Observations to Request for Advisory Opinion Submitted by the State of Ecuador

Maria-Teresa Gil-Bazo

Enviado:

To the Inter-American Court of Human Rights,

Please, find attached a note on written observations to the Request for an Advisory Opinion submitted by the State of Ecuador on Asylum. This note includes reference to two publications, which can be accessed free of charge through the provided links, and which are attached here for convenience. As requested by the Court, I am also attaching a copy of my passport.

Thank you and kind regards,
Dr Maria-Teresa Gil-Bazo

Free access to OUP resources on refugee law: http://opil.ouplaw.com/page/refugee-law

Before the

INTER-AMERICAN COURT OF HUMAN RIGHTS

Request for an Advisory Opinion Presented by the Republic of Ecuador
Concerning the Scope and Purpose of the Right of Asylum
in Light of International Human Rights Law, Inter-American Law and International Law

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WRITTEN OBSERVATIONS

Pursuant to Article 73(3) of the Rules of Procedure

Presented by

Dr María-Teresa Gil-Bazo, Senior Lecturer in Law, Newcastle University (UK)

These observations relate to the legal nature of asylum as a **human right** and as a **general principle of international law** and are elaborated on the following publications:

Maria-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law', *International Journal of Refugee Law*, 2015, Vol 27, No. 1, pp. 3-28. Available at: https://academic.oup.com/ijrl/article/27/1/3/2362480/Asylum-as-a-General-Principle-of-International-Law

María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', *Refugee Survey Quarterly*, 2008, Vol. 27, No. 3, pp. 33-52. Available at: https://academic.oup.com/rsq/article/27/3/33/1515095/The-Charter-of-Fundamental-Rights-of-the-European

Newcastle-Upon-Tyne (UK), 3 May 2017

International Journal of Refugee Law, 2015, Vol. 27, No. 1, 3–28
doi:10.1093/ijrl/eeu062
Advance Access publication February 3, 2015

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ARTICLES

Asylum as a General Principle of International Law

María-Teresa Gil-Bazo*

ABSTRACT

Asylum, understood as 'the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it', is a well-known institution in international law and its historical roots in state practice are well established. Asylum is different from refugee status, as the former constitutes the institution for protection while the latter refers to one of the categories of individuals –among others- who benefit from such protection and the content of that protection. This article explores the nature of asylum as a general principle of international law. It first examines the relationship between asylum and refugee status to place the discussion in context. It then outlines the current debate on asylum and, in particular, the nature of asylum as a right of individuals. The article explores the normative nature of asylum through its historical practice, paying particular attention to the practice of states as reflected in their constitutional traditions. This constitutional focus responds to the normative character of constitutions. As asylum features in a significant number of constitutional texts across the world, the value of this institution as one of the underlying principles in legal orders worldwide is clear and, as such, it informs international law itself. The article shows that the long historical tradition of asylum as an expression of sovereignty has now been coupled with a right of individuals to be granted asylum of constitutional rank, which in turn is recognised by international human rights instruments of regional scope. This, and its continuous historical presence across civilizations and over time, suggests that asylum constitutes a general principle of international law that is legally binding when it comes to the interpretation of the nature and scope of states' obligations towards individuals seeking protection.

1. INTRODUCTION

Asylum, understood as 'the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it',[1]

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1 Institute of International Law (5th Commission), 'Asylum in Public International Law', Resolutions Adopted at its Bath Session, Sept 1950, art 1.

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is a well-known institution in international law and its historical roots in state practice are well established.[2] It is in this sense that the term asylum will be used in this article.

Asylum is different from refugee status, as the former constitutes the institution for protection while the latter refers to one of the categories of individuals –among others- who benefit from such protection. Aware of this distinction and of its historical, international, and constitutional significance, an emerging trend developing among European states has been to blur it by restricting the use of the term asylum to refugees within the meaning of the Convention Relating to the Status of Refugees (the Refugee Convention)[3] while developing alternative institutions for protection (such as temporary protection and subsidiary/complementary protection). The process of European integration in the field of asylum illustrates this point. As UNHCR pointed out at the time European Union (EU) member states were negotiating the first Qualifications Directive,[4] this instrument 'appears to use the term "refugee status" to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR's view, better described by the use of the word "asylum"'.[5] At the same time, the Directive recognised a separate institution for protection called 'Subsidiary Protection'.[6] The desire to restrict asylum exclusively to refugees in the sense of the Refugee Convention has led EU member states to coin a new, overarching protection concept in the Recast Qualifications Directive for both refugees and individuals whose protection grounds derive from international human rights law (Subsidiary Protection), namely, 'international protection', as the protection granted by member states under EU law.[7] Despite this trend to exclude non Refugee Convention refugees from the protection offered by the institution of asylum, and the fact that some academics have argued that the distinction may be obsolete,[8] the conceptual distinction remains soundly established in law and practice, as will be shown in the pages that follow.

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2 For an overview of the evolution of this institution, see A Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980), and E Reale, '*Le droit d'asile*' (1938) 63 *Recueil des Cours de l'Académie de Droit International de La Haye* 473.

3 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 Apr 1954) 189 UNTS 137.

4 Directive 2004/83 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 [2004] OJ L/304/12.

5 UNHCR, Annotated Comments on the EC 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 (OJ L 304/12 of 30 Sept 2004), Jan 2005, 10–11.

6 For a construction of subsidiary protection as asylum that rejects the conceptualisation of asylum in the Directive as the protection exclusively enjoyed by Convention refugees, see M-T Gil-Bazo, 'Refugee status and subsidiary protection under EC law: the qualification directive and the right to be granted asylum' in A Baldaccini, E Guild, and H Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart 2007).

7 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L/337/9, art 2(a). The use of the term 'international protection' in this way is conceptually incorrect, as showed by Antonio Fortin, 'The Meaning of "Protection" in the Refugee Definition' (2000) 12 IJRL 548.

8 '[H]owever unique and individual constitutional asylum has traditionally been regarded in France, Italy, and Germany, international obligations and recent European commitments have absorbed its distinctiveness, making it a redundant, almost obsolete concept', H Lambert, F Messineo, and P Tiedemann, 'Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: *Requiescat in Pace?*' (2008) 27 RSQ 16, 17.

The recognition of the separate nature of asylum and refugee status has been confirmed by judicial decisions across different countries and internationally[9] by the Court of Justice of the European Union (CJEU) in response to a request for a preliminary ruling lodged by the German Federal Administrative Court (*Bundesverwaltungsgericht*).[10] The German Court asked the CJEU to clarify whether the granting of asylum by application of the German Constitution to individuals excluded from refugee status, by article 1F of the Refugee Convention, was compatible with the obligations imposed by EU law. The response by the CJEU was unequivocal: 'Member States may grant a right of asylum under their national law to a person who is excluded from refugee status ….'[11]

Although the debate on asylum has been dormant since the failure of the 1977 Conference on Territorial Asylum to lead to an international treaty of universal scope, it has recently attracted renewed interest. The highly publicised decision by Ecuador, in June 2012, to grant asylum to WikiLeaks founder Julian Assange, which prompted a Resolution of the Organisation of American States recalling the inviolability of diplomatic premises,[12] as well as the diplomatic dispute in 2013 involving several countries across the world in the case of Edward Snowden, which saw the European Parliament debating a call on European states to grant him asylum,[13] brought and the debate on asylum within that of state sovereignty and its boundaries.

The renewed discussion on asylum does not only exist in the domain of international relations, but also at the very concrete level of judicial decisions. The case of *NS*[14] before the CJEU brought to the forefront the fundamental question on the role that asylum plays in refugee protection. The Court of Appeal of England and Wales referred seven questions to the CJEU on the rights of refugees under EU law, specifically focusing on general principles of EU law in the field of human rights as codified by the Charter of Fundamental Rights of the EU,[15] notably article 18 on the right to asylum. Question five reads as follows:

> Is the scope of the protection conferred upon a person ... by the *general principles* of EU law, and, in particular, the rights set out in Articles 1, 18, and 47 of the Charter *wider* than the protection conferred by Article 3 of the European Convention on Human Rights and Fundamental Freedoms (the Convention)?[16]

In her Opinion in the *NS* case, Advocate General Trstenjak addresses the issue only implicitly when she states that article 18 precludes *refoulement*. However, she does not

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[9] The term 'international' will be consistently used in its technical sense to refer both to instruments and debates of universal scope (under the umbrella of the United Nations or otherwise) as well as those of regional scope (Africa, America and Europe).

[10] Joined Cases C 57/09 and C 101/09 *Bundesrepublik Deutschland v B & D* [2010] ECR I-10979.

[11] ibid para 121.

[12] OAS, Resolution of the Twenty-Seventh Meeting of Consultation of Ministers of Foreign Affairs, 24 Aug 2012 <www.oas.org/en/media_center/press_release.asp?sCodigo=E-67> accessed 26 Jun 2014.

[13] European Parliament, Draft report Claude Moraes (PE526.085v02-00) on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, Doc 2013/2188(INI) 24 Jan 2014, Motion for a resolution para 76 (amendment 354), 48.

[14] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* and *ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905.

[15] [2012] OJ C 326/391.

[16] [2010] OJ C 274/21 (emphasis added).

indicate whether any *wider* protection beyond the prohibition to remove someone to a risk of prohibited treatment may be available to refugees under this provision, which is precisely the question asked. The Court chose not to enter into the discussion by referring to its earlier analysis on the prohibition of torture and stating that the right to human dignity, the right to asylum, and the right to an effective remedy would not give a different answer.[17]

Yet, in doing so, the Court implicitly construes the right to asylum as different from the right not to be removed to a risk of torture and, therefore, parts from the Advocate General's narrow view equating asylum with *non-refoulement* only. The Court chose not to pronounce itself on what exactly the right to asylum includes, and it has refused to do so again in the case of *Halaf*, where the requesting court specifically asks the CJEU to clarify '[w]hat is the content of the right to asylum under Article 18 of the Charter of Fundamental Rights of the European Union'.[18]

These instances show that the question of asylum is very much alive and that the debate as to its nature and content remains controversial. The purpose of this article is to explore the nature of asylum as a general principle of international law. The analysis that follows is informed by the understanding that '[t]he development of the law on asylum is inextricably bound up with the general development towards the greater recognition and protection of the human rights and fundamental freedoms of the individual by international law',[19] including the right to asylum as a human right. The analysis in this article is also grounded in international law itself. In this regard, it is worth noting that, while in common law judicial decisions constitute primary sources of law, in international law they are secondary sources and enjoy the same status as the views 'of the most highly qualified publicists *of the various nations*' (article 38(d) of the Statute of International Court of Justice (ICJ), emphasis added). Article 59 of the ICJ Statute further affirms that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'. Judicial decisions will be considered in this article, as appropriate, insofar as they constitute an expression of state practice, or if they reflect the authentic interpretation of treaties by international courts or human rights monitoring bodies, but not as primary sources of law or authority of higher rank than the most qualified doctrine. This article will also engage with the doctrinal views of the most qualified authors, especially those elected by the United Nations General Assembly to serve at the International Court of Justice, or by state parties to international human rights treaties to serve at United Nations Treaty Bodies (such as the Committee Against Torture) or at regional human rights courts (such as the Inter-American Court of Human Rights).

This article will first examine the relationship between asylum and refugee status to place the discussion on asylum in context. An assessment of the current debate will follow and, in particular, the nature of asylum as a right of individuals. The article will then set the theoretical framework for the consideration of asylum as a general principle of international law. The normative nature of asylum through the history of its practice

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17 Opinion, Case C 411/10, above n 14, para 115.

18 Case C-528/11 *Zuheyr Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet* [2012] OJ C 133, judgment 30 May 2013, not yet reported, para 42.

19 P Weis, 'Territorial Asylum' (1966) 6 Indian Journal of International Law 173, 194.

will be explored, with particular attention paid to the practice of states as reflected in their constitutional traditions. This focus responds to the normative character of constitutions. As asylum features in a significant number of constitutional texts across the world, the value of this institution as one of the underlying principles in legal orders worldwide is clear. As such, it informs international law itself. The article will conclude that asylum now constitutes a general principle of international law.

2. ASYLUM AND REFUGEE STATUS: TWO SEPARATE BUT RELATED INSTITUTIONS

As stated above, asylum is different from refugee status, as the former constitutes the institution for protection while the latter refers to one of the categories of individuals –among others- who benefit from such protection.

Constitutional texts often reflect this distinction. Article 20 of the Constitution of Mozambique on 'Support for the Freedom of Peoples and Asylum' illustrates this point. After a general provision in paragraph 1 stating that 'the Republic of Mozambique supports and shares the fight of peoples for national liberation and democracy', paragraph 2 goes on to recognize a right to be granted asylum in the following terms: 'The Republic of Mozambique grants asylum to foreigners persecuted by reason of their fight for national liberation, democracy, peace and the defense of human rights'. Paragraph 3 of article 20 then refers the determination of refugee status to the law: 'The law defines the status of political refugees'. This structure reflects the dual nature of both institutions and the conceptualization of asylum as a right (of individuals) intimately linked to the fight for democracy.

Historically, the practice of asylum pre-dates the existence of the international regime for the protection of refugees (which was born in the inter-war period in the twentieth century) and the international regime for the protection of human rights (born in the UN era).[20] Asylum constitutes the protection that a state grants to an individual in its territory (territorial asylum) or in some other place under the control of certain of its organs (such as diplomatic premises and warships). As such, asylum is an expression of state sovereignty.

Indeed, it is uncontroversial that asylum is a right of states to grant *if they so wish* in the exercise of their sovereignty, without it being considered a hostile act towards other states, who have a correlative duty to respect it.[21] Article 1(1) of the UN Declaration on Territorial Asylum words it in this way: 'Asylum granted by the State, in the exercise of its sovereignty … shall be respected by all other States'. The nature of asylum as a sovereign right of states is further safeguarded by article 1(3) of the Declaration, whereby '[it] shall rest with the State granting asylum to evaluate the grounds for the grant of asylum'.[22] Accordingly, asylum as an expression of state sovereignty is under no limitation

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[20] It is worth noting, however, that at the time when the foundations of international law were laid down from a natural law perspective, the individual protection aspects of asylum were the subject of much consideration by early writers; F de Vitoria, *Relectiones Theologicae XII*, Section 53, first published in 1557 (from the notes compiled by his students); H Grotius *De iure belli ac pacis*, *libri duo* [1625] (translated by AC Campbell) (Batoche Books 2001) ch 2, first published in 1625. Various translations of these works have been published in different languages.

[21] See, for instance, the Havana Convention on Asylum (adopted 20 Feb 1928) 132 LNTS 323; the Montevideo Convention on Political Asylum (adopted 26 Dec 1933, entered into force 28 Mar 1935) OASTS 34; the Convention on Diplomatic Asylum (adopted 28 Mar 1954, entered into force 29 Dec 1954) OASTS 18; and the Convention on Territorial Asylum (adopted 28 Mar 1954, entered into force 29 Dec 1954) OASTS 19.

