dunn, *Interpreting Political Responsibility* (Cambridge, Polity Press, 1990) p. 1.

[28] For example, Rogers Smith has recently written insightfully on the 'politics of people building', that is, the way that elites attempt (within the constraints of established identities) to fashion distinct peoples from diversity in order to enable efficient rule. This process, he suggests, is of necessity an exclusive one: 'to embrace one sense of personhood and shared way of life is to reject others.' See R.M. Smith, 'Citizenship and the politics of people-building', *Citizenship Studies*, forthcoming.

[29] See J. Dunn, *The Cunning of Unreason: Making Sense of Politics* (London: Harper Collins, 2000), pp. 75-92.

[30] Quoted in M. Walzer, "Response to Chaney and Lichtenberg", in P.G. Brown and H. Shue (eds.), *Boundaries: National Autonomy and its Limits* (Totowa: Rowman and Littlefield, 1981) p. 102.

[31] An expanded discussion of these issues is contained in M.J. Gibney, *Ethics and Politics of Asylum*, op cit.

The law of inclusion

The rise of restrictionist measures over the last decades, driven primarily by electoral politics, has occurred in tandem with another development of growing significance for asylum: the advance of a human rights culture. The emergence of this culture represents the instantiation across the West of the liberal ideal that *citizens* have fundamental rights that warrant protection both from the state and from majority preferences and desires. However, the language and law of rights, embodied in domestic practices, human rights organisations, national constitutions, and international declarations and conventions have had important spill over effects for *non-citizens* within the sphere of authority of European states. This is true not least of all in the case of immigrants. As Yasemin Soysal (1995) has recently shown, in most European states permanent residents enjoy a panoply of legal rights and protections that make them difficult to distinguish under law from citizens.[32]

Recent literature from political science and sociology has been divided on the source of these developments. In one corner, Soysal and Jacobsen[33] have argued that international human rights conventions, NGO's, international organizations and the human rights norms that have proliferated since 1945 have imposed overlapping *external* constraints on the behaviour of European states towards immigrants and asylum seekers in their territory. International agreements and conventions provide sources of law that can be drawn upon by domestic courts; the language of human rights employed by NGO's and UN organizations has provided a way of expressing the entitlements and claims of immigrants independent of national citizenship.

Others scholars have been more circumspect. Through detailed examinations of European countries, and in the case of Joppke, the USA, Hansen and Joppke[34] have argued that the most influential sources of rights-based constraint on state activity are *internal* to individual states, emerging particularly from national constitutions, and from international law only when incorporated into domestic law. Accordingly, these rights based constraints should be understood as self-imposed internal limitations on state activity, rather than as the product of an external diminution of sovereignty. The last few decades, as Hansen argues, have seen a 'transfer among institutions of the state – from the executive towards the judiciary and, to a lesser degree, the bureaucracy' rather than 'a transfer from the state to the transnational arena'.[35]

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[32] Y. Soysal, *Limits of citizenship: Migrants and postnational membership in Europe* (Chicago: University of Chicago Press, 1994). Of course, legal standing is not the same as social standing. Many immigrants in Europe continue to face informal discrimination and racism on a daily basis.

[33] Ibid.; D. Jacobson, *Rights across borders: Immigration and the decline of citizenship* (Baltimore: Johns Hopkins UP, 1996).

[34] C. Joppke, *Immigration and the nation state: The United States, Germany and Great Britain* (Oxford: Oxford University Press, 1999); R. Hansen, *Citizenship and immigration in post-war Britain*, (Oxford: Oxford University Press 2000).

[35] R. Hansen, 'Migration, citizenship and race in Europe: Between incorporation and exclusion', *European Journal of Political Research*, 35, (1999), p. 428.

The differences between these two approaches are important. States without internal constraints, such as the lack of a national constitution or a bill of rights, have a great deal of discretion to engage in egregiously restrictive practices towards asylum seekers and immigrants. Joppke suggests that the UK is a case in point[36], but one could just as easily point to Australia, where, absent a written bill of rights, governments have faced few legal limitations on their mandatory detention policy for asylum seekers. Nonetheless, both 'externalists' or 'internalists' acknowledge that immigration matters across the West have been increasingly judicialized in the last few decades. As a result, fundamental changes in how liberal democracies conceive of their obligations to foreigners within their territory have occurred.

