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## ASYLUM AS A GENERAL PRINCIPLE OF INTERNATIONAL LAW

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### 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 paper explores the nature of asylum as a general principle of international law. It first examines the relationship between asylum and refugee status in order to place the discussion on asylum in context. It then outlines the current debate on asylum, and in particular, the nature of asylum as a right of individuals. The paper 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, it gives an indication of the value of this institution as one of the underlying principles in legal orders worldwide and as such, it informs international law itself. The paper 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. 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 and in international instruments of regional scope 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.

### 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’<sup>1</sup> is a well-known institution in international law and its historical roots in State practice are well established.<sup>2</sup> It is in this sense that the term asylum will be used in this paper.

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

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<sup>1</sup> Institute of International Law (5th Commission), “Asylum in Public International Law”, Resolutions Adopted at its Bath Session, Sept 1950, art 1.

<sup>2</sup> 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(1) *Recueil des Cours de l’Académie de Droit International de La Haye* 473.

benefit from such protection. Aware of this distinction and of its historical international and constitutional significance, an emerging trend has been consistently developing among European States 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 (hereinafter, the Refugee Convention)<sup>3</sup> 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,<sup>4</sup> 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"'.<sup>5</sup> At the same time, the Directive recognised a separate institution for protection called "Subsidiary Protection".<sup>6</sup> 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.<sup>7</sup> 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,<sup>8</sup> the conceptual distinction remains soundly established in law and practice, as it will be shown in the pages that follow.

The recognition of the separate nature of asylum and refugee status has been confirmed by judicial decisions across different countries and internationally<sup>9</sup> by the Court of Justice of the European Union (CJEU) in response to a request for a preliminary ruling

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

<sup>4</sup> 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.

<sup>5</sup> 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 30.9.2004)*, Jan 2005, 10-11.

<sup>6</sup> For a construction of Subsidiary Protection as asylum which 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).

<sup>7</sup> 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 in his paper on 'The Meaning of 'Protection' in the Refugee Definition' (2000) 12(4) *International Journal of Refugee Law* 548.

<sup>8</sup> '[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(3) *Refugee Survey Quarterly* 16.

<sup>9</sup> 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).

lodged by the German Federal Administrative Court (*Bundesverwaltungsgericht*).<sup>10</sup> The German Court asked the CJEU to clarify whether the granting of asylum in application of the German Constitution to individuals excluded from refugee status by application of 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 [...].'<sup>11</sup>

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 acquired a 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<sup>12</sup>- 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,<sup>13</sup> brought the debate on this institution within that of State sovereignty and its boundaries.

The heated 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 *N.S.*<sup>14</sup> 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,<sup>15</sup> notably its 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')?<sup>16</sup>

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 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.<sup>17</sup>

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

<sup>11</sup> *Ibid* para 121.

<sup>12</sup> 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](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-67)> accessed 26 Jun 2014.

<sup>13</sup> 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.

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

<sup>15</sup> [2012] OJ C 326/391.

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

<sup>17</sup> Opinion Case C 411/10 (n 14), para 115.

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.'<sup>18</sup>

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 paper 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',<sup>19</sup> including on the right to asylum as a human right. The analysis in this paper is also grounded in international law itself. In this regard, it is worth noting that while in the common law judicial decisions constitute primary sources of law, in international law they are instead secondary sources and they 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 paper, as appropriate, in so far they constitute an expression of State practice or they reflect the authentic interpretation of treaties by international courts and human rights monitoring bodies, but not as primary sources of law or authority of higher rank than the most qualified doctrine. This paper 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 paper will first examine the relationship between asylum and refugee status in order to place the discussion on asylum in context. It will then explore the current debate on asylum, and in particular, the nature of asylum as a right of individuals. It 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 will then 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, it gives an indication of the value of this institution as one of the underlying principles in legal orders worldwide. And as such, it informs international law itself. The paper will conclude that asylum constitutes today a general principle of international law.

## 2. Asylum and Refugee Status: Two Separate but Related Institutions

As it has been 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.

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

<sup>19</sup> P Weis, 'Territorial Asylum' (1966) 6(2) *Indian Journal of International Law* 173, 194.

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 then 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 development 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 national liberation.