[22] UNGA res 2312(XXII) 14 Dec 1967.

in international law, with the exception of extradition or other obligations acquired by treaty.[23] The case of Hissène Habré (former President of the Republic of Chad in the 1980s who found asylum in Senegal) illustrates this point. The International Court of Justice examined the principle *aut dedere aut judicare* enshrined in article 7(1) of the UN Convention Against Torture (CAT)[24] in relation to Senegal. The consequence of this treaty obligation is not a prohibition to grant asylum, but rather a limitation on the right of states to do so. The Court ruled that 'Senegal must … take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, *if it does not extradite* Mr. Habré'.[25] The Court noted that while prosecution is an obligation under the CAT, extradition is merely an option: '[e]xtradition is an option offered to the State by the Convention'[26] in order to facilitate state compliance with the Convention's purpose 'to prevent alleged perpetrators of acts of torture from going unpunished'.[27] Furthermore, extradition may be hindered if its requirements cannot be met. In the case in question, the Court recalls that the individual can only be extradited 'to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him',[28] which allows extradition only to states who can claim jurisdiction on the basis of the territorial or nationality principles.[29] In this particular case, Senegal may therefore continue to grant asylum but such exercise of sovereignty is not absolute, but rather necessarily conditional to Senegal prosecuting Mr Habré for crimes of torture in compliance with article 7(1) CAT. Just to be clear, the fact that the asylum state prosecutes an individual for crimes of international law does not mean that asylum ceases to be granted. On the contrary, prosecution is precisely the legal tool allowing a state to comply with both its international obligations of protection towards the individual (by not removing him to a country of persecution or where there is a risk of prohibited treatment) *as well as* with its international obligations to fight against impunity for crimes of international law.

Within this context, the international legal regime for the protection of refugees was established in the early twentieth century, as the League of Nations received the mandate to find a solution to the refugee problem, that is, the problem posed by the presence of non-nationals in the territory of a state with no effective legal link to another state, as they do not enjoy or no longer enjoy the protection of the Government of their country of origin.[30] The adoption of international treaties establishing the standard of treatment of refugees reflected the understanding that refugees were a special group of non-nationals that required a collective response by the international community. The international refugee regime expressed the recognition among states of their mutual

[23] For a discussion on the limits imposed by international law on the right of states to grant asylum, see F Mariño Menéndez, '*El asilo y sus modalidades en Derecho internacional*' in F Mariño Menéndez (ed), *Derecho de extranjería, asilo y refugio* (*Ministerio de Asuntos Sociales* 1995).

[24] Adopted 10 Dec 1984, entered into force 26 June 1987; 1465 UNTS 85.

[25] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Reports 422, para 121 (emphasis added).

[26] ibid para 95.

[27] ibid para 120.

[28] ibid.

[29] Art 5(1) CAT.

[30] See, for instance, the refugee definitions in the Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees (adopted 12 May 1926) 89 LNTS 47.

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obligations in relation to this category of forced migrants, defined not so much by the causes of their flight or their plight thereon, but rather by the lack of protection by the state of their nationality.

Today, refugees enjoy a distinct and unique standard of protection under international law, which is based on the Refugee Convention and its 1967 Protocol,[31] as well as the legal standards of regional scope developed in Africa, Latin America, and more recently Europe. On the contrary, asylum has not found expression in any international treaty of universal scope and, therefore, there is no internationally agreed definition of what that protection encompasses.

However, despite the lack of an international treaty on the definition and content of asylum, its practice throughout centuries shows that its distinct feature is its vocation of permanence. The right to reside therefore constitutes the essential and distinct content of asylum, with its foundations soundly rooted in the early writers of international law.

In 1625 Grotius wrote that 'a permanent residence [ought not] to be refused to foreigners, who, driven from their own country, seek a place of refuge'.[32] In 1758 Vattel calls for the same principle: 'no Nation may, without good reason, refuse even a perpetual residence to a man who has been driven from his country'.[33]

More recently, Grahl-Madsen stated that '[t]o say that an individual has a right to be granted asylum is to say that the requested State is … duty bound to admit him to its territory, to allow him to remain there, or to abstain from extraditing him'.[34] The same position was held in 1988 by Special Rapporteur Mubanga-Chipoya, of the already disappeared UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[35]

The Refugee Convention does not enshrine a right of asylum or a right of residence. In fact, the enjoyment of most of its provisions is conditional on the immigration status of the refugee; some can only be enjoyed by refugees 'lawfully present' while others only by refugees 'lawfully resident'. Its drafters were well aware that refugees could find themselves without a country of asylum and therefore the Conference that adopted the Convention recommended 'that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement' (Recommendation D).

Refugee status is indeed temporary by nature; it exists so long as the circumstances that turn an individual into a refugee exist. However, the notion of permanence is not alien to the Refugee Convention, whose article 34 imposes obligations on states parties regarding naturalization:

> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

[31] Adopted 31 Jan 1967, entered into force 4 Oct 1967, 606 UNTS 267.

[32] Grotius, above n 20, ch 2, no XVI, 84.

[33] E De Vattel, *The Law of Nations* [1758] (Carnegie Institute 1916), bk I, ch 21, para 231.

[34] A Grahl-Madsen, *The Status of Refugees in International Law, Vol II* (Sijthoff 1972) 79.

[35] CLC Mubanga-Chipoya, 'The Right of Everyone to Leave any Country, Including His Own, and to Return to His Country', UN doc E/C.4/Sub.2/1988/35, 103–06.

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The significance of this provision is often overlooked. Its relevance lies in the recognition that states' obligations towards refugees include *every effort* to facilitate the full integration of refugees into the political community of the state of asylum. The inclusion of this article among the provisions of the Refugee Convention (immediately after the prohibition of *refoulement*) seeks to restore the legal bond between the individual and the state, which had been previously severed by persecution and flight, and thus correct the 'anomaly' that refugee status actually represents.[36]

The practice of states shows largely that domestic legislation has incorporated article 34 of the Refugee Convention. In the European context, the Recast Qualifications Directive[37] (which incorporates the Refugee Convention into a legally binding instrument of EU law for EU member states) does enshrine a right to asylum for refugees and for beneficiaries of subsidiary protection. The Directive does not word it in these terms, but it imposes an obligation on member states to grant refugee status and subsidiary protection status to individuals who meet the criteria (articles 13 and 18), and one of the rights attached to that status is the right of residence (article 24 of the Directive).[38]

It is in this sense that this article approaches asylum, as an institution for protection whose contours have been developed over centuries crystalising in today's legal and institutional framework worldwide.

3. THE CURRENT DEBATE ON ASYLUM

As said above, it is uncontested that asylum is indeed a right of states to grant if they so wish in the exercise of their sovereignty, without it being considered a hostile act towards other states. On the contrary, the legal nature of asylum as a right of individuals remains one of the most controversial matters in refugee studies.

Until the 1970s, the legal literature on the protection of those fleeing persecution focused on the institution of asylum. Grahl-Madsen's work, published in two volumes in 1966 and 1972 (originally conceived as a three-volume publication), constituted the first comprehensive analysis on the status of refugees in international law, prompted by developments following the adoption of the Refugee Convention and its Protocol.[39]

However, Grahl-Madsen did not just analyse the status of refugees by reference to the Refugee Convention. On the contrary, he devoted his second volume to asylum, entry, and sojourn, grounding the debate on refugee status within the existing framework of protection in international law. Writing in 1972, he noted that 'it is significant that scholars in many countries are seriously exploring the question [of a 'right of asylum' for the individual] with a view to finding a suitable form for a binding international instrument guaranteeing the individual a right to be granted asylum'.[40] And he, himself,

[36] For a discussion on the background of art 34 of the Refugee Convention, see R Marx, 'Article 34 (Naturalization/Naturalisation)' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011). For a political analysis of asylum as surrogate membership of a political community in the asylum state, see ME Price, *Rethinking Asylum: History, Purpose, and Limits* (CUP 2009). Although Price equates asylum with Convention Refugees only, his analysis on this point remains valid. For a review of Price's argument, see M-T Gil-Bazo, 'Rethinking Asylum: History, Purpose, and Limits: By Matthew E. Price' (2010) 23 JRS 402.

[37] Above n 7.

[38] For a construction of refugee status and subsidiary protection in the Directive as asylum, see Gil-Bazo, above n 6.

[39] A Grahl-Madsen, *The Status of Refugees in International Law, Vol I* (Sijthoff 1966) and *Vol II*, above n 34.

[40] ibid, *Vol II*, 22.

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felt the need to contribute further to that debate by dedicating a monograph to asylum in 1980, which included a proposal for an international treaty on the matter.[41]

Grahl-Madsen explains in detail the background and context for his draft Protocol and, in particular, the considerations that led him to propose what he himself calls a low-keyed instrument.[42] He also noted that, in addition to the traditional 'right of asylum', understood as the right of a state to grant asylum, 'lately one has also come to speak of a 'right of asylum' for the individual'.[43] In his view:

> [t]he idea that States might agree on a binding convention guaranteeing the individual a right to be granted asylum is not entirely utopian. As a matter of fact, in many countries there are provisions of municipal law laying down a more or less perfect right of asylum for individuals … In some countries such provisions are embodied in the national constitutions; in others they are of statutory character.[44]

This view is also shared by Weis, one of the drafters of the Refugee Convention, who notes that while:

> [i]n the Anglo-Saxon countries, the grant of asylum is a matter of executive discretion … [t]he constitutions of a number of countries provide for a right to asylum … Other countries have provisions in their aliens' legislation that either explicitly or *de facto, as a result of the prohibition of refoulement*, including rejection at the frontier, establish a right to asylum[45] ... [which confers] upon the individual a subjective right to asylum.[46]

Grahl-Madsen wrote at a time when there was consensus that individuals did not enjoy international legal personality and long before developments in international human rights law consolidated the right of petition of individuals before international human rights monitoring bodies. Yet, he affirmed the qualified obligation of states to grant asylum derived from the political clause in extradition treaties and -more interestingly- from the duty of non-*refoulement*. He noted that 'our generation has witnessed an impressive development towards an internationally guaranteed right for the individual to be granted asylum' and stated that '[a]rticle 33 [of the Refugee Convention] creates an obligation to grant asylum to persons entitled to invoke it, provided that no third State is either obliged or willing to receive them'.[47]

Although not in such explicit terms, Weis found that the principle of *non-refoulement* resulted in certain obligations for states in relation to asylum. Exploring the nature of asylum as a human right, Weis recalls that the early writers of international law (Grotius, Suarez and Wolff) conceived asylum 'as a duty of the State or a natural right of the individual … in pursuance of an international humanitarian duty'.[48] As he explains, 'the

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41 Grahl-Madsen, above n 2, 216–19.

42 ibid 69–71.

43 ibid 2.

44 ibid 24.

45 P Weis, 'The Development of Refugee Law: Transnational Legal Problems of Refugees' (1982) 3 *Michigan Yearbook of International Legal Studies* 27, 38 (emphasis added).

46 Weis, above n 19, 180. Weis lists 38 countries where the right to asylum for individuals is recognised.

47 ibid 42–43.

48 ibid 175.

individual State granting asylum acts as an agent of the international community'.[49] In interpreting the 1967 UN Declaration on Territorial Asylum, Weis notes that this principle has found expression in article 2 of the Declaration, which declares that asylum is a matter of concern to the international community.[50] Weis recalls that the adoption of the Declaration was the result of the lack of agreement among states on the inclusion of the right to asylum in the International Covenant on Civil and Political Rights.[51] The same disagreement emerged during the negotiations on the Declaration, as '[a] number of [States] considered that the right of asylum was a sovereign right of States [such as the United Kingdom]. Others did not expressly subscribe to this view [such as Denmark], while yet others supported the opposite view of asylum as a right of the individual [such as Spain, Sweden and the Netherlands]'.[52] Yet, while the Declaration does not explicitly recognise asylum as a human right, in his view 'it would seem to be the meaning of the Declaration that asylum … should not be exercised in such a way as to refuse a person admission, at least temporary admission, if such refusal would subject him to persecution'.[53]

Grahl-Madsen's position on the existence of a right to asylum derived from *non-refoulement* must be seen in the overall context of his work. Grahl-Madsen also examined in detail the plight of unlawfully present refugees, that is, refugees without a country of asylum, and concluded that when the state is unable to remove a refugee, he gains:

> freedom of movement and residence [and it] follows that he must be considered 'lawfully' (and 'lawfully staying') in the territory. And after a number of years (normally about three years) his interest in growing roots must override any other considerations, which means that he may not be caused to leave the territory, merely because another country should prove willing to accept him.[54]

Grahl-Madsen argued this position on the grounds that '[i]t has never been envisaged that there should be any group of underprivileged refugees, subject to the whims of the authorities'[55] and that 'as a State would not dream of expelling its own nationals … there is hardly any reason for a State to press too hard for the expulsion of refugees'[56] and, therefore, 'after a period of some three years, the interests of the refugee in remaining where he is, must normally be held to override any other considerations'.[57]

In sum, a careful reading of the works of Grahl-Madsen and Weis shows that they believed that asylum as a subjective right of the individual was already a reality in domestic legislation, notably of constitutional rank. Grahl-Madsen went further in arguing that the principle of *non-refoulement* in the Refugee Convention imposed an

49 P Weis, 'Human Rights and Refugees' (1972) 12 IRRC 537, 544.

50 ibid.

51 Adopted 16 Dec 1966, entered into force 23 Mar 1976, 999 UNTS 171.

52 Weis, above n 19, 180.

53 Weis, above n 49, 546.

54 Grahl-Madsen, above n 34, 442.

55 ibid.

56 ibid 443.

57 ibid 437.

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obligation on states to grant asylum if no other country was ready to receive them after a reasonable time, which he fixed at three years.

More recently, an obligation to grant asylum based on *non-refoulement* has been recognised by the Inter-American Court of Human Rights in the case of *Pacheco Tineo*. The Court:

> analysed the evolution of the right to seek and be granted asylum and of the principle of non-refoulement ... [W]hen certain rights such as life or physical integrity of non-nationals are at risk, [such persons] must be protected against removal to the State where the risk exists, *as a specific modality of asylum under article 22.8 of the Convention*.[58]

While article 22(7) of the American Convention on Human Rights[59] recognises 'the right to seek and be granted asylum', article 22(8) enshrines the principle of *non-refoulement*. The Court therefore chose to interpret the right to *non-refoulement* to include a right to asylum in the specific circumstances of the case. The Court also confirmed the interpretation that article 22(7) on the right to asylum enshrines a right of individuals, which imposes specific procedural obligations on states, including to give them access to asylum procedures.[60]

However, Grahl-Madsen's efforts to advance the asylum debate in the context of existing states' obligations to protect refugees did not have much follow-up in the English legal literature. It is most surprising that the fact that 40 years ago he found an obligation to grant asylum to refugees derived from the principle of *non-refoulement* has passed unnoticed by scholars and others. Following the failure of the 1977 Conference on Territorial Asylum, the legal literature in English has abandoned the debate on asylum and mostly focuses on the various categories of protected individuals (rather than on the institution of protection itself), that is, refugees within the meaning of the Refugee Convention,[61] internally displaced persons,[62] and, more recently, those benefiting from complementary protection.[63] The emphasis on identifying categories of beneficiaries (without a corresponding state duty to grant asylum) has expanded beyond the legal literature to proposals for new categories emerging among non-lawyers as well.[64]

This analysis of refugee protection in the English literature shares a common understanding that international law does not recognise the existence of a right of individuals to be granted asylum. Often, this position will be stated as one of the premises on which the analysis is founded[65] before addressing the interpretation and scope of the obligations that states *do* have in relation to refugees.