Asylum seekers have felt the implications of the recent rights revolution more slowly and with much with less force than permanent residents and, *a fortiori*, citizens. Usually lacking communal ties, they have required, in contrast to permanent residents, 'a triumph of the abstract moral over the concrete communitarian obligations', as Joppke has put it.[37] Yet they have not faced the state completely unarmed. They have been able to point to the 1951 Refugee Convention (and 1967 Protocol), which obliges states to respect the Article 33 principle of *non-refoulement*, as well as identifying a range of refugee rights that signatory states are required to recognize. The force of this limitation on state discretion has, moreover, been strongest where it is incorporated into domestic law, as it is in almost all Western countries.

The Refugee Convention is only the most obvious barrier that exists to curb the politics of restrictionism in the realm of asylum. I want briefly to outline three other developments that represent important manifestations of the new rights culture on the relationship between liberal democratic states and asylum seekers. These developments are most fully evident in Europe, but they have also been on display in Canada, Australia and the US.

The first is the development and consolidation of due process protections for asylum seekers. Since the early 1980s, across European countries, the process of refugee claims determination has moved gradually out of the realm of state discretion to independent, quasi-judicial bodies. This development has been the product of a number of factors including the extension of administrative law to cover immigration decisions in the post War period, the incorporation of the 1951 Convention into domestic law in many European countries, and impact of the ECHR which has extended the procedural rights of asylum seekers and responsibilities of European states, as well as placing these rights on a firmer footing. One consequence has been that virtually all liberal democratic states now offer, at a minimum, a standard set of procedures for assessing asylum claims. These include an initial decision by an independent arbitrator, the opportunity for appeal against

[36] C. Joppke, 'Asylum and state sovereignty: A comparison of the United States, Germany and Britain' in C. Joppke (ed.), *Challenge to the nation state: Immigration in Western Europe and the United State* (Oxford: Oxford University Press, 1998). Joppke's analysis of the UK has been weakened somewhat by the incorporation of the European Convention of Human Rights into domestic British law in 1998.
[37] Ibid., at 134.

a negative initial decision to an immigration or refugee appeals tribunal, and the possibility to appeal on matters of law to the judicial courts.

Due process protections in EU states are set to become a feature of EU law in the next few years. A European Commission proposal on 'minimum standards on procedures in Member states for the granting and withdrawing of refugee status' is currently being considered by member states. The proposal aims to establish regional standards on matters including procedural guarantees for asylum applicants; minimum requirements for the decision making process; and common standards for the application of certain concepts and practices (such as 'manifestly unfounded claims'). Due process standards will thus become entrenched at European level.

Much debate surrounds how these processes for decision-making work in practice. Advocates have justifiably pointed to the lack of legal assistance in some countries, the operation of 'manifestly unfounded' case procedures, and the (often) limited opportunities for asylum seekers to present their cases in person. Yet the convergence upon a similar set of standards across states with very different legal systems is a considerable achievement, not least for asylum seekers themselves. The gradual judicialization of refugee decision-making is even more remarkable because the 1951 Convention itself offers little guidance on how states should determine refugee claims.

A second development is the emergence of what I will call the norm of membership through residence. The twentieth century has seen numerous peacetime occurrences of the forceful return by Western states of long-term resident foreigners. Economic recession, the expiration of resident permits, or ethnic or racial hostility led, for example, to the mass repatriation of Poles from France in 1934-1935 and the deportation of 'Bracero' labour migrants from the US in 1954.[38] However, in recent years, liberal democratic states have demonstrated a reluctance forcefully to deport long term resident foreigners, even those with no legal entitlement to remain. This reluctance has been extremely well documented in the case of guestworker immigrants in Western Europe, who remained after the migration stop in the early 1970s.[39] Much less attention has been paid to the consequences of this (often implicit) norm for asylum seekers.[40]

The kinds of due process protections I outlined above, have, in combination with growing asylum claims, outdated bureaucratic processing and inadequate resources, helped to create huge backlogs in the asylum determination systems of European states, most notably in Germany in the mid 1990s, and in the UK at the current time. Indeed, it is probably fair to say that no country that offers asylum seekers the kind of due process protections outlined above has yet found a way of squaring them with speedy and

[38] P. Weil, 'The state matters: Immigration control in developed countries', *Report for the Department of Economic and Social Affairs Population Division*, United Nations, New York, (1998) p. 6.
[39] See, for example, Soysal, op cit.; Jacobson, op. cit.; and J. Hollifield, *Immigrants, markets and states: The political economy of postwar Europe*, (Cambridge: Harvard University Press, 1992).
[40] See M. J. Gibney and R. Hansen, 'Deportation and the Liberal State', Unpublished manuscript on file with the author (2001), Oxford.

efficient decision making. The UK, for example, has recently celebrated its achievement of reducing the time period for an initial decision in asylum cases to 14 months; hidden from view, however, are the large percentage of appeals that result from these decisions and extend the period before a definitive decision is reached to months if not years longer.