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).<sup>20</sup> 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 it *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.<sup>21</sup> 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.’<sup>22</sup> Accordingly, asylum as an expression of State sovereignty is under no limitation in international law, with the exception of extradition or other obligations acquired by treaty.<sup>23</sup> 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)<sup>24</sup> 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.*’<sup>25</sup> The Court noted that while prosecution is an obligation under the CAT, extradition

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<sup>20</sup> 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 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.

<sup>21</sup> 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.

<sup>22</sup> UNGA Res 2312(XXII) 14 Dec 1967.

<sup>23</sup> 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).

<sup>24</sup> Adopted 10 Dec 1984, entered into force 26 June 1987; 1465 UNTS 85.

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

is merely an option: '[e]xtradition is an option offered to the State by the Convention'<sup>26</sup> in order to facilitate State compliance with the Convention's purpose 'to prevent alleged perpetrators of acts of torture from going unpunished.'<sup>27</sup> 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,'<sup>28</sup> which allows extradition only to States who can claim jurisdiction on the basis of the territorial or nationality principles.<sup>29</sup> 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 20th 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.<sup>30</sup> 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 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,<sup>31</sup> 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.'<sup>32</sup> In 1758 Vattel calls

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<sup>26</sup> Ibid para 95.

<sup>27</sup> Ibid para 120.

<sup>28</sup> Ibid.

<sup>29</sup> Article 5(1) CAT.

<sup>30</sup> 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.

<sup>31</sup> Adopted 31 Jan 1967, entered into force 4 Oct 1967, 606 UNTS 267.

<sup>32</sup> H Grotius, *De iure belli* n 20 ch 2, No. XVI, 84.

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.'<sup>33</sup>

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.'<sup>34</sup> 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.<sup>35</sup>

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.

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.<sup>36</sup>

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<sup>37</sup> (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

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

<sup>34</sup> A Grahl-Madsen, *The Status of Refugees in International Law, Vol. II* (Sijthoff 1972) 79.

<sup>35</sup> CLC Mubanga-Chipoya, 'The Right of Everyone to Leave any Country, Including His Own, and to Return to His Country', Doc. E/C.4/Sub.2/1988/35, pp 103-106.

<sup>36</sup> 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* (Oxford University Press 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* (Cambridge University Press 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(3) *Journal of Refugee Studies* 402.

<sup>37</sup> n 7

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).<sup>38</sup>

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

### 3. The Current Debate on Asylum

As it has been said above, it is uncontested that asylum is indeed a right of States to grant it 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 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.<sup>39</sup>

But Grahl-Madsen did not just analyse the status of refugees by reference to the Refugee Convention. Rather 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.'<sup>40</sup> And he, himself, 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.<sup>41</sup>

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.<sup>42</sup> He also noted that in addition to the traditional "right of asylum", understood at the right of a State to grant asylum, 'lately one has also come to speak of a 'right of asylum' for the individual.'<sup>43</sup> 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.'<sup>44</sup> 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

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<sup>38</sup> For a construction of refugee status and subsidiary protection in the Directive as asylum, see M-T Gil-Bazo, 'Refugee status and subsidiary protection', n 6.

<sup>39</sup> A Grahl-Madsen, *The Status of Refugees in International Law, Vol. I* (Sijthoff 1966) and *Vol. II* (Sijthoff 1972).

<sup>40</sup> A Grahl-Madsen, *The Status of Refugees Vol. II* n 34, 22.

<sup>41</sup> A Grahl-Madsen, *Territorial Asylum*, n 2, 216-219.

<sup>42</sup> *Ibid* 69-71.

<sup>43</sup> *Ibid* 2.

<sup>44</sup> *Ibid* 24.

*refoulement*, including rejection at the frontier, establish a right to asylum<sup>45</sup> which confers 'upon the individual a subjective right to asylum'.<sup>46</sup> 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.'<sup>47</sup>

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.'<sup>48</sup> As he explains, 'the individual State granting asylum acts as an agent of the international community.'<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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].'<sup>52</sup> 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.'<sup>53</sup>

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

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

<sup>46</sup> P. Weis, 'Territorial Asylum', n 19, 180. Weis lists 38 countries where the right to asylum for individuals is recognised.

<sup>47</sup> Ibid 42-43.

<sup>48</sup> Ibid 175.

<sup>49</sup> P. Weis 'Human Rights and Refugees' (1972) 12(139) *International Review of the Red Cross* 537, 544.