[58] Caso *Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, *Sentencia de 25 de noviembre de 2013*, 2 (author's own translation, emphasis added).

[59] Adopted 22 Nov 1969, entered into force 18 Jul 1978, 114 UNTS 123.

[60] Above n 58, 3.

[61] J Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, CUP 2014); GS Goodwin-Gill & J McAdam, *The Refugee in International Law* (3rd edn, OUP 2007); J Hathaway, *The Rights of Refugees under International Law* (CUP 2005).

[62] C Phuong, *The International Protection of Internally Displaced Persons* (CUP 2005).

[63] J McAdam, *Complementary Protection in International Refugee Law* (OUP 2007).

[64] A Betts, 'Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants' (2010) 22 IJRL 209.

[65] Goodwin-Gill & McAdam, above n 61, 414–15; C Harvey, 'The Right to Seek Asylum in the European Union' (2004) 1 European Human Rights Law Review 17; Hathaway, *The Rights of Refugees*, above n 61, 300–02; A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 16. Gilbert has analysed whether the right of asylum is vested on individuals, concluding that, given that the right to asylum cannot be absolute, 'asylum can never be a right'; G Gilbert, 'Right of Asylum: A Change of Direction' (1983) 32 ICLQ 633, 650.

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This approach contrasts sharply with the lively debate in the literature in other languages – notably, but not exclusively, in Spanish - that considers extensively the institution of asylum alongside refugee status.[66]

To be clear, these approaches are not mutually exclusive, but rather complementary. They speak to different responses from the law to the plight of refugees. The risk is in considering one while ignoring the other, or in inferring rules of international law that do not take account of the rich practice of states across legal cultures and traditions worldwide and the scholarly debates that such practice generates. Indeed, the duality of approach may well reflect different legal cultures and traditions, which in turn result in different understandings of international law itself.

4. ASYLUM AS A GENERAL PRINCIPLE OF INTERNATIONAL LAW: THE NORMATIVE CHARACTER OF ASYLUM

In order to discuss the nature of asylum as a general principle, we need to consider what a general principle is, and where we find it. In this regard, it is necessary to examine what we understand by law.

The English term 'law' is translated into two different terms in Spanish and French: '*Derecho/Droit*' and '*ley/loi*'. The latter refers to the actual rules or provisions dictated by the competent authority to impose or prohibit a particular conduct. But the former reveals a much deeper concept.

The Spanish dictionary defines '*Derecho*' as the 'body of principles and norms, expression of an idea of justice and order, which rule human relations in every society'.[67] Likewise the French dictionary defines '*Droit*' as the 'body of rules considered as [those which] must order human relations, founded on the ideas of the defence of the individual and of justice, and which constitute the subject-matter of the law [*loi*] and regulations' as well as 'the moral foundation of those rules'.[68]

In other words, the actual legal rules (*ley/loi*) exist to carry an idea of justice at the service of the human person (*Derecho/Droit*) and, therefore, their lawfulness requires that they comply with such ideals. Rosalyn Higgins expresses this duality in the following terms: 'International law is not rules. It is a normative system … The role of law is to provide an operational system for securing values'.[69]

As Sir Gerald Fitzmaurice states:

> [T]here are principles behind the rules, and … it is upon the nature of these principles that the rules will often depend. Hence the importance of general

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66 D Alland & C Teitgen-Colly, *Traité du droit d'asile* (PUF 2002); H Gross Espiell, '*Análisis jurídico comparativo de las legislaciones sobre asilo en Américal Latina y los instrumentos internacionales y regionales*' in *Estudios Básicos de Derechos Humanos Tomo V* (*Instituto Interamericano de Derechos Humanos* 1996) 206–23; M Manly '*La consagración del asilo como un derecho humano: Análisis comparativo de la Declaración Universal, la Declaración Americana y la Convención Americana sobre Derechos Humanos*' in L Franco (ed), *El Asilo y la protección internacional de los refugiados en América Latina. Análisis crítico del dualismo 'asilo-refugio' a la luz del Derecho Internacional de los Derechos Humanos* (Editorama & UNHCR 2004); FM Mariño Menéndez, above n 23; F Lenzerini, '*Diritto d'asilo e esclusione dello status di rifugiato. Luci e ombre nell'approccio della Corte di giustizia dell'Unione Europea*' (2011) XCIV(1) *Rivista di Diritto Internazionale* 103; C San Juan & M Manly, '*El asilo y la protección internacional de los refugiados en América Latina: Análisis crítico del dualismo "asilo-refugio" a la luz del Derecho Internacional de los Derechos Humanos*' in L Franco, *El Asilo y la protección internacional de los refugiados*, 54–56.

67 *Real Academia Española, Diccionario de la lengua española* <www.rae.es> accessed on 26 Jun 2014 (author's own translation).

68 *Académie française, Dictionnaire Académie française* <http://www.academie-francaise.fr/dictionnaire/index.html> accessed on 26 Jun 2014 (author's own translation).

69 R Higgins, *Problems and Process International Law and How We Use It* (Clarendon Press 1995) 1.

> principles, particularly so for such a subject as international law, where practice is far from uniform, and where there may be considerable areas of doubt or controversy as to what the correct rule is, or ought to be.[70]

International law takes account of this perspective, as, together with treaties and custom, it also recognises general principles as binding sources of international law irrespective of state consent (article 38(1)(c) of the Statute of the International Court of Justice). As Judge Tanaka states '[a]rticle 38, paragraph 1 (c) … does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize [a] principle or even deny its validity are nevertheless subject to its rule'.[71] The International Court of Justice affirmed in the *Genocide Convention* case that 'the principles underlying the Convention are principles which are recognised by civilized nations as binding on States, even without any conventional obligation'.[72] Furthermore, principles are not only self-standing sources of international law but, rather, as argued by Verdross in 1935, they serve as a standard of validity for treaties and custom.[73]

In the words of Cançado Trinidade, Judge at the International Court of Justice and former President of the Inter-American Court of Human Rights:

> Despite the apparent indifference with which they were treated by legal positivism (always seeking to demonstrate a 'recognition' of such principles in positive legal order), and despite the lesser attention dispensed to them by the reductionist legal doctrine of our days, yet one will never be able to prescind from them. From the *prima principia* the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself, and disclose the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), the necessary primacy of law over force, the preservation of peace. Contrary to those who attempt — in my view in vain — to minimize them, I understand that, if there are no principles, nor is there truly a legal system.[74]

As Valencia Restrepo argues, a principle requires the pre-existence of a fundamental social value whose acceptance by the international community confers upon it the conviction of its compulsory nature, which in turn can be enforced. In his view, a value has a fundamental nature when its existence is necessary for the existence of the international community itself and its social nature implies that it pursues the collective (rather than individual) interests of the international community.[75]

[70] G Fitzmaurice, 'The General Principles of International Law' (1957-II) 92 *Recueil des cours de l'Académie de droit international de La Haye* 1, 8–9.

[71] *South West Africa (Liberia v South Africa)*, Second Phase, Judge Tanaka Dissenting Opinion [1966] ICJ Reports 6, 298.

[72] *Reservations to the Convention on Genocide, Advisory Opinion* [1951] ICJ Reports 15, 23.

[73] A Von Verdross, '*Les principes généraux du droit dans la jurisprudence internationale*' (1935-II) 52 *Recueil des cours de l'Académie de droit international de La Haye* 191, 204–06.

[74] AA Cançado Trinidade, 'International Law for Humankind: Towards a New *Jus Gentium* (I): General Course on Public International Law' (2005) 316 *Recueil des cours de l'Académie de droit international de La Haye* 9, 85–86.

[75] H Valencia Restrepo '*La definición de los principios en el Derecho internacional contemporáneo*' (2007) 37(106) *Revista de la Facultad de Derecho y Ciencias Políticas* 76.

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Principles are to be found –but not only- in national legal orders and, from there, they are 'transferred' to international law itself. After an examination of the *travaux préparatoires* of article 38, Judge Gaja concludes that:

> the drafters had different views about what the reference to general principles of law was intended to cover … [and] the text adopted … covered a division of opinions, especially on the question whether a general principle was to be regarded as part of international law only because it was already present in municipal systems.[76]

Oppenheim states that the purpose of article 38(1)(c) is 'to authorise the Court to apply the general principles of municipal jurisprudence, insofar as they are applicable to relations of states'.[77] Crawford elaborates on that idea and argues that:

> Tribunals have not adopted a mechanical system of borrowing from domestic law. Rather they have employed or adapted modes of general legal reasoning as well as comparative law analogies in order to make a coherent body of rules for application by international judicial process.[78]

The case law of the Permanent Court of International Justice and of the International Court of Justice shows that both Courts have made express reference to general principles existing in national legal orders as sources of general principles of international law.[79] In Gaja's view:

> When a principle exists both in municipal laws and in international law, the origin of the principle is likely to be in municipal systems … However, the application of the principle in international law does not necessarily depend on the fact that the principle is common to a number of municipal systems.[80]

This opinion is also shared by Judge Tanaka when he states that 'the recognition of a principle by civilized nations … does not mean recognition by *all* civilized nations, nor does it mean recognition by an official act such as a legislative act'.[81] As Mariño notes, for a given principle to exist in international law, its recognition among states does not need to be universal. The main legal traditions worldwide are represented in the International Court of Justice, which allows for principles to be drawn from the most relevant legal orders in any given case, and even from general principles found in the domestic legal orders of a group of states. What matters is that the principles thus found may have the potential for universal applicability.[82]

76 G Gaja, 'General Principles of Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2012) 370, 371.

77 R Jennings & A Watts (eds), *Oppenheim's International Law* (9th edn, Vol I, Longman 1992) 37.

78 J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 35.

79 *Chorzów Factory case (Germany v Poland) [Claim for Indemnity] [Jurisdiction]* (PCIJ, Series A, No 9, 1927), 31; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, [1997] ICJ Reports 7, para 110.

80 Gaja, above n 76, 372.

81 Judge Tanaka's Dissenting Opinion, above n 71, 299.

82 FM Mariño Menéndez, *Derecho Internacional Público* (Trotta 1995) 367–68.

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In sum, international law is not only made of treaties and therefore the absence of an express recognition of the right to be granted asylum in an international instrument of universal scope cannot lead to the affirmation of its absence altogether from international law. Yet, the understanding of general principles and of the position that they take in the different legal order varies enormously across legal cultures. Notably, general principles –understood as binding law- have very little grounding in the common law tradition, while they enjoy a much more prominent role in civil law jurisdictions.

It is not the purpose of this article to elaborate on debates on the sources of international law. Yet, it is important to alert the reader to the understated premises that inform different perspectives of international law and that account for different understandings of the relationship between states and individuals caught in a transnational search for safety. Awareness of the broad and diverse context where analysis takes place is therefore a pre-requisite to a well-informed and comprehensive debate on refugee protection in international law.

The analysis developed in this article is based on the understanding that general principles of international law are legally binding on states irrespective of their express recognition, and that when a general principle exists in national legal orders it can constitute a source of a principle in international law. As Tridimas explains:

> The process of discovery of a general principle is *par excellence* a creative exercise and may involve an inductive process, where a court derives a principle from specific rules or precedent, or a deductive one, where it derives from the objectives of law and its underlying values, or a combination of the two processes.[83]

5. THE FOUNDATIONS OF ASYLUM AS A LEGAL INSTITUTION

It is beyond the scope of this article to offer a detailed account of the religious and historical foundations of human rights, which have been well explored in the literature.[84] The purpose of this section is to offer an overview of the background to asylum as an institution of international law that was well grounded in the practice of states long before the international regime for the protection of refugees was born.

5.1 Asylum as a religious command

Asylum is an ancient institution, known and practised historically. However, the relevance of asylum as a legal institution goes well beyond its actual recognition in law and practice for centuries. What this recognition reflects is the normative character of asylum, which finds its roots in the most ancient bodies of norms for human conduct both in relation to individuals as well as to societies.

[83] T Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 1–2.

[84] On the religious origins of asylum and on its historical background, see Reale, above n 2, 473–510; C Gortázar Rotaeche, *Derecho de Asilo y 'No Rechazo' del Refugiado* (Dykinson 1997) 38–59; and M-T Gil-Bazo, *The Right to Asylum as an Individual Human Right in International Law. Special Reference to European Law* (UMI 1999) 33–56. On the historical and religious foundations of human rights, see for instance, W Felice, 'The Historical Foundation of Human Rights' (1998) 12 Ethics & International Affairs 221, and C Green and J Witte, 'Religion' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

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Indeed, evidence of the normative character of asylum can be found in its nature as a religious command, a call for divine protection against human in/justice. All three monotheistic religions impose a duty of hospitality and protection to strangers, which constitutes the anthropological and historical background to the law and practice of asylum over time. Asylum therefore constitutes an ancient rule, together with the prohibitions to kill or to steal. In its primitive form, asylum was not concerned with the politically persecuted, but rather with the broader category of those in distress, who could be innocent or guilty.

Judaism construed asylum as an institution exclusively for the protection of the innocent, whether Hebrews or foreigners, and for the slaves that belonged to the Jews.[85] It was the Jewish conception of religious asylum that gave the existing practice of protection its greatest expression and brought the institution into the domain of public law.

Asylum is cited on numerous occasions in the Old Testament: Exodus 21, 13 (the protection offered by the altar to those innocent of murder); I Book of Kings 1, 50–53 (the case of Adonijah, who took refuge at the altar and was later pardoned, after having usurped the throne) and 2, 28–34 (the case of Joab, who had supported Adonijah, and also took refuge at the altar).