With asylum decisions in Europe often taking between two and eight years to reach, by the time finality is achieved, the lives of asylum seekers have often moved on considerably. They may have married, established a family, attained a permanent job, and generally established deep connections with their host country. In the face of these connections, they have become *de facto* members and, accordingly, the courts and governments are often reluctant to deport them. The result is the reinforcement of a norm of membership through extended residence.[41]

Evidence for this norm can be derived from government practices. In the UK, for example, the government recently announced in parliament that asylum seekers with children who had been in the country for more than seven years would not be removed. Most other states have a cut-off period that ranges from 5 to 10 years after which the removal of overstayers or illegal entrants, is a low priority.[42] However, *ad hoc* and informal practices protecting long staying asylum seekers (and other immigrants) are increasingly supported by immigration rules and legal jurisprudence.

In the Netherlands, those whose asylum claims take more than three years to process can claim permanent residence. International human rights law can also reinforce the norm. In Canada, the Supreme Court decided in *Baker v Canada* 1999, that under the Convention on the Rights of the Child, the 'best interests of the child' must be taken into account in deportation and removals proceedings.[43] The presence of a child in school in Canada, and the disruption deportation would cause, could, under such rulings, provide a significant barrier to deportation.[44] Article 3 of the ECHR in Europe may also provide similar constraints on the ability of states to remove those who have been resident in the state for an extended period, if that removal can be shown to constitute 'inhuman or degrading treatment', though jurisprudence is inconclusive as yet in this regard. Other articles of the ECHR, such as the right to a family life, may also prove important future sources of jurisprudence. The consequences of this new norm are one reason why most Western states have had very low rates of return for rejected asylum seekers in recent years.[45]

A third significant development is the emergence of new legal protections against *refoulement* that complement (and, some observers fear, replace) the 1951 Geneva Convention. The impact and development of these protections are probably most

[41] Ibid.
[42] Interviews with officials from the Immigration and Refugee Board (IRB) and Citizenship and Immigration (CIC) Canada, December 2000.
[43] Interview with an official from the IRB, Canada, December 2000.
[44] Ibid.
[45] Gibney and Hansen, op. cit.

developed in Europe, where as I mentioned above, the European Convention on Human Rights places legal barriers on the return of foreigners to territories where their human rights would be threatened, even if the foreigners in question are ineligible for refugee status. There have, of course, long been forms of subsidiary status (ELR, Duldung, B-Status) offered by states to individuals and groups of *de facto* refugees who fail to attain Convention status. But the impact of new conventions like the ECHR, the Convention Against Torture (CAT) and the EU's new Charter of Fundamental Rights and Freedoms (which recognizes a right of asylum) is that these protections against *refoulement* become enshrined into international and, in many cases, national law.

Some of the most important jurisprudential developments have come through the ECHR. The European Commission of Human Rights found in *Ahmed v. Austria* 1995 that a person who loses refugee status because of the commission of a serious crime in their country of asylum is still protected from deportation or return home under Article 3 if they would face a real risk of torture, inhumane or degrading treatment or punishment. In *Soering v. UK* in 1989, the extradition of a fugitive to the US was deemed to violate Article 3 because the individual concerned was likely to face many years on 'death row'. The case of *Chahal v. UK* added a new dimension to ECHR protection by finding that *refoulement* is not justifiable even when the person concern might pose a threat to the national security of the state of asylum.

Many questions are raised by the expansion of protection against *refoulement*. What entitlements should those protected by the ECHR or the CAT have other than the right not to be removed? Some fear that new forms of protection, if used as a substitute for the Convention refugee status, gives states too much discretion in determining the civil, political and economic rights that refugees and other protected peoples will enjoy under subsidiary protection arrangements. This has been a common criticism made of the temporary protection arrangements made for Bosnians and Kosovars in Europe. Others are concerned that the development of regional Conventions and agreements (in Europe in particular) risk making the 1951 Convention redundant, thus severing the golden thread (already somewhat frayed to say the least) that currently connects the world's poorest and the world's richest states in their dealings with refugees. For others still, the growing constraints on expulsion and deportation seem to be of most benefit to those guilty of serious crimes rather than those 'deserving' of asylum.[46] These concerns aside, the developments outlined here have not only multiplied the resources that asylum seekers might potentially have to gain protection, they have given trump cards to the courts at national and European level by countering some of the restrictive tendencies that emerge from electoral politics.[47]

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[46] The concerns are even greater when one believes that there is a risk that restrictions on removal or deportation might *attract* serious criminals to a country of refuge. Canada is currently wrestling with the ethical, political and legal dimensions of this problem, not least in terms of the question of returning alleged or convicted criminals to face the death penalty in the US. See J. Brooke, "Canada's haven: For notorious fugitives, too?", *New York Times*, December 29 (2000), p. A10.