<sup>50</sup> Ibid.

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

<sup>52</sup> P. Weis, 'Territorial Asylum', n 19, 180.

<sup>53</sup> P. Weis, 'Human Rights and Refugees', n 49, 546.

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.<sup>54</sup>

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'<sup>55</sup> 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'<sup>56</sup> 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.'<sup>57</sup>

In sum, a careful reading to 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 obligation of States to grant asylum if no other country was ready to receive them after a reasonable time, which he fixed in 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.<sup>58</sup>

While article 22(7) of the American Convention on Human Rights<sup>59</sup> recognises 'the right to seek and be granted asylum', article 22(8) enshrines the principle of *non-refoulement*. The Court therefore chose to interpret that the right to *non-refoulement* includes a right to asylum in the specific circumstances of the case. The Court 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.<sup>60</sup>

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 already 40 years ago he found an obligation to grant asylum to refugees derived from the principle of *non-refoulement* has passed unnoticed to 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), this is, refugees within the meaning of the Refugee Convention,<sup>61</sup> internally displaced persons,<sup>62</sup> and more recently those benefiting from

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<sup>54</sup> A Grahl-Madsen, *The Status of Refugees Vol. II*, n 34, 442.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* 443.

<sup>57</sup> *Ibid.* 437.

<sup>58</sup> *Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, Sentencia de 25 de noviembre de 2013, p 2 (author's own translation, emphasis added).

<sup>59</sup> Adopted 22 Nov 1969, entered into force 18 Jul 1978, 114 UNTS 123.

<sup>60</sup> n 58, 3.

<sup>61</sup> GS Goodwin-Gill & J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007); J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005).

<sup>62</sup> C Phuong, *The International Protection of Internally Displaced Persons* (Cambridge University Press 2005).

complementary protection.<sup>63</sup> The emphasis on identifying categories of beneficiaries (without a corresponding State duty to grant asylum) has expanded beyond the legal literature to see proposals for new categories emerging among non-lawyers too.<sup>64</sup>

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

This approach contrasts sharply with the lively debate in the literature in other languages -notably in Spanish, but not only- that considers extensively the institution of asylum alongside refugee status.<sup>66</sup>

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'.<sup>67</sup>

<sup>63</sup> J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007).

<sup>64</sup> A Betts, 'Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants' (2010) 22(2) *International Journal of Refugee Law* 209.

<sup>65</sup> GS Goodwin-Gill & J McAdam, *The Refugee in International Law*, n 61, 414-415; C Harvey, 'The Right to Seek Asylum in the European Union' (2004) 1 *European Human Rights Law Review* 17; J Hathaway, *The Rights of Refugees*, n 61, 300-302; A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 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' 32 *International and Comparative Law Quarterly* 633, 650.

<sup>66</sup> D Alland & C Teitgen-Colly, *Traité du droit d'asile* (PUF 2002); H Gross Espiell, 'Análisis jurídico comparativo de las legislaciones sobre asilo en América Latina y los instrumentos internacionales y regionales', in *Estudios Básicos de Derechos Humanos Tomo V* (Instituto Interamericano de Derechos Humanos 1996) 206-223; 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, 'El asilo y sus modalidades', 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* n 66, 54-56.

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'.<sup>68</sup>

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.'<sup>69</sup>

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 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.<sup>70</sup>

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.'<sup>71</sup> 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.'<sup>72</sup> 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.<sup>73</sup>

In the words of Cançado Trindade, 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.

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<sup>67</sup> Real Academia Española, *Diccionario de la lengua española*, <[www.rae.es](http://www.rae.es)>, visited on 26 Jun 2014 (author's own translation).

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

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

<sup>70</sup> Sir 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.

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

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

<sup>73</sup> 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, 204-206.

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.<sup>74</sup>

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 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.<sup>75</sup>

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.’<sup>76</sup> 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.’<sup>77</sup> 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.’<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup>

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’.<sup>81</sup> 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

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<sup>74</sup> AA Cañado Trinidad, ‘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.

<sup>75</sup> 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

<sup>76</sup> G Gaja, ‘General Principles of Law’, in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 370, 371.

<sup>77</sup> Sir R Jennings & Sir A Watts (eds), *Oppenheim’s International Law (Ninth ed) Vol I* (Longman 1992) 37.