After the destruction of all the ancient temples of Israel, the protection offered by asylum was moved from the temples to the cities. The Hebraic law established, first, three cities of refuge, and later six cities: Shechem, Kedesh, Hebron, Bezer, Ramoth, and Golan; all of them on the banks of the Jordan River.[86] The foundations for this disposition are to be found in divine command: 'Yahweh spoke to Moses and said … you are to select towns which you will make into cities of refuge for the sons of Israel as well as for the stranger and settler among you'.[87]

The decision to establish those cities as places of asylum turned the practice of asylum into an institution regulated by law: 'These were the appointed cities for all the sons of Israel and for the stranger who sojourns among them, that whoever kills any person unintentionally may flee there, and not die by the hand of the avenger of blood until he stands before the congregation'.[88]

Together with the institution of protection, Biblical texts also enshrine the prohibition to hurt the stranger, as Israel has also known exile: 'you must not oppress the stranger … for you lived as strangers in the land of Egypt'.[89] The prohibition to hurt is qualitatively expanded with a command to love the stranger as yourself: 'If a stranger lives with you in your land, do not molest him. You must count him as one of your own countrymen and love him as yourself –for you were once strangers yourselves in Egypt'.[90]

In the New Testament, Jesus and his parents must flee from Bethlehem in order to find protection from Herod.[91] Christianity thus embraces the Jewish obligation of protection expressed in the Old Testament and transforms it into a new teaching. The

85 Deuteronomy 23, 16–17.

86 Joshua 20, 7–8.

87 Numbers 35, 6–13.

88 Joshua 20, 9.

89 Exodus 23, 9.

90 Leviticus 19, 33–34.

91 Matthew 1, 13–15.

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protection of strangers then becomes one of the standards for Salvation: 'The King will say to those on his right hand, "Come, you whom my Father has blessed, take for your heritage the kingdom prepared for you since the foundation of the world. For … I was a stranger and you made me welcome"'.[92]

The Judeo-Christian tradition of hospitality is deeply rooted in the understanding that the stranger represents the extraordinary, the unknown, the mystery, that is, divinity itself or its messenger. As Aguirre expresses it:

> To welcome the stranger … implies the conviction that he has something important to tell us, which must be listened to, and whose words need to be received. A profound anthropology of the radical encounter with the other is exposed through theological texts. The foreigner, the stranger, the one who does not belong has something very important to reveal to us. Hospitality is about opening the doors of our house, but most importantly, the doors into our culture and into our heart. There is something fundamental –divine- that we must learn from the stranger and the one in need who knocks at our door (author's own translation).[93]

Likewise, the Islamic practice of asylum finds its roots in the pre-Islamic traditions of protection and hospitality towards strangers. The (religious) law is preceded by a social code of conduct. The special consideration towards the guest and the foreigner constitutes a feature of generosity and spiritual excellence in pre-Islamic Arabia. The protection of the stranger in accordance with the rules of hospitality was a sacred command[94] and is intimately linked to nomadic life and to the political organization of the Arabs. Protection was sought in the light of the hardship of life in the dessert, as an exercise of alliance between tribes, or due to the need to flee from revenge (*ataar*). The rule of *husn addyafa* (welcoming the guest) constituted a duty of respect and hospitality to the stranger, which had to be offered also to enemies.[95]

Thus, asylum constituted a duty imposed on every tribe towards anyone who requested it for whichever reason and its concession constituted a true pact of protection symbolized by sharing bread and salt.[96]

Islam draws from these sources. The Prophet himself became a refugee (*al-mouhajir*) in 622. And it is precisely this flight, the *Hijrah*, that marks the birth of Islam and glorifies the refugee in the Islamic tradition: '[T]hose who have believed and emigrated and fought in the cause of Allah and those who gave shelter and aided - it is they who are the believers, truly. For them is forgiveness and noble provision.'[97]

Islam thus conferred a legal and philosophical framework on asylum. The institution of *amân* requires every Muslim to provide protection to every non-Muslim foreigner

92 Matthew 25, 35.

93 R Aguirre, '*El extranjero en el cristianismo primitivo*' in VV.AA. *El extranjero en la cultura europea de nuestros días* (Universidad de Deusto 1997) 478–79.

94 JC Riosalido Gambotti, *La Risala de Abu Muhammad'Abd Allah Ibn Abi Zayd Al-Qayrawani* (*Editorial de la Universidad Complutense de Madrid* 1990) 7.

95 L Massignon, '*El respeto a la persona humana en el Islam y la prioridad del derecho de asilo sobre el deber de la guerra justa*' (1952) 34 (402) *Revue Internacional de la Croix Rouge* 463.

96 GM Arnaout, *L'asile dans la tradition Arabo-Islamique* (UNHCR/IIDH 1986) 12–13.

97 Quran 8, 74.

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who fleeing persecution seeks asylum in an Islamic country: 'And if any one of the polytheists seeks your protection, then grant him protection so that he may hear the words of Allah. Then deliver him to his place of safety'.[98] The protection provided includes the right to be admitted into the territory where asylum is sought as well as the prohibition to return him to his country of origin (including by extradition). Likewise, the transfer of the foreigner cannot be arranged in exchange for that of a Muslim.[99]

This rich religious tradition then developed over centuries and its normative character finds its current expression in constitutional texts worldwide.

5.2 The legal practice of asylum in historical perspective

Asylum - a word of Greek origin that means 'what cannot be seized' - refers to what is inviolable, and as such it invokes a higher power that offers protection.[100] It follows that such protection could only exist in human societies where religious and civil authorities were not united under a unique supreme authority[101] but, rather, where civil and religious powers exercised different areas of sovereignty, and therefore an appeal could be made to grace against the action of the law. If, on the contrary, civil and religious powers were held by the same sovereign –such as in India, for example- there was no possibility for such appeal.[102]

Long before the international regime for the protection of refugees was born in the twentieth century, asylum had been practiced for thousands of years, and was known in most ancient civilizations. The Kadesh Peace Treaty - concluded in the 13th century BC - between Ramses II and Hatusil III, king of the Hitittas, constitutes the first international treaty that we have evidence of and it contains protection clauses.[103] In nine provisions, the treaty establishes that the exchange of population between the two sovereigns will only take place on condition that neither the individuals themselves nor their families be subject to punishment.[104]

In ancient Greece, where most temples constituted sacred places of refuge, the god took the refugee under his or her divine power, which in turn forced human justice to be relinquished in favour of divine authority. The development of the concept of *polis* itself favoured the development of the institution of asylum, which is reflected in numerous Greek writings of the time.[105]

Protection in Greece took two forms: *hiketeia* and *asulia*. The former applied to all temples in the city, was exclusively religious in nature and only those who were innocent

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98 Quran 9, 6.

99 Arnaout, above n 96, 17–19.

100 FM Mariño Menéndez, above n 23, 507; L Bolesta-Koziebrodzki, *Le droit d'asile* (Sithoff 1962) 14; Reale, above n 2, 475; Grahl-Madsen, above n 2, 1.

101 SP Sinha, *Asylum and International Law* (Martinus Nijhoff 1971) 6.

102 R Nathan-Chapotot, *Les Nations Unies et les Réfugiés* (Pedone 1949) 24.

103 F Crépeau, *Droit d'asile. De l'hospitalité aux contrôles migratoires* (Bruylant 1995) 29; E Luque Angel, *El derecho de asilo* (Ed. San Juan Eudes 1959) 42; WR Smyser, 'Refugees: a Never-Ending Story' in RP Claude and BH Weston (eds), *Human Rights in the World Community* (2nd edn, University of Pennsylvania Press 1992) 114; G Stadtmüller, *Historia del Derecho Internacional Público* (Aguilar 1961) 16.

104 For a transcript of the protection clauses, including the exchanges of population between sovereigns and the treatment to be afforded to strangers, see WG Plaut, *Asylum: A Moral Dilemma* (Praeger 1995) 145–47.

105 See, for instance, Aeschylus' play *Iketides* (The Suppliants), where King Pelasgus offers protection to the Danaides knowing that this would lead to a war against Egypt.

found grace in the sacred place, while those who were guilty only obtained temporary protection, a delay in the execution of the punishment that was to be construed as a favour granted by the god. The latter, asylum as such, was a prerogative of certain sanctuaries (Zeus, Athena, and Artemis).

Most importantly, the Greek political organization in *polis* brought the institution of asylum into the domain of Public Law. Diplomatic relations included the recognition of the right of asylum in international treaties both among the *polis* as well as between Greece and other peoples.[106]

In Rome, the tradition of protection was established partly around a temple in honour of god *Asylaeus*, founded by Romulo and Remo, so that those outside the law could find refuge.[107] Garzón, however, challenges whether these original places of asylum were such strictly speaking. In his view, asylum could not be reconciled with the Roman conception of the law and the duties of the citizen.[108]

As Christianity became the official faith of the Roman Empire and spread across Europe, the affirmation of the power of the Church contributed to the process of territorialisation of asylum. The separate spheres of jurisdiction between the civil and the religious powers became themselves territorial.

The original intercession of the Bishop before the Prince on behalf of those seeking refuge in churches gave way to the understanding that the church and its premises were inviolable and, therefore, asylum could be granted in any land belonging to the Church. Protection thus extended from the churches to the convents, monasteries, baptisteries, graveyards, hospitals, and even to the Bishop's residence. This conception of asylum was codified by Emperor Theodosius II in 438 and Justinian I in 534.

The *Codex Theodosianus* codified the prerogative of churches to grant asylum, as well as the territorial limits of such protection. The expansion of the territorial limits of asylum granted by the Church was motivated by the wish to preserve the solemnity of sacred spaces, so that no refugee needed to lie, sleep, or eat in them.[109] A hundred years later, the *Codex Jutinianus* also included the norms relating to asylum in churches and sanctioned with the highest penalty the violation of such protection. The *Codex* prohibited the forced seizure of refugees from the church and qualified such action as a crime of *lèse-majesté*, that is, against the sovereign.[110] The territorial limits of asylum included the altar, but not only; all premises were protected, including public spaces, such as cells, rooms, orchards, baths, graveyards, and cloisters.[111]

Christianity, with its vocation of universality, made asylum also universal. The various Councils confirmed and widened the position of the Church on the matter.[112] Over

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106 Documentary evidence exists of this practise between the Greek city of Teos and 25 other states, as well as with Rome, which recognised Teos' right of asylum by the Praetor and the Senate. JD Cortés, *El asilo Americano: Sus orígenes, su naturaleza jurídica, su evolución* (*Talleres Gráficos de la Caja Popular Cooperativa* 1982) 34–36.

107 Bolesta-Koziebrodzki, above n 100, 32.

108 JD Garzón Fray OP, '*El asilo en las culturas pre-Cristianas*' (1953)(Mar) *El Siglo: Páginas Literarias*, cited in Luque Angel, *El derecho de asilo*, above n 103, 53.

109 Book VIII, Title XLV (*De His qvi ad Ecclesias Confvgivnt*), Sections 2 & 4, *Theodosiani libri* XVI (T Mommsen – PM Meyer 1954).

110 Book I, Title XII, Section 2 (*De los que se refugian en las iglesias o en ellas piden auxilio*); Código de Justiniano, *Cuerpo de Derecho Civil Romano: Publicado por Hermanos Kriegel, Hermann y Osenbrüggen con notas por García del Corral*, Tomo I (Jaime Molinas 1892).

111 ibid s 3.

112 Reale, above n 2, 487. For a historical overview of the Church's doctrine on asylum in its various Councils, see Luque Angel, above n 103, 109–12.

time, the significance of asylum in the Church grew and it found its golden age from the twelfth century. The uncontested power of the Church consolidated the inviolability of asylum within the territorial limits of the ecclesiastical jurisdiction, the infringement of which was punished by excommunication.

This tradition of asylum found expression in the legislation of the various European kingdoms established following the fall of the Roman Empire. For instance, in Spanish legislation, the VII Laws of King Alfonso X in the 13th century, confirmed the Church's privilege. Title XI of the First Law contained detailed instructions about asylum and it imposed a duty on the clergy to provide refugees with food and drink. Likewise, it prohibited refugees under the Church's protection from being harmed, killed, or prevented from accessing food and drink.[113] Thus, the legislation imposed not only a duty to respect asylum, but also regulated a minimum standard of treatment in relation to its beneficiaries.

As sovereignty lost its personal nature and became territorial, so did asylum. The development of the Modern state, as a form of political organization that exercises its sovereignty over a defined territory, consolidated the process of territorialisation of asylum, and led to the decline of asylum conceived as a Church prerogative. Territorial asylum, as is currently understood today –that is, as the protection conferred by the sovereign in its own territory- is a continuation of asylum as a Church territorial prerogative, both conceptually as well as historically.

Asylum in this form was frequently practised by Italian Republics after the end of the Middle Ages, as well as in the case of the first mass expulsion in the modern sense, that of Sephardic Jews from Spain in the fifteenth century, as a result of the edict of Granada of 30 March 1492, who found protection in other Mediterranean territories and in Eastern Europe.[114] Likewise, the religious wars that took place across Europe at the time of the Reformation allowed European states to develop the practice of asylum.

As the sovereign entities that emerged after the fall of the Roman Empire consolidated and asylum became an expression of territorial sovereignty, it also became regulated by state legislation. This took place in France in 1539, as part of the extensive legislative reform undertaken by Francis I affecting several areas of law, including ecclesiastical law.[115] In England, James I abolished the existing legislation that recognised sanctuaries in 1605, and in 1625 the law prohibited the recognition of any new sanctuaries.[116] By contrast, in the German states, asylum as a Church prerogative persisted until the nineteenth century,[117] as well as in Spain, where the fight between civil and religious powers was particularly intense, until asylum became regulated by law in 1835.[118]

But perhaps the most fundamental step in the history of asylum was the transformation of its nature into an institution for the protection of the politically persecuted.

113 Primera Partida, Título XI (*De los preuillejos e de las franquezas que han las Eglesias, e sus cementerios*), Ley 2, reprinted in M Martínez Alcubilla, *Códigos antiguos de España* (Administración 1885).

114 Nathan-Chapotot, above n 102, 19; MR Marrus, *The Unwanted: European Refugees in the Twentieth Century* (OUP 1985) 5.

115 Art 166, *Ordonnance de Villers-Cotterets*, 1 Aug 1539, cited in J Turpin, *Nouveaux aspects juridiques de l'asile politique: Le litige Hungaro-Yougoslave devant la Societé des Nations* (G-P Maissonneuve 1937) 9.

116 Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1769, reprinted by Dawson's of Pall Mall 1966) ch 26, 326–27.

117 Bolesta-Koziebrodzki, above n 100, 35.

118 Turpin, above n 115, 9.

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Although, originally, asylum could and in fact was granted to common criminals, the Age of Enlightenment saw the transformation of its nature: in addition to life, freedom of thought was also protected, while an understanding developed that asylum should not prevent the legitimate prosecution of crimes.

Key to this development, the French Revolution marked a distinct qualitative novelty in the way states conducted their affairs. Just as the division of the (European) world between Catholics and Protestants led to the protection of those persecuted by reason of their faith, the new division of the world between Monarchies and Republics, as diametrically opposite political conceptions, produces a new type of refugee: the political refugee.[119]

Therefore, as of the eighteenth century, the nature of asylum became political. Together with the transformation of sovereignty (from the Monarch to the People), asylum became not only a sovereign right of states to grant at will, but also an expression of a duty. Reale notes that in the mid-eighteenth century, the extradition of those who had been granted asylum as a result of the political nature of their crime was resented as 'an offence to the laws of humanity and honour'.[120] In his view, this sentiment of the public conscience was transformed into a legal principle for which it was necessary to find a place in the law.[121] And, as a matter of law, this conception of asylum as a duty found its first formulation in modern times in article 120 of the 1793 French Constitution, born after the French Revolution: '[*Le Peuple français] donne asile aux étrangers bannis de leur patrie pour la cause de la liberté. Il le refuse aux tyrans*'.[122] Far from being obsolete, despite the establishment of the refugee protection regime as a matter of international law, this provision constitutes a reference on which constitutions around the world still formulate asylum in their bill of rights as an essential element of liberal-democratic states.

6. THE CONSTITUTIONAL NATURE OF THE RIGHT TO ASYLUM

Today, constitutions worldwide recognise the right to asylum in their bill of rights and in doing so they represent a continuation in the ancient normative character of the institution to inform conceptions of society for the wellbeing of individuals.[123] As has been examined above, Grahl-Madsen believed that constitutions around the world '[laid] down a more or less perfect right of asylum for individuals',[124] a view shared by Weis, who stated that constitutions around the world '[confer] upon the individual a subjective right to asylum'.[125] Indeed, an exploration of constitutions around the world shows that the right to asylum is enshrined in most constitutions of countries across different legal traditions.[126] The constitutions of Angola, Bénin, Bolivia, Bulgaria,

119 A Grahl-Madsen, above n 2, 3.

120 Reale, above n 2, 544.

121 ibid.

122 Constitution du 24 juin 1793 <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-du-24-juin-1793.5084.html> accessed on 26 Jun 2014.