[47] A very useful discussion of the expanding legal protections against *refoulement* (and their practical efficacy) can be found in, H. Lambert, "Protection against *refoulement* from Europe: Human rights law comes to the rescue", *The International and Comparative Law Quarterly*, 48 (1999), pp. 515-544.

Theoretical and practical tensions in the liberal democratic state

These are key developments in pruning back and restraining some of the worst effects of restrictive practices in recent years. To be sure, they do not signal that asylum seekers are adequately protected within liberal democratic states, less still that they have become full rights-bearing subjects. In Europe and beyond, many asylum seekers are still likely to face detention, be denied the right to work for extended periods, and face harsher (and more humiliating) welfare regimes than permanent residents or citizens. Recent legislation in the UK, for example, the Asylum and Immigration Act of 1999, enabled the government to operate a dispersal system for asylum seekers, and introduced vouchers as a substitute for cash payments for welfare support.

The legal gains of asylum seekers thus have to compete with the strong exclusionary measures and pressures that emanate from the political realm that I have outlined. Moreover, the law is itself hardly an unerring foe of state discretion. European Commission of Human Rights decisions, for example, invariably begin by reasserting the international law right of states to control the entry, residence and expulsion of aliens. But the importance of the legal gains should not be underestimated. The changes I have discussed complicate, frustrate, and compete with government attempts to manage asylum in a way that causes the least possible political disturbance.

Due process protections make asylum determination an exceedingly expensive affair; extensions in the principle of *non-refoulement* can allow highly unsavoury individuals to gain protection; and limitations on removal can act as a magnet to asylum seekers and undocumented migrants. All these measures thus increase the political risks of asylum. How, then, are we to explain why governments sign conventions and empower judges and courts that undermine their own attempts to control asylum? What explains this seemingly schizophrenic reaction in European states where increasingly restrictive measures exist side by side with growing inclusive legal practices?

There are many ways that one might seek to answer these questions. In order to understand why states accede to human rights instruments one might consider the particularities prevailing in the case of each individual state. Different states sign human rights conventions for a variety of reasons – both principled and pragmatic – ranging from a real commitment to human rights, to the desire to gain entrance to regional or international bodies, like the EU. But rather than consider what motivates individual states to sign particular treaties, I want now to provide an explanation of a more general character, one that draws upon the kind of entities that these (European) states claim to be.

We can understand the tension between the law of inclusion and the politics of restriction I have outlined by seeing it as reflecting a deeper conflict of values in the liberal democratic state. Recent legal developments have actualized the *liberal* values that European states claim to uphold and instantiate. Historically, the protections afforded by liberal democratic states – such as rights to due process – have been available almost

exclusively to citizens. Yet the legitimation of these rights has usually been universalistic: they have been presented (for instance, in national constitutions) as rights that should accrue to individuals on the basis of personhood rather than on the basis of membership in a particular state. This gap between the practical reality of membership-based rights and their universalistic mode of justification has provided a foothold for human rights groups and other NGO's to challenge the state's arbitrary treatment of asylum seekers. Their challenge has been most effective in the courts. Insulated from popular politics and empowered by developments in administrative and human rights law, the courts have been able to expand the responsibilities of states to foreigners, including asylum seekers. In the hands of the judiciary, the universality of liberal principles has provided a basis for undermining legal distinctions between citizens and aliens.

The principle of *democracy*, on the other hand, mandates that "the people" have the sovereign right to deliberate together to fashion their collective future over time. In its attenuated contemporary version, this means the right to elect representatives of their choice.[48] Given the profound impact that decisions on entrance and membership can have on societies, it is not surprising that the right to deliberate on these decisions is a feature of every democratic community.[49] But who should have the right to have their preferences count? Citizenship is prerequisite in the modern state. In recent years, substantial sections of the citizenry in Europe have seen asylum seekers as a threat, as competitors to economic, social and political goods that they possess or to which they aspire. These attitudes are contingent and liable to change; they are the product of a set of empirical factors prevailing at a particular point in time (irresponsible media reporting, poor housing or social policies, the dynamics of political competition, rising numbers of entrants, etc.) But the fact that governments attach more importance to the anxieties of their citizens than the needs of asylum seekers is anything but contingent. It is a result, as I showed earlier, of a system of democratic citizenship in which there are structural incentives for political leaders to take heed of their citizen's views. The principle of electoral democracy is thus deeply implicated in the rise and maintenance of restrictive asylum policies.