<sup>78</sup> J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press 2012) 35.

<sup>79</sup> *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.

<sup>80</sup> G Gaja, ‘General Principles of Law’, n 76, 372.

<sup>81</sup> Judge Tanaka’s Dissenting Opinion, n 71, 299.

States. What matters is that the principles thus found may have the potential for universal applicability.<sup>82</sup>

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 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 paper 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 which 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 paper 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.<sup>83</sup>

## 5. The Foundations of Asylum as a Legal Institution

It is beyond the scope of this paper to offer a detailed account of the religious and historical foundations of human rights, which have been well explored in the literature.<sup>84</sup> The purpose of this section is to offer an overview of the background of asylum as an institution of international law 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. But 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.

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<sup>82</sup> FM Mariño Menéndez, *Derecho Internacional Público* (Trotta 1995) 367-368.

<sup>83</sup> T Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 1-2.

<sup>84</sup> On the religious origins of asylum and on its historical background, see E Reale, 'Le droit d'asile', n 2, 473-510; C Gortázar Rotaache, *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* (Oxford University Press 2013).

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.<sup>85</sup> 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 in 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 in the banks of the Jordan River.<sup>86</sup> 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.'<sup>87</sup>

The decision made 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.'<sup>88</sup>

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.'<sup>89</sup> 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.'<sup>90</sup>

In the New Testament, Jesus and his parents must flee from Bethlehem in order to find protection from Herod.<sup>91</sup> Christianity thus embraces the Jewish obligation of protection expressed in the Old Testament and transforms it into a new teaching. The 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".'<sup>92</sup>

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<sup>85</sup> Deuteronomy 23, 16-17.

<sup>86</sup> Joshua 20, 7-8.

<sup>87</sup> Numbers 35, 6-13.

<sup>88</sup> Joshua 20, 9.

<sup>89</sup> Exodus 23, 9.

<sup>90</sup> Leviticus 19, 33-34.

<sup>91</sup> Matthew 1, 13-15.

<sup>92</sup> Matthew 25:35.

The Judeo-Christian tradition of hospitality is deeply rooted in the understanding that the stranger represents the extraordinary, the unknown, the mystery, this 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).<sup>93</sup>

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<sup>94</sup> 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 desert, 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.<sup>95</sup>

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.<sup>96</sup>

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.'<sup>97</sup>

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 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.'<sup>98</sup> 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.<sup>99</sup>

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

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<sup>93</sup> R Aguirre, 'El extranjero en el cristianismo primitivo', in VV.AA. *El extranjero en la cultura europea de nuestros días* (Universidad de Deusto 1997) 478-479.

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

<sup>95</sup> 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 Internationale de la Croix Rouge* 463.

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

<sup>97</sup> Quran 8, 74.

<sup>98</sup> Quran 9, 6.

<sup>99</sup> GM Arnaout, *L'asile*, n 96, 17-19.

## 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.<sup>100</sup> It follows that such protection could only exist in human societies where religious and civil authorities were not united under a unique supreme authority,<sup>101</sup> 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.<sup>102</sup>

Long before the international regime for the protection of refugees was born in the 20<sup>th</sup> century, asylum had been practiced for thousands of years, and was known in most ancient civilizations. The Kadesh Peace Treaty -concluded in the 13<sup>th</sup> century B.C.- 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.<sup>103</sup> 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.<sup>104</sup>

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 relinquish in favor of divine authority. The development of the concept of *polis* itself favored the development of the institution of asylum, which is reflected in numerous Greek writings of the time.<sup>105</sup>

Protection in Greece took two forms: *hiketeia* and *asulia*. The former applied to all temples in the city, is of exclusive religious nature and only those who are innocent find grace in the sacred place, while those who are guilty only obtain a temporary protection, a delay in the execution of the punishment that is 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.<sup>106</sup>

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

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<sup>100</sup> FM Mariño Menéndez, 'El asilo y sus modalidades', n 23, 507; L Bolesta-Koziebrodzki *Le droit d'asile* (Sithoff 1962) 14; E Reale, 'Le droit d'asile', n 2, 475; Grahl-Madsen, *Territorial Asylum*, n 2, 1.

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

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

<sup>103</sup> 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.

<sup>104</sup> 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) 145-147.

<sup>105</sup> 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.