123 On the constitutional foundations of human rights, see M O'Boyle & M Lafferty, 'Constitutions and General Principles as Sources of Human Rights Law' in D Shelton (ed), *The Oxford Handbook*, fn 83.

124 Grahl-Madsen, above n 2, 24.

125 Weis, above n 19, 180.

126 For an analysis of the right to asylum for individuals enshrined in national constitutions, see Weis, above n 19, 180; Gil-Bazo, above n 84, 476-47; and M-T Gil-Bazo, 'Asylum in the practice of Latin American and African States', New Issues in Refugee Research, Research Paper No 249 (UNHCR 2013).

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Burundi, Brazil, Cape Verde, Chad, China, Colombia, Costa Rica, Cuba, Democratic Republic of Congo, the Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Guatemala, Guinea-Conakry, Honduras, Hungary, Italy, Ivory Coast, Mali, Mozambique, Nicaragua, Paraguay, Peru, Portugal, Spain, and Venezuela all recognise the right to asylum. They all draw from the liberal-democratic tradition that emerged from the French Revolution, changing the conception of the state and of the relationship between individuals and the state.

The wording of constitutions reflects this tradition of protection. The broad range of beneficiaries of asylum reflects the historical tradition of the institution that offers protection on a variety of grounds, including, but not only, those that give rise to refugee status. A look at some of the constitutions in Africa, America, and Europe allows the reader to acquire a sense of the scope of the institution by means of example.

Article 13 of the Cuban Constitution constitutes one of the most detailed provisions on constitutional asylum:

> The Republic of Cuba grants asylum to [individuals] persecuted because of their democratic ideals against imperialism, fascism, colonialism and neo-colonialism; against discrimination and racism; for national liberation; for the rights of workers, peasants and students; because of their progressive political, scientific, artistic, and literary activities, because of socialism and peace.[127]

The 1987 Nicaraguan Constitution also establishes the contours of asylum in detail. In article 42 it states that asylum 'protects solely [individuals] persecuted for their fight in favour of democracy, peace, justice, and human rights'.

Article 33(8) of the 1976 Portuguese Constitution guarantees the right to asylum 'to foreigners and stateless persons persecuted or seriously threatened with persecution as a result of their activities in favour of democracy, social and national freedom, peace among peoples, individual freedoms and rights'.

Article 71(1) of the 2010 Angolan Constitution reads as follows:

> The right of asylum is guaranteed to every foreigner or stateless person persecuted for political reasons, especially those under serious threat or persecuted by reason of their activities in favour of democracy, national liberation, peace among peoples, freedom, and human rights, in accordance with the laws in force and international instruments.

Article 39 of the Constitution of Cape Verde (as amended in 2010) similarly states: 'Foreigners and stateless persons persecuted for political reasons or under serious threat of persecution by virtue of their activities in favour of national liberation, democracy, or the respect of human rights, have the right to asylum in national territory'.

Article 11 of the 1992 Constitution of Guinea-Conakry reads as follows: 'Everyone persecuted by reason of his political, philosophical or religious opinions, his race, his ethnic membership, his intellectual, scientific or cultural activities, [or] by reason of his defence of freedom has the right to asylum in the territory of the Republic'.

127 Unless otherwise stated, all constitutional provisions and foreign case-law cited for the countries considered in this article are the author's own translation.

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Article 33 of the 2006 Constitution of the Democratic Republic of Congo provides that:

> [t]he Democratic Republic of Congo grants … asylum in its national territory to foreigners sought or persecuted by reason of their opinion; beliefs; racial, tribal, ethnic, linguistic membership or because of their activities in favour of democracy and the Rights of Man and Peoples, in accordance with the laws and regulations in force.

What emerges from this brief overview is that asylum protects refugees within the meaning of the Refugee Convention, but also those who flee persecution on account of their fight for freedom (including national liberation), for democracy, or for the rights of others. The ideological charge in the wording of constitutional provisions worldwide reflects conceptions of the state itself and of the values that it exists to protect.

Indeed, the constitutional rank of asylum speaks to its nature as a ruling principle of the state itself. In Brazil and Nicaragua, asylum is explicitly recognised as such. Article 4 of the 1988 Brazilian Constitution establishes that 'the international relations of the Federal Republic of Brazil are ruled by the following principles: ... the granting of political asylum'. Likewise, article 5 of the 1987 Nicaraguan Constitution includes guaranteeing asylum for individuals who suffer political persecution among the principles on which the Nicaraguan nation is founded.

This normative value of asylum was elaborated upon by the Costa Rican Supreme Court in a judgment of 1998. The Court stated that a decision on the case in question required an analysis of the constitutional nature of asylum. The Court understood that:

> asylum is a legal principle of higher rank that ... turns the State's territory into an inviolable space for the protection of individuals of other countries when they are persecuted by reason of their political or ideological preferences or actions, a principle enshrined in article 31 of the Constitution, and that as such it constitutes a fundamental right [of individuals].[128]

Accordingly, the Court interpreted the protective nature of asylum as twofold: on the one hand, it protects the individual persecuted on political grounds, and, on the other, it protects the 'fundamental values of the constitutional order, the tradition of protection of freedom of thought [and] freedom of expression'[129] that are at the basis of a democratic state founded on the rule of law.

In Ecuador, the Constitutional Court construes the right to asylum as a human right[130] and refers to the significant importance of asylum within the Constitutional framework 'insofar as [asylum] arises from the need to restore the fundamental human rights of individuals who have been forced to leave their countries of origin'.[131]

128 *Leiva Durán v Ministro de Relaciones Exteriores y Tribunal Penal del Primer Circuito Judicial de San José*, Costa Rica Supreme Court, decisión No 6441–98, 4 Sept 1998.

129 ibid.

130 *Case No 0056-12-IM & 0003-12-IA Acumulados*, Ecuador Constitutional Court, Judgment No 002-14-SIN-CC, 14 Aug 2014, 38. The author is indebted to Karina Sarmiento for sharing the full original version of the judgment.

131 ibid 42.

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In Spain, the constitutional debate clearly rejected a provision on asylum explicitly worded in terms of a subjective right of individuals[132] and, instead, chose to refer its precise content to the legislator. Article 13(4) of the Constitution thus reads as follows: 'The law shall establish the terms under which nationals of other countries and stateless persons shall enjoy the right of asylum in Spain' (author's own translation). Despite the original intention of the legislator, the debates in the Council of State, and subsequently in the Supreme Court, confirmed that, on the basis of other constitutional rights and principles, including the rule of law and the prohibition of arbitrary action on the part of the state, asylum is to be construed as an individual subjective right that the Government is obliged to recognize when the applicant meets the requirements established by law, and its refusal is open to judicial scrutiny.[133]

More recently, the Administrative Tribunal in Nantes (France) found that the refusal to issue a short-term visa to a Syrian asylum seeker and her family to allow them to travel to France to apply for asylum constituted a violation of the right to asylum enshrined in the French Constitution. While the Court acknowledged that the provision of 'asylum visas' was not regulated in the relevant legislation, it found that given that the nature of the constitutional right to asylum is that of a fundamental freedom, it follows that the refusal to issue a visa constituted 'a serious and manifestly unlawful violation of a fundamental freedom with serious consequences for the asylum seekers in question'.[134]

Despite the nuances and differences in the wording of constitutional provisions, asylum aims to protect the higher values on which the state itself is founded: national liberation, justice, democracy, and human rights. These values are also at the core of international law, as enshrined in article 1 of the United Nations Charter on the purposes of the United Nations.

Indeed, this conception of asylum does not exist exclusively within any given domestic legal order. On the contrary, it is intimately linked with international law. Some constitutions explicitly include an express reference to the international legal framework where constitutional asylum exists. For instance, article 27 of the Constitution of Guatemala states that the country 'recognises the right to asylum and grants it in accordance with international practice'. Article 12(1) of the 1990 Constitution of Bénin mirrors article 12(3) of the African Charter: 'Every person has the right, when persecuted, to seek and obtain asylum in foreign territory in accordance with laws of those countries and international conventions'.

The Colombian Constitutional Court explained the role of international law in the interpretation of the constitutional provision on asylum in a judgment of 1995. The Court explicitly stated that 'the right to asylum … is founded on international law, as enshrined in international treaties …. Therefore, when the Constitution … refers to the law, this must be interpreted as an express reference to the laws that sanction international instruments'.[135]

132 N Pérez Sola, *La regulación del derecho de asilo y refugio en España* (Adhara 1997) 75–78.

133 D Blanquer, *Asilo político en España. Garantías del extranjero y garantías del interés general* (Ministerio del Interior 1997) 163–72.

134 Case No 1407765, *M et autres v Republique Française*, Decision 16 Sept 2014, 3–4.

135 *Revisión Oficiosa de la 'Convención sobre prevención y castigo de delitos contra personas internacionalmente protegidas', suscrita en Nueva York el 14 de diciembre de 1973, y de su Ley Aprobatoria Número 169 de diciembre 6 de 1994*, Colombia Constitutional Court, judgment no C-396/95 (Expediente No LAT 038), 7 Sept 1995, sec E(2).

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Later, in a judgment of 2003, the Court made express reference to the 1954 Caracas Convention and the American Declaration of Human Rights as international instruments that lie at the basis of the legal framework for the interpretation of article 36.[136]

Likewise, the Constitutional Court of Ecuador affirmed the need to interpret asylum legislation in the light of international law, as well as the direct application of international human rights norms (including the right to asylum in international treaties) when their protective scope is higher than domestic legislation.[137]

In Europe, the Sofia City Administrative Court in Bulgaria asked the Court of Justice of the EU to interpret the content of the right to asylum in the case of *Halaf*, already mentioned.[138] Following the judgment of the EU Court, the Sofia Court ruled in the national proceedings that:

> the right to asylum guaranteed under article 18 of the Charter [of Fundamental Rights of the EU] and the Treaty on the Functioning of the European Union (TFEU) includes the right of every third-country national that the Member State where he has applied for asylum fulfil *its obligation* of achieving the purpose in article 78(1) TFEU '*to offer appropriate status* to any third-country national in need of international protection.'[139]

The extensive recognition of asylum in constitutions worldwide speaks to the value of this institution as one of the underlying principles in legal orders worldwide. And as such, it informs international law itself. In the context of the European Union, asylum has been recognised as a (legally binding) general principle of EU Law resulting from the constitutional traditions of its member states. In the words of Advocate General Maduro in the *Elgafaji* case: '[the] fundamental right to asylum … follows from the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States.'[140] Furthermore, although the research into constitutional texts worldwide has shown that English-speaking countries do not have a tradition of constitutional asylum, it is undeniable that the protection of individuals from persecution does feature highly in their domestic legal orders as asylum is granted to refugees. In other words, asylum (conceived as protection) does play a fundamental role in the underlying legal conceptions of what a state is and what it exists for across the world. And as such, these traditions (however conceived and applied) still reflect today the principle of humanitarianism recognising 'the existence of duties that stem from membership in a single human community'.[141]

[136] *Acción de tutela promovida por Reza Pirhadi contra el Ministerio de Relaciones Exteriores y el Departamento Administrativo de Seguridad DAS*, Colombia Constitutional Court, Judgment T-704/03 (expediente T-738454), 14 Aug 2003, 8–9.

[137] *Case No 0056-12-IM & 0003-12-IA Acumulados*, above n 130, 51.

[138] Above n 18.

[139] *Zuheyr Freyeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerski savet*, Sofia City Administrative Court, judgment no 297, 15 Jan 2014 (emphasis added). The author is indebted to Valeria Ilareva for her translation of the relevant paragraphs in the judgment.

[140] Advocate General Maduro's Opinion in case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, para 21. For an analysis of the constitutional foundations of asylum as a general principle of EU Law, see M-T Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 RSQ 33, 46–48.

[141] M Gibney, *The Ethics and Politics of Asylum* (CUP 2004) 231.

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7. CONCLUSIONS

This article has examined asylum in international law. It has contested the perception of the institution as obsolete[142] as well as its strict equation with refugee status within the meaning of the Refugee Convention.

By exploring the historical roots and normative character of asylum, this article has shown that this institution has historically provided a normative framework common to different societies, and accordingly it has shaped the relations between sovereigns. Today it remains one of the foundations of states, whose objective is not only the protection of the individual but also of the core values on which the state itself rests.

The article has examined the constitutions of countries representing different legal systems and traditions and has found that the long historical tradition of asylum as an expression of sovereignty has now been coupled with a right of individuals to be granted asylum of constitutional rank, which in turn is recognised by international human rights instruments of regional scope.

In sum, the continuous historical presence of asylum across civilizations and over time, as well as its crystallization in a norm of constitutional rank among states worldwide, suggests that asylum constitutes a general principle of international law and, as such, it is legally binding when it comes to the interpretation of the nature and scope of states' obligations towards individuals seeking protection.

The nuances of what specific protection asylum provides, who is entitled to benefit from it, as well as its derogations or exceptions are far from settled, but a reductionist approach that denies the existence of asylum in international law because it lacks grounding in an international treaty of universal scope fails to recognise the relevance and role that this institution still plays in today's search for safety as a matter of international law. As international human rights monitoring bodies and international courts are called to examine states conduct in relation to refugees and others entitled to asylum, the response of the scholar cannot be silence. A methodological approach that takes account of the multiple dimensions of international law and the interpretation of its rules in the broader context of state practice across different legal traditions is called for, making the analysis of asylum truly international.

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142 Lambert, Messineo and Tiedemann, above n 8.

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND THE RIGHT TO BE GRANTED ASYLUM IN THE UNION'S LAW

*María-Teresa Gil-Bazo**

The 2000 Charter of Fundamental Rights of the European Union recognizes the right to asylum in article 18. Once the 2007 Treaty of Lisbon enters into force, the Charter will become legally binding and its provisions will have treaty rank within the Union's legal order. Compliance with the Charter will then be a requirement for the validity and legality of the Union's secondary legislation, including Directives and Regulations in the field of asylum. This article traces the roots of article 18 back to article 14 of the 1948 Universal Declaration of Human Rights and argues that the right to be granted asylum has become a subjective and enforceable right of individuals under the Union's legal order. The article examines the legal nature, interpretation, scope of application, and enforceability of article 18 of the Charter on the right to asylum in the Union's legal order. It concludes that the beneficiaries of this provision are all individuals who fall under the scope of application of the Union's law, whose international protection grounds are established by international human rights law, including the Refugee Convention and the European Convention on Human Rights. The Charter, as a regional supranational instrument, reinforces the protection of asylum in international law by bringing Europe into line with other regional developments that recognize not only the right to seek, but also the right to be granted, asylum. On the sixtieth anniversary of the Universal Declaration of Human Rights, more than two-thirds of the States Parties to the Refugee Convention are also bound by a rule of international or supranational law to grant asylum.

1. Introduction

The right to asylum is recognized by the Charter of Fundamental Rights of the European Union[1] (hereinafter, the Charter), that was solemnly proclaimed on 7 December 2000 by the three main European Union (EU) institutions, namely, the European Parliament, the Council, and the Commission, on the fringe of a meeting of the European Council in Nice.

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1 [2000] OJ C364/1.

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DOI:10.1093/rsq/hdn044

The Charter contains a comprehensive catalogue of civil, political, economic, and social rights, as well as the rights attached to European citizenship. Its provisions are divided into seven titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, Justice, and General Provisions (on interpretation and application).