This account of the politics and law of asylum suggests that the paradox with which I started – the existence of increasingly restrictive asylum policies alongside the incorporation and development of human rights legislation – is rooted in the nature of liberal democratic state itself. The problem is not, as some observers would have it, simply a matter of states failing to live up to principles they claim to represent. It is that the principles they claim to represent are failing to live up to challenges posed by asylum. For the current asylum crisis exposes the tense and conflictual relationship between the values supposedly embraced by liberal democracies. Embodying the principle of democratic rule, electoral politics pushes policies towards closure and restriction; embodying liberal principles, the law inches unevenly towards greater respect for the human rights of those seeking asylum.

[48] See B. Constant, "On the liberty of the ancients compared to that of the moderns", in B. Fontana, editor, *Benjamin Constant: Political Writings* (Cambridge: Cambridge University Press: 1988).
[49] M. Walzer, *Spheres of Justice* (New York: Martin Robertson, 1983), chapter 2.

The conflictual and competitive relationship between the law of inclusion and the politics of restriction gives us an insight into the way current asylum policies are evolving. For it is plausible to believe that, as legal developments empowering asylum seekers have come to frustrate government efforts to respond to political pressures for restriction within national territory, other outlets for these pressures have been found. European states increasingly resort to non-arrival measures (such as visa regimes, carrier sanctions, international zones, and airport liaison officers) to insulate themselves from claims by asylum seekers. By using these extra-border measures, states have been able to carve out a realm for themselves free of legal constraint and scrutiny.

As one Western government official stated, these measures are needed because, when our state confronts asylum seekers outside our territory, the onus is on the asylum seeker to prove why she should be admitted, whereas once she arrives the onus is on us to show why she should be removed. Non-arrival policies are thus an example of the demands of electoral politics 'striking back' (albeit in a way that fails to discriminate between Convention refugees and other claimants for entry.) In short, I am suggesting that the developments made in human rights protections within European states outlined above, are, paradoxically, fueling practices by states that prevent refugees from accessing protection in their territory. The cost of increasingly inclusive practices towards asylum seekers *within* the territory of the state is the rapid development of exclusive measures *outside* it.

Conclusion

I have attempted to describe here what I see as one of the central problems facing the future of asylum in Europe fifty years after the signing of the Geneva Convention. The tension between greater liberalism towards asylum seekers and refugees at home and greater restrictionism towards these individuals abroad may not be resolvable, at least not within the structure of liberal democratic states that profess simultaneously to uphold the value of human rights and the value of membership. Might this tension at the heart of asylum at least be reduced?

There is one obvious way to respond to the conflict between the law of inclusion and the politics of exclusion: expand the reach of the law, and thus judicial scrutiny, to follow state's activity outside its territorial boundaries. If immigration control and asylum policy have shifted from Sydney to Jakarta or from London to Bombay, the law ought to reflect this fact. The range of measures used by states needs to be made public and subject to the glare of the media; the legality of the full range of non-arrival measures need to be scrutinized, especially in the light of the expanding sphere of human rights law; and ways of ameliorating the worst effects of these policies need to be proposed and considered. This last point is of particular importance. Non-arrival measures are not going to go away. They are an increasingly important part of the immigration control arsenal of liberal democratic states. Work needs to be done on how a legal and ethical framework

might be put around these forms of activity, at the very least to ensure that they do not result in *refoulement*.

It is important to recognize, however, that a further expansion in the law is only part of what is required. One implication of my argument is that restrictive political pressures will find a way of manifesting themselves if they are not addressed. The current approach of using law to smother this restrictionism is having some perverse and disturbing consequences. Clearly, what is required is a more inclusive politics of asylum, one that goes beyond the law to elicit from the public of Western states greater identification with and respect for the claims of refugees and asylum seekers. The creation of such new understandings and identifications would require the coordination of many different actors with different interests. Moreover, new global institutions may need to be formed if identities that transcend the boundaries of citizenship are to be sustained over time. These are daunting requirements indeed. We are still a long way off from a world where human rights law reflects our politics rather than constrains it.