<sup>106</sup> Documentary evidence exists of this practise between the Greek city of Teos and other 25 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.

refuge.<sup>107</sup> 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.<sup>108</sup>

As Christianity becomes the official faith of the Roman Empire and expands 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 become themselves territorial.

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

The *Codex Theodosianus* codifies 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.<sup>109</sup> A hundred years later, the *Codex Justinianus* also included the norms relating to asylum in churches and sanctioned with the highest penalty the violation of such protection. The *Codex* prohibits the forced seizure of refugees from the church and qualifies such action as a crime of *lèse-majesté*, this is, against the sovereign.<sup>110</sup> 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.<sup>111</sup>

Christianity, with its vocation of universality, makes asylum also universal. The various Councils confirm and widen the position of the Church on the matter.<sup>112</sup> Over time, the significance of asylum in the Church grows and it finds its golden age as of the 12<sup>th</sup> century. The uncontested power of the Church consolidates the inviolability of asylum within the territorial limits of the ecclesiastical jurisdiction, the infringement of which was punished by excommunication.

This tradition of asylum finds expression in the legislation of the various European kingdoms that follow the disappearance of the Empire. For instance, in Spanish legislation, the VII Laws of King Alfonso X in the 13<sup>th</sup> century, confirm the Church's privilege. Title XI of the First Law contains detailed instructions about asylum and it imposes a duty on the clergy to provide refugees with food and drink. Likewise, it prohibits that refugees under the Church's protection be harmed, killed, or prevented from accessing food and drink.<sup>113</sup> Thus the legislation imposes not only a duty to respect asylum, but also regulates a minimum standard of treatment in relation to its beneficiaries.

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<sup>107</sup> L Bolesta-Koziebrodzki, *Le droit d'asile*, n 100, 32.

<sup>108</sup> 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*, n 103, 53.

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

<sup>110</sup> 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).

<sup>111</sup> *Ibid* Section 3.

<sup>112</sup> E Reale, 'Le droit d'asile', n 2, 487. For a historical overview of the Church's doctrine on asylum in its various Councils, see Luque Angel, *El derecho de asilo*, n 103, 109-112.

<sup>113</sup> Primera Partida, Título XI (*De los preuilejos e de las franquezas que han las Iglesias, e sus cementerios*), Ley 2. Reprinted in M Martínez Alcubilla, *Códigos antiguos de España* (Administración 1885).

As sovereignty loses its personal nature and becomes territorial, so does asylum. The development of the Modern State as a form of political organization that exercises its sovereignty over a defined territory consolidates the process of territorialisation of asylum, and leads 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 15<sup>th</sup> Century as a result of the edict of Granada of 30 March 1492, who found protection in other Mediterranean territories and in Eastern Europe.<sup>114</sup> 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 consolidate and asylum becomes an expression of territorial sovereignty, it also becomes 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.<sup>115</sup> 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.<sup>116</sup> By contrast, in the German States asylum as a Church prerogative persisted until the 19<sup>th</sup> Century,<sup>117</sup> as well as in Spain, where the fight between civil and religious powers was particularly intense, until asylum became regulated by law in 1835.<sup>118</sup>

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. Although originally asylum could and in fact was granted to common criminals, the Age of Enlightenment sees the transformation of its nature: in addition to life, freedom of thought is then protected, while an understanding develops 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 conduct 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, in turn produces a new type of refugee: the political refugee.<sup>119</sup>

Therefore, as of the 18<sup>th</sup> century, the nature of asylum becomes political. Together with the transformation of sovereignty (from the Monarch to the People), asylum becomes then not only a sovereign right of States to grant it at will but also an expression of a duty. Reale notes that in the mid-18<sup>th</sup> century, the extradition of those who had been granted asylum as a result of the political nature of their crime is resented as 'an offence to the laws

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<sup>114</sup> R Nathan-Chapotot, *Les Nations Unies et les Réfugiés*, n 102, 19; MR Marrus, *The Unwanted. European Refugees in the Twentieth Century* (Oxford University Press 1985) 5.

<sup>115</sup> Article 166 of the Ordonnance de Villers-Cotterets, 1 Aug 1539, cited in J Turpin, *Nouveaux aspects juridiques de l'asile politique. Le litige Hungaro-Yougoslave devant la Société des Nations* (G-P Maissonneuve 1937) 9.