While the Charter is not yet legally binding, it is generally understood that it reaffirms existing rights, for the purpose of making them more visible.[2] Furthermore, the 2007 Treaty of Lisbon (not yet in force),[3] establishes that the Charter provisions shall have the same legal value as the Treaties. Therefore, once the Treaty of Lisbon enters into force, the Charter will acquire the rank of primary legislation within the Union's legal order, and accordingly, compliance with the Charter will be a requirement for the validity and legality of the Union's secondary legislation (including Directives and Regulations in the field of asylum).

This article traces the roots of article 18 back to article 14 of the 1948 Universal Declaration of Human Rights (UDHR)[4] and argues that the right to be granted asylum has become a subjective right of individuals under the Union's legal order. It examines the legal nature, interpretation, scope of application, and enforceability of article 18 of the Charter on the Right to Asylum in the Union's legal order. Given that this article is concerned with article 18 as a legally binding provision and that, as at the entry into force of the Treaty of Lisbon, the European Community is to be replaced and succeeded by the Union,[5] this article refers to the Union rather than the European Community.

2. The legal nature and scope of application of the Charter

As has been pointed out above, article 6(1) of the Treaty on European Union (TEU), as amended by the 2007 Treaty of Lisbon, establishes that:

> The Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, *which shall have the same legal value as the Treaties*. (emphasis added)

[2] Lord Goldsmith, QC, "A charter of rights, freedoms and principles", *Common Market Law Review*, Vol. 38, 2001, 1204; P. Eeckhout, "The EU charter of fundamental rights and the federal question", *Common Market Law Review*, Vol. 39, 2002, 947.

[3] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 Dec. 2007, [2007] OJ C306/1. The Charter's text was amended in Dec. 2007 ([2007] OJ C303/1) in order to bring its terms into line with the Treaty of Lisbon. The new text will replace the original one upon the entry into force of the Treaty of Lisbon. It is expected that, subject to ratification by all twenty-seven Member States, the Treaty of Lisbon will enter into force on 1 Jan. 2009, prior to the European Parliament elections in June of the same year.

[4] Universal Declaration of Human Rights (UNGA res. 217 A(III), 10 Dec. 1948).

[5] Treaty on European Union ([2002] C325/1), art. 1, as amended by the Treaty of Lisbon. Likewise, the Treaty Establishing the European Community ([2002] C325/33) will be named the Treaty on the Functioning of the European Union (Treaty of Lisbon, art. 2).

The language of this provision deserves some attention. The TEU, as amended by the Treaty of Lisbon, establishes that the Charter will have "the same legal value as the Treaties". But is it a treaty as a matter of international law? Article 1(a) of the Vienna Convention on the Law of Treaties[6] establishes that a treaty is:

> an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

The Charter, therefore, is not a treaty as a matter of international law, as it is not an agreement between States. It was neither signed and ratified by the Member States, nor have its provisions been included in the Treaty of Lisbon (to which all Member States are parties).[7]

However, and despite its lack of treaty nature in international law, the Charter provisions will have the same legal value as the Treaties as a matter of Union law. This significant distinction should have no bearing as far as the Union's legal order is concerned, since the Charter will have the rank of primary legislation. However, it is most relevant regarding the relationship between the Charter and other international human rights instruments to which the Member States are parties. This relationship is not governed by the Vienna Convention on the Law of Treaties; in particular, the lack of treaty nature of the Charter preserves the current *status quo* regarding the legal obligations of the Member States under the European Convention on Human Rights.[8]

Furthermore, article 6(2) TEU, as amended by the Treaty of Lisbon, also introduces a legal obligation for the Union to accede to the European Convention on Human Rights. It states: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." The specific provisions regulating this accession are included in a Protocol,[9] article 2 of which also safeguards (as a matter of Union law) the legal obligations of the Member States in relation to the European Convention on Human Rights, stating:

> [A]ccession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention [. . .].

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6 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 Jan. 1980) 1155 UNTS 331.

7 The Charter was, however, incorporated in part II of the 2004 Treaty Establishing a Constitution for Europe, signed in Rome on 29 Oct. 2004, [2004] C310/41. Accordingly, after the entry into force of this instrument, the Charter provisions would have had legally binding force as treaty law. However, it is a well-known fact that, although this treaty was signed by all Member States, its ratification and entry into force was precluded as a result of its rejection by referenda in France and the Netherlands.

8 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 Nov. 1950, entered into force 3 Sept. 1953), ETS 005.

9 Protocol Relating to art. 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, [2007] OJ C306/155.

Therefore, once the Treaty of Lisbon enters into force, the legal nature of the Charter's provisions will be that of primary legislation within the Union's legal order. Accordingly, compliance with the Charter will be a requirement for the validity and legality of the Union's secondary legislation (including Directives and Regulations). However, it will not affect the international obligations of Member States under international human rights law.

Once the legally binding nature of the Charter provisions has been established as primary Union law, the question arises as to the scope of application of those provisions. As far as the Member States are concerned, unlike other human rights instruments, the Charter does not bind them to guarantee the rights it enshrines to everyone in their territory and under their jurisdiction in an unqualified manner, but rather, by its very nature as an instrument of Union law, its scope of application is limited to the areas of State activity ruled by Union law itself. Accordingly, article 51 of the Charter specifies that it shall apply to the "institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*" (emphasis added). Article 52(1) further clarifies: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties." This is also reinforced by article 6(1) TEU, as amended by the Treaty of Lisbon, which reads: "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."

While some areas of Union activity, such as commercial policies or the conservation of marine biological resources, are the exclusive competence of the Union, shared competence applies in the field of Justice and Home Affairs. Therefore, as far as asylum and other forms of protection are concerned, the Charter only imposes standards of treatment in the areas of Member State activity that fall within the competence transferred to the Union, while all other protection-related matters remain within the domain of the Member States and subject to their international commitments.[10] For example, as the law stands today, standards of procedural fairness and judicial review enshrined in the Charter only apply to procedures for the recognition of refugee status, but not to those for the granting of subsidiary protection in Member States that have separate procedures for different forms of protection and have chosen not to extend the scope of application of the Procedures Directive[11] to subsidiary protection (in accordance with its article 3).

The Charter's comprehensive character as a catalogue of human rights, its limited scope of application, and its treaty-binding nature (despite not being a treaty), makes it a unique human rights instrument.

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[10] See A. Dashwood, "The relationship between the Member States and the European Union/European community", *Common Market Law Review*, Vol. 41, 2004, 355–81.

[11] Council Directive 2005/85/EC of 1 Dec. 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L326/13.

3. Asylum: the invisible right

Article 18 of the Charter on the right to asylum, as amended by the Treaty of Lisbon, is worded as follows:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties").

The reading of this provision raises a number of issues. The most striking feature is that it lacks an explicit subject. This matter needs to be examined in the light of another issue of significant relevance, namely, the inconsistent translation of the provision into the different official languages of the Union, as is outlined in section 3.2 below. The provision also raises issues insofar as it makes reference to the United Nations Convention relating to the Status of Refugees[12] (hereinafter, the Refugee Convention) and its Protocol[13] as the standards that need to be complied with in the application of this right, despite the fact that neither one of these instruments explicitly recognizes asylum as one of the rights to which refugees are entitled.

While article 18 imposes an obligation to guarantee the right to asylum, it does not say who is entitled to it. The question therefore arises as to whether this is a right of States, or a right of individuals. This question is far from a purely intellectual exercise. While the right of States to grant asylum to individuals is well established as a matter of international law, the right of individuals to be granted asylum is not explicitly enshrined in any international instruments of universal scope, although it is recognized in international treaties of regional scope.[14] I have argued elsewhere that this is also the case within the Union's legal order, as individuals have a right to be granted protection under articles 13 and 18, respectively, of the Qualification Directive,[15] which includes the right of residence.[16] Yet, the question remains as to whether, as a Charter right, asylum is to be construed as a subjective right of individuals to be granted it.

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12 Convention relating to the Status of Refugees (adopted 28 Jul. 1951, entered into force 22 Apr. 1954), 189 UNTS 137.

13 Protocol relating to the Status of Refugees (adopted 31 Jan. 1967, entered into force 4 Oct. 1967), 606 UNTS 267.

14 See American Convention on Human Rights (adopted 22 Nov. 1969, entered into force 18 Jul. 1978) 114 UNTS 123, art. 22; African Charter on Human and Peoples' Rights (adopted 27 Jun. 1981, entered into force 21 Oct. 1986), OAU Doc. CAB/LEG/67/3 rev. 5, printed in (1982) 21 *International Legal Materials*. 58, art. 12(3).

15 Council Directive 2004/83/EC of 29 Apr. 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, [2004] OJ L304/12.

16 M.-T. Gil-Bazo, "Refugee status and subsidiary protection under EC law: the qualification directive and the right to be granted asylum", in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, Hart, 2007, 236–9.

3.1 The dual nature of asylum in international law: a right of States and a right of individuals

Asylum is a well-known institution in international law and its historical roots in State practice are well established.[17] Asylum thus conceived, however, refers to the right of States to grant asylum *if they so wish* in the exercise of their sovereignty, without it being considered a hostile act towards other States, who have a correlative duty to respect it. Accordingly, asylum as an exercise of State sovereignty is under no limitation in international law, with the exception of extradition or other obligations acquired by treaty, and hence, the corresponding duty on other States to respect it.[18]

To be clear, the discussion that follows on the right of asylum as a right of States does not refer to the human rights debate about whether the duties enshrined in international human rights treaties are owned to other States, or whether they are owed to individuals, as no right to be granted asylum is enshrined in any international human rights instrument of universal scope. The discussion refers to the coexistence in international law of a well-established sovereign right of States to grant asylum on the grounds and under conditions that they may choose; and a right of individuals to be granted asylum, which so far has found express recognition only in regional human rights treaties in America and Africa, as well as in the constitutions of States worldwide, but not yet in an international human rights instrument of universal scope. The question examined here is whether the Charter guarantees the right of Member States to grant asylum, or the right of individuals to receive it.

Historically, asylum pre-dates the existence of the international regime for the protection of refugees (which was born in the inter-war period in the twentieth century) and the international regime for the protection of human rights (born in the UN era).[19] International instruments on the matter have repeatedly reaffirmed the sovereign right of States to grant asylum and the correlative duty of other States to respect it.[20] Article 1(1) of the UN Declaration on Territorial

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17 For an analysis of the evolution and legal regime of this institution, see for instance, G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford, Oxford University Press, 3rd edn., 2007, 353–68; A. Grahl-Madsen, *Territorial Asylum*, Stockholm, Almqvist & Wiksell International, 1980; E. Reale, "Le droit d'asile", *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 63, No. 1, 1938, 473–601.

18 For a discussion on the limits imposed by international law on the right of States to grant asylum, see F. Mariño Menéndez, "El asilo y sus modalidades en Derecho internacional", in F. Mariño Menéndez (ed.), *Derecho de extranjería, asilo y refugio*, Madrid, Ministerio de Asuntos Sociales, 1995, 509–11.

19 It is worth noting, however, that at the time the foundations of international law were laid down from a natural law perspective, the individual protection aspects of asylum were the subject of much consideration by early writers: see for example, F. de Vitoria, *Relectiones Theologicae XII*, Section 53, first published in 1557 (from the notes compiled by his students); H. Grotius, *De Jure Belli Ac Pacis Libri Tres*, Book II, Chapter II, first published in 1625. Various translations of these works have been published in different languages.

20 See for example, the Havana Convention on Asylum (adopted 20 Feb. 1928) 132 LNTS 323; the Montevideo Convention on Political Asylum (adopted 26 Dec. 1933, entered into force 28 Mar. 1935) OASTS 34; the Convention on Diplomatic Asylum (adopted 28 Mar. 1954, entered into force 29 Dec. 1954) OASTS 18; and the Convention on Territorial Asylum (adopted 28 Mar. 1954, entered into force 29 Dec. 1954) OASTS 19.

Asylum words it in this way: "Asylum granted by the State, in the exercise of its sovereignty [. . .] shall be respected by all other States." The nature of asylum as a sovereign right of States is further safeguarded by article 1(3) of this Declaration, which states that "[it] shall rest with the State granting asylum to evaluate the grounds for the grant of asylum".[21] These same constitutive elements appear again in article 1 of the Council of Europe Declaration on Territorial Asylum:[22]

> 2. The member states of the Council of Europe [. . .] *reaffirm their right to grant asylum* [. . .] (emphasis added)
> 3. The member states of the Council of Europe reaffirm that the grant of territorial asylum is a peaceful and humanitarian act and shall not be regarded as an act unfriendly to any other state and *shall be respected by all states* (emphasis added).

However – and given that the freedom fighters of one State are also the dissidents of another – by its very nature the practice of both territorial and diplomatic asylum has not always been a peaceful matter in the relations between States. The *Asylum* case[23] before the International Court of Justice (ICJ), with its dissenting opinions and the two cases that followed,[24] gives a clear idea of the heated nature and relevance of the debate.[25]

In contrast, it was only in the twentieth century that the language of human rights made its appearance in international law, and with it, the recognition of individuals' rights as a matter of international law. The Universal Declaration of Human Rights refers to the right to life, the right to freedom of movement, and the right to leave any country, to name a few of the rights enumerated. This is also the case in relation to asylum. Article 14 of the Universal Declaration of Human Rights establishes: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Likewise, article 22(7) of the American Convention on Human Rights recognizes "the right to seek and be granted asylum", and article 12(3) of the African Charter refers to the right of every individual "to seek and obtain asylum". Thus, the right *to* asylum becomes a right of individuals, which coexists with the already established right *of* States to grant it.

As has been pointed out above, the Charter of Fundamental Rights does not specify who is entitled to asylum. Given that its wording refers to the existence of a right and a duty to guarantee it, the provision evokes the traditional elements of the right of asylum as a right of States. Furthermore, given that, as the Preamble indicates, the Charter reaffirms existing rights and that the right to

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21 UNGA res. 2312(XXII), 14 Dec. 1967.

22 Council of Europe, Declaration on Territorial Asylum, Decl-18.11.77E, 18 Nov. 1977.

23 ICJ *Asylum* case, Judgment, ICJ Reports 1950, 266.

24 ICJ, *Request for interpretation of the Judgment of Nov. 20th, 1950, in the asylum case*, ICJ Reports 1950, 395; ICJ, *Haya de la Torre*, ICJ Reports 1951, 71.

25 See J.L.F. van Essen, "Some reflections on the judgments of the international court of justice in the asylum and Haya de la Torre cases", *International and Comparative Law Quarterly*, Vol. 1, 1952, 583–9.

be granted asylum has not been recognized as pertaining to individuals in any international instrument to which Member States are parties, the question arises whether the provision enshrines a right of States to grant asylum that must be respected, or whether it recognizes a right of individuals to be granted asylum.

3.2 The individual nature of the right to asylum

Given that the Charter is not an international treaty, as has been shown above, its legally binding nature will derive exclusively from article 6(1) TEU, and therefore it needs to be interpreted within the context of the Union's legal order, including the rules of interpretation set by article 6(1) TEU, Title VII of the Charter, and the case law of the European Court of Justice (ECJ) generally.