<sup>116</sup> Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1769). Reprinted in 1966 by Dawson's of Pall Mall, Ch 26, 326-327.

<sup>117</sup> L Bolesta-Koziebrodzki, *Le droit d'asile*, n 100, 35.

<sup>118</sup> J Turpin, *Nouveaux aspects*, n 115, 9.

<sup>119</sup> A Grahl-Madsen, *Territorial Asylum*, n 2, 3.

of humanity and honour.<sup>120</sup> In his view, this sentiment of the public conscience is transformed into a legal principle for which it was necessary to find a place in the law.<sup>121</sup> . And, as a matter of law, this conception of asylum as a duty finds 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.'<sup>122</sup> 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.<sup>123</sup> As it has been examined above, Grahl-Madsen believed that constitutions around the world '[laid] down a more or less perfect right of asylum for individuals,'<sup>124</sup> a view shared by Weis, who stated that constitutions around the world '[confer] upon the individual a subjective right to asylum.'<sup>125</sup> 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.<sup>126</sup> The constitutions of Angola, Bénin, Bolivia, Bulgaria, 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

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<sup>120</sup> E Reale, 'Le droit d'asile', n 2, 544.

<sup>121</sup> Ibid.

<sup>122</sup> 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](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-du-24-juin-1793.5084.html)>, visited on 26 Jun 2014.

<sup>123</sup> 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*, n 83.

<sup>124</sup> A. Grahl-Madsen, *Territorial Asylum*, n 2, 24.

<sup>125</sup> P. Weis, 'Territorial Asylum', n 19, 180.

<sup>126</sup> For an analysis of the right to asylum for individuals enshrined in national constitutions, see P Weis, 'Territorial Asylum', n 19, 180; M-T Gil-Bazo, *The Right to Asylum*, n 84, 476-547; 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).

workers, peasants and students; because of their progressive political, scientific, artistic, and literary activities, because of socialism and peace.<sup>127</sup>

The 1987 Nicaraguan Constitution also establishes the contours of asylum in detail. Its article 42 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.'

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 favor 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

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

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].'<sup>128</sup>

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'<sup>129</sup> 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<sup>130</sup> 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'.<sup>131</sup>

In Spain, the constitutional debate clearly rejected a provision on asylum explicitly worded in terms of a subjective right of individuals<sup>132</sup> 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 was to be construed as an individual subjective right that the Government was obliged to recognize when the applicant met the requirements established by law, and whose refusal was open to judicial scrutiny.<sup>133</sup>

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 allowing them to travel to France in order 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'.<sup>134</sup>

Despite the nuances and differences in the wording of constitutional provisions, asylum aims at the protection of 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. Rather on the contrary, it is intimately linked with international law. Some constitutions explicitly include an express reference to the international legal

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<sup>128</sup> *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.

<sup>129</sup> *Ibid.*

<sup>130</sup> *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 versión of the judgment.

<sup>131</sup> *Ibid* 42.

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

<sup>133</sup> D Blanquer, *Asilo político en España. Garantías del extranjero y garantías del interés general* (Ministerio del Interior 1997) 163–172.

<sup>134</sup> Case No. 1407765, *M et autres v Republique Française*, Decision 16 Sept 2014, 3-4.

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.'<sup>135</sup>

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.<sup>136</sup>

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.<sup>137</sup>

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<sup>138</sup>. 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"<sup>139</sup>

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.'<sup>140</sup> Furthermore, although the research into constitutional texts worldwide

<sup>135</sup> *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. L.A.T. 038), 7 Sept 1995, sec E(2).

<sup>136</sup> *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.

<sup>137</sup> *Case No 0056-12-IM & 0003-12-IA Acumulados*, n 130, 51.

<sup>138</sup> n 18.

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

<sup>140</sup> 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

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.'<sup>141</sup>

## 7. Conclusions

This paper has examined asylum in international law. It has contested the perception of the institution as obsolete<sup>142</sup> 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 paper has shown that this institution has provided historically 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 paper 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 its lack of 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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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(3) *Refugee Survey Quarterly* 33, 46-48.

<sup>141</sup> M Gibney, *The Ethics and Politics of Asylum* (Cambridge University Press 2004) 231.

<sup>142</sup> H Lambert, F Messineo and P Tiedemann, 'Comparative Perspectives of Constitutional Asylum', n 8.