Neither the Treaties nor the Statute of the ECJ includes rules of interpretation of the Union's law. However, the ECJ has developed a sound body of case law in which a variety of methods have been used. These include independent interpretation (of the Union's legal order), uniform interpretation (in all official languages), literal interpretation, reasonable interpretation, logical interpretation, and teleological interpretation. References to the spirit and to the general scheme of the instrument have been, particularly, strong in the ECJ's interpretation of the Union's law.[26] Unlike international law, where the ordinary meaning of the terms is the primary interpretative criteria,[27] the relevance of this in the Union's legal order is tempered due to the difficulties inherent in the interpretation of instruments in 23 official languages, all equally authentic. In particular, the ECJ has found that:

> When a single decision is addressed to all the Member States the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both *the real intention of its author* and *the aim he seeks to achieve*, in the light in particular of *the versions in all [...] languages* (emphasis added).[28]

In cases where the different language versions lead to divergent interpretations, the ECJ has emphasized the need to interpret the contested provision in light of its purpose and general context:

> By reason of the divergences that exist between the versions of this text in different languages it does not lend itself to a clear and uniform interpretation on the point in question [...] accordingly, it must be interpreted by reference to the *purpose and the general scheme*.[29]

[26] D. Wyatt and A. Dashwood, *European Union Law*, London, Sweet & Maxwell, 5th edn., 2006, 404–7.

[27] Vienna Convention on the Law of Treaties, art. 31.

[28] ECJ Case 29/69, *Stauder* [1969] *ECR* 419, para. 3.

[29] ECJ Case 6/74, *Johannes Coenrad Moulijn v. Commission of the European Communities* [1974] *ECR* 1287, paras 10–11.

It would appear that while the English and Dutch versions, for instance, refer to the "right *to* asylum", many official languages refer to the "right *of* asylum". This is the case, for instance, in French ("*droit d'asile*"), Greek, Italian, Portuguese, Romanian, and Spanish. The formulation in other languages does not raise the issue, as no preposition is used; this is the case in German ("*Asylrecht*") and Hungarian ("*menedékjog*"). And the distinction between "of" and "to" does not appear to exist in other languages, such as Bulgarian, where the "right to" or the "right of" would equally be translated into "*pravo na*".[30]

All the provisions in the Charter enshrine rights of individuals, and not a single provision makes reference to any rights of States. The Preamble of the Charter states that it:

> [r]eaffirms [. . .] the rights *as they result*, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights (emphasis added).

Therefore, the content of the Charter, as well as the explicit reference to international human rights instruments and fundamental freedoms of constitutional rank, suggests that this instrument is indeed concerned with the recognition of fundamental rights, rather than with the rights of Member States. Therefore, it would only be reasonable to assume that despite the lack of express subject, the well-established nature of asylum as a right of States in international law, and the divergence among official languages, the right to asylum/*droit d'asile* in the Charter is to be construed as a right of individuals, rather than a right of States.

Furthermore, it is worth noting that while the English version of article 22(7) of the American Convention on Human Rights, already referred to, speaks of "the right *to* seek and be granted asylum," the equally authentic Spanish version refers to the right "of" ("*derecho* de *buscar y recibir asilo*"). Yet both versions of this provision are unequivocal as to the individual nature of the right: "every person" ("*toda persona*"). Likewise, the English version of article 12(3) of the African Charter refers to the right of every individual "*to* seek and obtain asylum", while the equally authentic French version refers to the right *of* ("*droit* [. . .] de *rechercher et* de *recevoir*"). It would, therefore, appear that while traditionally the language of human rights refers to "the right *to*" when guaranteeing rights to individuals, the apparent divergence in the wording of asylum provisions does not have much bearing if one considers equally authentic versions of different languages in human rights treaties that unequivocally refer to an individual right.

[30] The author is indebted to Karina Franssen, Gábor Gyulai, Valeria Ilareva, Elena Katselli, and Themba Lewis for their assistance with different language versions. Any errors remain the author's own.

3.3 The drafting history of the Charter

An examination of the Charter's *travaux préparatoires* provides insight into article 18 and confirms that the right to asylum was conceived as a right of individuals. The unfortunate and inconsistent wording in the Charter seems to reflect the sensitivity of the matter and the lack of specific legal expertise on the part of its drafters, compounded by the speed of the negotiations, rather than to an underlying debate on its nature as a right of States or as a right of individuals.

Unlike the rules of treaty interpretation in the Vienna Convention on the Law of Treaties, whereby the *travaux préparatoires* are, according to article 32, only a supplementary means of interpretation, the Union's legal order attaches some significance to the *travaux préparatoires* as a means of identifying the drafters' intentions, and only in the absence of the *travaux préparatoires* would the literal and logical interpretations prevail:

> In the absence of working documents clearly expressing the intention of the draftsmen of a provision, the Court can base itself only on the scope of the wording as it is and give it a meaning based on a literal and logical interpretation.[31]

A look at the drafting history of this provision confirms that debate focused on the specific categories of *individuals* who should be protected, and, in particular, on whether the Charter should recognize a right for *all* individuals or only third-country nationals.[32]

The Charter was drafted by a so-called "Convention", as established by the European Council in Cologne.[33] The Tampere European Council further decided on the composition, working methods, and other arrangements, establishing that the Convention would be comprised of sixty-two members, including fifteen representatives of Heads of State or Government (one for each of the Member States at the time).[34] In order to facilitate the work, a Presidium was established, effectively acting as a Secretariat for the drafting body.[35]

The working languages of the Convention were French and English, although the Presidium originally drafted all proposals in French, and the

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[31] ECJ Case 15/60, *Gabriel Simon v. Court of Justice of the European Communities*, European Court Reports [1961] *ECR* 115, 244.

[32] The scope of the Charter *ratione personae* and the restriction in the application of some of its provisions on the grounds of nationality was a matter of discussion from the very beginning, given the comprehensive nature of the Charter as a catalogue of rights and the division of powers between the Union and the Member States; Doc. CHARTE 4111/00 BODY 3, 20 Jan. 2000.

[33] *European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union*, European Council Conclusions, Annex IV, Cologne, 3–4 Jun. 1999.

[34] *Composition, Method of Work, and Practical Arrangements for the Body to Elaborate a Draft EU Charter of Fundamental Rights, as set out in the Cologne Conclusions*, European Council Conclusions, Annex, Tampere, 15–16 Oct. 1999.

[35] For a discussion on the drafting of the Charter in the context of the EU's legal and constitutional debates, see G. De Burca, "The drafting of the European Union charter of fundamental rights", *European Law Review*, Vol. 26, No. 2, 2001, 126–38; J. Schönlau, *Drafting the EU Charter: Rights, Legitimacy and Process*, Hampshire, Palgrave Macmillan, 2005.

contributions from Convention Members and others were written in a number of official languages (and later translated into French and English). The first Presidium proposal was presented in February 2000 and the French original referred to the "*droit d'asile*". The official English translation referred to the "right *of* asylum".[36] This proposal explicitly excluded EU nationals:

> Persons who are not nationals of the Union shall have a right of asylum in the European Union [*in accordance with the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees*] [*under the conditions laid down in the Treaties*].

The proposal sought to take into account Protocol 29 to the Treaty Establishing the European Community (TEC) on asylum for nationals of Member States of the European Union.[37] This Protocol was the result of a bitter dispute between Spain and Belgium in relation to the examination of asylum claims made by members of terrorist organizations. The Protocol introduced a prohibition on examining asylum applications lodged by nationals of the EU's Member States. It nevertheless allowed for several exceptions, including a unilateral decision by a Member State to examine such a claim,[38] which in practice deprived the prohibition of much of its impact. As a matter of law, Member States remain free to fulfil their international legal obligations towards refugees and asylum-seekers, including that enshrined in article 3 of the Refugee Convention not to discriminate on the grounds of nationality. However, the political implications of such a move were met by the explicit rejection of Belgium, which introduced a declaration to the effect that it would continue to undertake an examination of any asylum request made by a national of another Member State "in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol".[39]

Further to discussions on the various draft articles, the second Presidium proposal was presented in May 2000. Originally drafted in French, it continued to refer to the "*droit d'asile*". However, the official English translation referred then to the "right *to* asylum". By then, the wording of the provision had also been modified, although it continued to exclude EU nationals:

> Nationals of third countries shall have the right to asylum in the European Union in accordance with the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees.[40]

This wording was not satisfactory for anyone. On the one hand, while it excluded EU nationals, it also implicitly excluded stateless persons. On the

[36] See Doc. CHARTE 4137/00 CONVENT 8, 24 Feb. 2000, draft art. 17.

[37] European Union, *Selected Instruments taken from the Treaties, Book I, Volume I*, Luxembourg, Office for Official Publications of the European Communities, 1999, 561.

[38] Para. (d) of its sole article.

[39] European Union, *Selected Instruments taken from the Treaties*, *op. cit.*, 737.

[40] See Doc. CHARTE 4284/00 CONVENT 28, 5 May 2000, draft art. 21.

other hand, it continued to exclude individuals on the grounds of nationality, which was opposed by many, including Convention members and human rights organizations, as a clear violation of international law, including article 2 of the Universal Declaration of Human Rights, article 3 of the Refugee Convention, article 3 of the International Covenant on Civil and Political Rights,[41] and article 14 of the European Convention on Human Rights.

On 12 May 2000, the Presidium invited Convention members to present amendments to the second draft proposal. On the basis of the amendments presented and further discussions, the Presidium produced a compromise proposal, where any explicit references to the subject of this right had been omitted. Both the original French text as well as its English translation referred to the right *of* asylum:

> The right of asylum shall be guaranteed, in accordance with the Treaty establishing the European Community and with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.[42]

By avoiding a reference to the subject entitled to asylum, the Presidium sought to find a solution to the divergent positions advocating for the exclusion of EU nationals, as well as those against. The proposal for this subject-less wording was presented by the European Commission, but on the basis of an earlier proposal made by United Nations High Comissioner for Refugee (UNHCR) at a public hearing.

UNHCR had had a very strong say during the negotiations of the Amsterdam Treaty, fiercely opposing the exclusion of EU nationals in Protocol 29 to the TEC and entering into a major dispute with Spain. In an attempt to maintain a principled position, while at the same time not antagonizing its donors, UNHCR advocated wording which would avoid an explicit exclusion of its beneficiaries on the grounds of nationality. While this may have been a clever (and eventually unavoidable) political move, it is unfortunate that in its sole intervention on the Charter, UNHCR's proposal effectively precluded a meaningful debate on the matter, at a time when the majority of representatives of Member States, as well as other Convention members and human rights organizations (such as Amnesty International) were strongly advocating for an explicit recognition of the right to asylum for everyone.[43]

It is unfortunate that the first recognition in a supranational European instrument of the noble commitment to grant asylum from persecution was achieved at the expense of the visibility of those that it seeks to protect. Notwithstanding its legal implications (which seem not to have received much consideration at the time), the lack of clarity of this provision is an example of

[41] International Covenant on Civil and Political Rights (adopted 16 Dec. 1966, entered into force 23 Mar. 1976) 999 UNTS 171.

[42] See Doc. CHARTE 4333/00 CONVENT 36, 4 Jun. 2000, draft art. 21.

[43] See Doc. CHARTE 4332/00 CONVENT 35, 25 May 2000.

unsatisfactory legal drafting and it raises issues under the principle of legal certainty, which holds a prominent position in the EU's legal order as an essential component of the rule of law, and requires that every measure having legal effect must be clear and precise.[44]

Further to discussions, a revised compromise proposal was again presented by the Presidium in July 2000 where the original French text was translated back again into a right *to* asylum:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.[45]

The provision underwent reformulation in subsequent drafts in relation to the treaties that it needed to comply with, but its main components remained unaltered and a consistent wording on the "right to asylum"/"*droit d'asile*" was adopted. This dual wording underwent scrutiny by the Linguist Jurists, without apparently raising any issues,[46] and eventually a final text was agreed.[47] Consensus was then declared by the Convention's President, Mr Roman Herzog, to the Council's President, Mr Jacques Chirac, in a letter of 5 October 2000.[48]

In sum, despite the unclear literal meaning of the provision and the divergence in the different official languages (in the light of the issues that these raise due to the dual nature of asylum in international law), it is clear from the *travaux préparatoires*, the object and context of the Charter, as well as logical and reasonable interpretation, that the intention of the drafters was to enshrine the right to asylum as a right of individuals.

4. The scope of protection of the right to asylum in the Union's legal order

Once it is established that the right to asylum in the Charter is to be construed as a right of individuals, the question arises as to the precise content of that right. Is it a right to *seek* (and eventually *enjoy*) asylum, as enshrined in the Universal Declaration of Human Rights? Or does it go beyond that to guarantee a right *to be granted asylum* in line with other regional human rights instruments? And does it apply only to individuals who meet the criteria in the Refugee

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[44] K. Lenaerts, " "In the Union We Trust": trust-enhancing principles of community law" *Common Market Law Review*, Vol. 41, 2004, 340–2.

[45] See Doc. CHARTE 4422/00 CONVENT 45, 28 Jul. 2000, draft art. 18.

[46] Doc. CHARTE 4470/1/00 REV 1 CONVENT 47, 21 Sept. 2000, contains the text as finalized by the Legal Linguistic Working Party.

[47] Doc. CHARTE 4487/00 CONVENT 50, 28 Sept. 2000.

[48] Doc. CHARTE 4960/00 CONVENT 55, 26 Oct. 2000.

Convention, or does it apply broadly to other categories of protected persons as well?

4.1 The scope of article 18 ratione materiae

A look at the *travaux préparatoires* shows that the drafters considered, and rejected, wording restricting the scope of the provision to the "right to *seek* asylum" and chose the more encompassing language of the "right to asylum".

During the negotiations, some Convention members noted that the right to asylum was not guaranteed in any international human rights instrument and that, given that the Charter was to be a reaffirmation of existing rights, rather than a source of new ones, it was appropriate for article 18 to reflect the right to *seek* asylum or the right to *apply* for asylum. Proposals in this regard were presented by several Convention members, including the representatives of the Irish, Spanish and Dutch Governments, as well as two Members of National Parliaments (a British one and a Spanish one). However, the majority of Convention members (including the representatives of all Member States, except the three already cited and the United Kingdom) explicitly supported the more encompassing wording, or simply did not raise any issues on the Presidium text. Indeed, of the twenty-nine amendments presented by Convention members to this provision, only five rejected the right to asylum in favour of the right to seek or apply for asylum. The representative of the UK Government proposed to "delete the article entirely".[49]

The Presidum's compromise proposal of June 2000 retained the wording "right of asylum" and based this decision on the amendments as presented by Convention members.[50]

It is, therefore, clear that neither the wording of the provision, nor the intention of the drafters as agreed, was to restrict the content of this right to a mere procedural right to apply for asylum. Yet, in absence of an agreed definition of "asylum" in international law, the interpretation of the actual content of this provision needs further analysis and resort to other rules of interpretation beyond the intention of the drafters (as reflected in the *travaux préparatoires*).

Article 6(1) TEU, as amended by the Treaty of Lisbon, establishes that "[t]he rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application". In particular, article 52(3) of the Charter establishes that "[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions".

Given that asylum is not a right recognized in international treaties to which the Member States are parties, and that the Charter reflects existing rights, one must examine the content of the right to asylum in the constitutional traditions

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49 Doc. CHARTE 4332/00 CONVENT 35, *op. cit.*, 496–528.

50 Doc. CHARTE 4333/00 CONVENT 36, *op. cit.*, 5.

common to the Member States in order to determine the content of the right to asylum in the Charter, as it is here that the right to asylum in the Charter has found its inspiration.

It is not the purpose of this article to undertake a detailed examination of the legal nature and extent of the right to asylum in comparative constitutional law, but rather to show that it appears to guarantee not only the right to apply for it, but also the right to be granted it.

In a number of Member States, including France, Germany, Italy,[51] Bulgaria,[52] Hungary,[53] and Spain,[54] constitutional asylum seems to be conceived as a subjective right *to be granted* asylum for individuals who meet the relevant criteria.

The case of Spain is illustrative. The constitutional debate clearly rejected a provision on asylum worded in terms of a subjective right of individuals[55] and instead, chose to refer its precise content to the legislator. article 13(4) of the Constitution thus reads as follows: "The law shall establish the terms under which nationals of other countries and stateless persons shall enjoy the right of asylum in Spain" (author's own translation). While originally the law explicitly conceived of it as a discretionary act, the debates in the Council of State and subsequently the Supreme Court confirmed that on the basis of other constitutional rights and principles, including the rule of law and the prohibition of arbitrary action on the part of the State, asylum was an individual subjective right that the Administration was obliged to recognize when the individual met the requirements established by law, and whose refusal was the object of judicial scrutiny.[56]

Against conceptions based on the traditional understanding that asylum is a right of States (long before individuals were recognized as subjects of rights in international law) and that, therefore, its granting is a *discretionary act of the State* or a prerogative outside judicial scrutiny, it would appear that developments in

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51 For an analysis of the right to asylum in the constitutions of France, Germany, and Italy, see H. Lambert, F. Messineo, and P. Tiedemann, "Comparative perspectives of constitutional asylum in France, Italy and Germany: *Requiescat in Pace*?", in this Special Issue.

52 Art. 27 of the Bulgarian Constitution imposes a duty on the State to grant asylum to those persecuted on account of their opinions or activity in the defence of internationally recognized rights and freedoms. While this provision has not been interpreted by the Bulgarian Constitutional Court, the nature of asylum as a subjective right of individuals who meet the criteria established in the law seems not to have been challenged. The author is indebted to Valeria Ilareva and Themba Lewis for their assistance with Bulgarian legislation and case law; any errors remain the author's own.

53 Art. 65(1) of the Hungarian Constitution establishes a duty to grant asylum to individuals who meet the criteria in art. 1A(2) of the Refugee Convention. While this provision has not been the interpreted by the Hungarian Constitutional Court, decisions of other instances interpreting it refer to its nature as a right of individuals: see for example, Decision 21/1996 (V. 17.) and Decision 30/1992 (V. 26.). The author is indebted to Gábor Gyulai for his assistance with Hungarian legislation and case law; any errors remain the author's own.

54 P. Santolaya Machetti, *El derecho de asilo en la Constitución española*, Valladolid, Lex Nova, 2001, 53.

55 N. Pérez Sola, *La regulación del derecho de asilo y refugio en España*, Granada, Adhara, 1997, 75–8.

56 D. Blanquer, *Asilo político en España. Garantías del extranjero y garantías del interés general*, Madrid, Ministerio del Interior, 1997, 163–72.

international human rights law and in Member States' domestic legal orders have enhanced the subjective nature of the right of individuals to be granted asylum when they meet the criteria established by law, as will be examined below.

Both the Charter's *travaux préparatoires* as well as the constitutional traditions of Member States seem to reflect that the right to asylum in the Charter has gone beyond the article 14 of the Universal Declaration of Human Rights and is to be construed as the right of individuals to be granted asylum when they meet the criteria. These criteria are necessarily those established by the Union's law, rather than by the Member States themselves.

4.2 The scope of asylum ratione personae

Once the nature of asylum in article 18 of the Charter has been established as a subjective right of individuals to be granted asylum, the question arises as to which categories of individuals fall under the protection scope of this provision.

The Charter is complemented by the *explanations* drafted by the Presidium for the purposes of clarifying its provisions.[57] The legal nature of these explanations, and, in particular, the role that they play in interpreting the Charter, remains unclear. On the one hand, the explanations document itself states: "Although they do not as such have the status of law, they are a *valuable tool* of interpretation intended to clarify the provisions of the Charter" (emphasis added). Furthermore, article 6(1) TEU, as amended by the Treaty of Lisbon, seems to create a legal obligation to refer to them when interpreting the Charter rights. This states: "The rights, freedoms and principles in the Charter shall be interpreted [...] with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

The obligation enshrined in article 6(1) is, therefore, to interpret the Charter *with due regard* to the explanations, rather than to confer legal value on the explanations themselves. However, what this nuance exactly implies in terms of legal obligations will eventually have to be determined.[58]

The explanations to article 18 read as follows:

> The text of the article has been based article 63 TEC, now replaced by article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area and the extent to which this article is applicable to them. This article is in line with the Protocol on Asylum annexed to the Treaties.

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[57] Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/17.

[58] Peers notes that the explanations have been widely referred to by the ECJ and in the legislation itself, and argues that as the Charter acquires legally binding force, the explanations will become more relevant in its interpretation; S. Peers, "Taking rights away? limitations and derogations", in S. Peers and A. Ward (eds), *The EU Charter of Rights: Politics, Law and Policy*, Oxford, Hart, 2004, 154.

The explanations, therefore, safeguard the special position of the United Kingdom, Ireland,[59] and Denmark.[60] The express reference to the Protocol on Asylum also confirms the exclusion of EU nationals from asylum protection *as a matter of Union law* (leaving it to Member States to deal with the matter in their domestic legislation, if they so wish).[61] A further reference is made to article 63 TEC, as amended by the Treaty of Lisbon:

> The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

It would appear that, given the strong and consistent reference to the Refugee Convention, as a minimum, individuals who meet the criteria in article 1A of the Refugee Convention would have a right to be granted asylum. But since the Refugee Convention does not itself recognize a right to asylum, the question arises whether this is the only category of individuals to whom article 18 of the Charter applies, or whether other categories might also fall within the scope of article 18, once their international protection grounds have been established in other international human rights instruments.

The language of protection within the Union's law and policy is not always consistent and does not always reflect well-established legal terms under international law. Article 63 seems to refer to asylum as a form of protection, different from other forms, such as subsidiary protection. Yet, the Qualification Directive (whose legal basis is article 63) refers to the granting of *refugee status* (article 13) and not of asylum. Given that different legal terms are to be given different legal meanings, asylum in the Charter should, therefore, be something different from refugee status, and indeed these are two separate legal concepts in international law. While asylum seems to be conceived as the protection granted to individuals within the meaning of the Refugee Convention,[62] and the legal orders of

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59 Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, as amended by the Treaty of Lisbon ([2007] OJ C306/185). According to the new art. 4a of the Protocol, these Member States (which are currently bound by the EC asylum *acquis*), may choose in the future not to participate in measures amending the existing ones and would therefore cease to be bound by existing measures. In plain words, the UK and Ireland may at a later stage decide to "opt out" of the EC asylum law that currently binds them.

60 The Protocol on the position of Denmark, and which excludes Denmark from the asylum *acquis*, has also been amended by the Treaty of Lisbon to bring it into line with the new legislative framework, [2007] OJ C306/187.

61 Peers argues that "if the *a contrario* principle of legislative interpretation is applied, all the provisions of the Charter which are not expressly limited in personal scope must apply equally to EU citizens and non-citizens alike", although he also refers to the possibility of implied derogations: S. Peers, "Immigration, asylum and the European Union charter of fundamental rights", *European Journal of Migration and Law*, Vol. 3, 2001, 146 and 155.

62 See for example, Qualification Directive, recital 17, and Procedures Directive, art. 2(d).

Member States have evolved in that direction, it is a false assumption that this is the only category of people that States are *obliged* to protect under international law.[63] However, asylum is a far-reaching institution, *allowing* States to protect categories of individuals beyond those who meet the criteria in article 1A of the Refugee Convention, as indeed its historical practice[64] and the language in the constitutional provisions of Member States suggest.

Even if human rights are not in themselves a source of new *powers* for the Union, in the absence of specific conferral by the Member States,[65] they do constitute a well-established source of legally binding *obligations* as general principles of the Union's law,[66] whose content is inspired by international human rights treaties and the constitutional traditions common to the Member States.[67] Furthermore, in the future, the Union itself shall become a party to the European Convention on Human Rights, in application of article 6(2) TEU, as amended by the Treaty of Lisbon, and therefore international protection *obligations* would arise for the Union itself in relation to the categories of individuals whose international protection grounds are found in this instrument, in so far the Union *may have competence* over those categories of individuals.

It is, therefore, argued here that asylum in the Charter is to be construed as the protection to which all individuals with an international protection need are entitled, provided that their protection grounds are established by *international law*, irrespective of whether they are found in the Refugee Convention or in any other international human rights instrument. As McAdam has noted, "international human rights treaties must not be viewed as discrete, unrelated

63 H. Lambert, F. Messineo, and P. Tiedemann, "Comparative perspectives of constitutional asylum in France, Italy and Germany: *Requiescat in Pace*?", *op. cit.*; M.-T. Gil-Bazo, "The role of Spain as a gateway to the Schengen area: changes in the asylum law and their implications for human rights", *International Journal of Refugee Law*, Vol. 10, No. 1/2,1998, 218–20.

64 G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, *op. cit.*; A. Grahl-Madsen, *Territorial Asylum*, *op. cit.*; E. Reale, "Le droit d'asile", *op. cit.*

65 Opinion 2/94, *Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] *ECR* I-1759. This *status quo* is confirmed by art. 6(1) TEU, as amended by the Treaty of Lisbon. The view has been expressed that effective respect for fundamental rights in the Union's legal order requires the development of a Union human rights policy: P. Alston and J.H.H. Weiler, "An 'Ever Closer Union' in need of a human rights policy: the European union and human rights", in P. Alston (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999, 3–66. However, arguments have been made that the incorporation of a legally binding human rights instrument into the Union's legal order will effectively affect the vertical division of powers in the Union: A. Knook, "The court, the charter, and the vertical division of powers in the European Union", *Common Market Law Review*, Vol. 42, 2005, 367–98; cf. A. José Menéndez, "Chartering Europe: legal status and policy implications of the charter of fundamental rights of the European Union", *Journal of Common Market Studies*, Vol. 40, No. 3, 2002, 471–90.

66 ECJ Case 29/69, *Stauder* [1969] *ECR* 419, para 7. This nature is confirmed by art. 6(3) TEU, as amended by the Treaty of Lisbon. For a detailed commentary, see for example, G.C. Rodríguez Iglesias, "The protection of fundamental rights in the case law of the court of justice of the European communities", *Columbia Journal of European Law*, Vol. I, No. 2, 1995, 169–81; K. Lenaerts, "Fundamental rights in the European Union", *European Law Review*, Vol. 25, No. 6, 2000, 575–600; P. Alston and O. de Schutter (eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, Oxford, Hart, 2005; F.G. Jacobs, "The evolution of the European legal order", *Common Market Law Review*, Vol. 41, 2004, 306–10.

67 ECJ Case 4/73, *Nold* [1974] *ECR* 491.

documents, but as interconnected instruments which together constitute the international obligations to which States have agreed".[68]

5. The enforceability of the right to asylum

It is not the purpose of this section to undertake a detailed analysis of the vast and complex enforcement mechanisms available within the Union's legal order, but rather to note the enforceability of the right to asylum as primary Union law, directly applicable within the national legal orders without the need for further transposition or incorporation.

It is also worth noting that despite its origins in international law and the traditional constitutions of Member States, asylum in the Charter is an autonomous concept in the Union's legal order whose content is not determined by the way it is shaped in the legal orders of the Member States.[69] Rather, to the contrary, national legislation and even secondary Union legislation (including the Qualification Directive and the Procedures Directive) must be interpreted in accordance with the fundamental rights protected by the Union,[70] and in this regard, the role of national judges is crucial.[71]

The Charter can be directly invoked before national courts in the Member States. This is true in all Member States, except in the United Kingdom and Poland, since although these countries recognize the legally binding nature of the Charter, a Protocol to the Treaty of Lisbon explicitly excludes the examination by national courts and the ECJ of these countries' compliance with the Charter. In other words, the rights in the Charter are not justiciable in relation to these two countries.[72] In any case, and given that article 6(3) TEU confirms the *status quo* of fundamental rights as general principles of the Union's law and that the rights in the Charter do not create new rights, but rather reaffirm existing ones, fundamental rights with the *same content* as those recognized in the Charter but with a *different legal nature* will continue to be justiciable in relation to

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68 J. McAdam, "The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection", Research Paper No. 125, UNHCR, Geneva, 2006, 16. For a comprehensive analysis of the Refugee Convention as a subset of human rights law and *lex specialis* for all persons in need of international protection irrespective of the source of the State's protection obligation, see J. McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2007.

69 "The legal classification in Community law of a national measure does not depend upon how that measure is viewed or appraised in the national context. The need to ensure that the provisions of the Treaty are applied in a uniform manner throughout the Community requires that they should be interpreted independently", ECJ Case 17/81, *Pabst & Richarz KG v. Hauptzollamt Oldenburg* [1982] *ECR* 1331, para. 18.

70 Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres* [2007] *ECR* I-05305, para. 28.

71 K. Lenaerts, "The rule of law and the coherence of the judicial system of the European Union", *Common Market Law Review*, Vol. 44, 2007, 1625–59.

72 Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, [2007] OJ C306/156. For some insight on the position of the UK, see Lord Goldsmith, QC, "A charter of rights, freedoms and principles", *op. cit.*, 1214–15.

these two countries. In particular, as Peers argues, the right to asylum is already a general principle of Community law.[73]

6. Conclusions

This article has shown that despite its unclear wording and lack of explicit subject, the right to asylum/*droit d'asile* in article 18 of the Charter is to be construed as a subjective and enforceable right of individuals to be granted asylum under the Union's law. An interpretation of the provision in the light of the intention of the drafters and the overall context of the Charter, further supported by the *travaux préparatoires*, shows that the right to be granted asylum, despite not being of treaty nature in international law, constitutes legally binding primary law in the Union.

The foregoing analysis of article 18 by reference to the Union's own interpretative criteria and the legally binding force of human rights in the Union's legal order has demonstrated that the content of this provision is to be determined by reference to international human rights treaties and to the constitutional traditions of Member States.

In particular, it has been argued here that the beneficiaries of this provision are all those individuals whose international protection grounds are established under any instrument of international human rights law, including the Refugee Convention and the European Convention on Human Rights. Since asylum is a shared competence between the Union and its Member States, the protection of article 18 applies in all areas of activity of the Union and its Member States that fall within the scope of application of the Union's law.

However, once established, asylum is an autonomous concept in the Union's legal order and therefore its scope of application needs to be determined by application of the Union's own rules.

The Charter, as a regional supranational instrument, brings Europe into line with other regional developments that recognize not only the right to seek, but also the right to be granted, asylum. More than two-thirds of the States Parties to the Refugee Convention are also bound by a rule of international law or a supranational law of regional scope to grant asylum. On the sixtieth anniversary of the Universal Declaration of Human Rights, the existence of a right to be granted asylum in international law cannot be denied, despite its lack of express recognition in an international instrument of universal scope.

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[73] S. Peers, *EU Justice and Home Affairs*, Oxford, Oxford University Press, 2nd edn., 2008, 315.