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Asylum in the practice of Latin American and African states

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Introduction

Asylum, understood as ‘the protection that a state grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it,’¹ is a well-known institution in international law² and its historical roots in state practice are well established. This is the sense that the term “asylum” will receive 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 benefit from such protection. Although some academics have argued that the distinction is no longer relevant,³ and an emerging trend has been consistently developing among European states to blur it by restricting asylum to refugees within the meaning of the 1951 Convention on the Status of Refugees,⁴ the distinction remains soundly established in Law and practice, as it will be shown in the pages that follow.

Indeed, the recognition of the separate nature of both institutions has been confirmed by judicial decisions across different countries, as will be seen below, but also internationally by the Court of Justice of the European Union (CJEU) in response to a request for a preliminary ruling lodged by German Federal Administrative Court (*Bundesverwaltungsgericht*).⁵

The case concerned the exclusion from refugee status by application of article 1F of the 1951 Refugee Convention. The German Court wished the CJEU to clarify whether the granting of asylum, enshrined by the German Constitution, to which the excluded individuals in the case in question still had a right, was still 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 [...]’ (para. 121).

Against this background, the purpose of this paper is to bring into the legal debate on refugee protection a perspective often overlooked, namely, that of asylum itself as an institution different from refugee status. In particular, the practice of Latin American and African states, which have a long-standing tradition of protection, will be explored. The constitutions of Latin American and African states have been examined, together with their interpretations by Constitutional and/or Supreme Courts when they exist.

This paper is not concerned with the constitutional traditions of European states, although it is important to note the relationship between them resulting from historical and cultural links. I have shown elsewhere that a number of European states recognise a right to be granted asylum of constitutional rank and have argued that the right to asylum enshrined in article 18

¹ “Asylum in Public International Law”, Institute of International Law (5th Commission), Resolutions Adopted at its Bath Session, September 1950, Article 1.

² For an overview of the evolution of this institution, see A. Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International, Stockholm 1980) and E. Reale, “Le droit d’asile”, (1938) 63(1) *Recueil des Cours de l’Académie de Droit International de La Haye* 473–601.

³ 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* 16-32.

⁴ Adopted 28 July 1951, entered into force 22 April 1954; 189 UNTS 137.

⁵ Joined Cases C 57/09 and C 101/09, *Bundesrepublik Deutschland v B. & D*, Judgment of 9 November 2010 (not yet reported).

of the Charter of Fundamental Rights of the European Union⁶ draws precisely from the constitutional traditions common to the Member States of the European Union.⁷

This paper will focus on constitutional provisions only, notwithstanding that a significant number of countries which do not recognise asylum in their constitutions do so in other legislation or may recognise a right not to be extradited (closely related to asylum itself). 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 of legal orders worldwide (something explicitly recognised by some constitutions). And as such, it informs international law itself.

Indeed, the interpretation of the evolving content of international provisions on asylum requires examination of state practice. Article 31 of the Vienna Convention on the Law of Treaties establishes the general rule of interpretation of treaties, which requires that international provisions be interpreted in their context. Article (3)(b) establishes that – together with the context- ‘any subsequent practice in the application of the treaty’ must be taken into account. Furthermore, article 29(b) of the American Convention on Human Rights precludes its interpretation as ‘restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party.’

Therefore, an examination of the practice of African and Latin American states in the field of asylum may shed light on the interpretation to be given to the provisions on asylum enshrined in international treaties of regional scope.

The research on African and Latin American states has been funded by a Small Grant from UNHCR. Three researchers undertook the task of identifying constitutional texts and their interpretative case-law in both regions. As expected, the research showed that countries whose legal tradition is closely linked to Spain, France and Portugal largely recognise a right of individuals to be granted asylum of constitutional rank. On the contrary, English-speaking countries in Africa do not include asylum in their bill of rights. This is not to say that protection has no legal recognition in their legal orders, but rather that such legal protection has been developed within the context of the 1951 Convention on the Status of Refugees⁸ (hereinafter, 1951 Refugee Convention).

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 briefly argue the position of refugees as subjects of international law –and therefore as subjects of the right to be granted asylum. The paper will then explore the constitutional traditions of Latin American and African states to show that asylum is enshrined as a right of individuals whose scope of application includes, but not only, refugees within the meaning of the 1951 Refugee Convention. It will also show that the constitutional ranking of the right to be granted asylum protects not only the individual, but also constitutes one of the foundations of the state.

It is also important to note what this paper will not speak about. It will not address refugee status, its practice, interpretation, exclusion thereof, or procedures for its recognition. This paper does not aim at presenting a collection of all protection-related legal provisions in *all*

⁶ [2007] OJ C 303.

⁷ MT 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* 33-52, at 46-48.

⁸ Adopted 28 July 1951, entered into force 22 April 1954; 189 UNTS 137.

Latin American and African countries. Rather, its purpose is to explore the legal recognition of the institution of asylum (as different from refugee status) and as such, it will not include information on countries whose legal orders do not recognise asylum itself, even if such countries have a long standing tradition of protection derived from a broad interpretation of the 1951 Refugee Convention and the wider refugee regional definitions in the Cartagena Declaration and the OAU Convention on African Refugees.

Background to the asylum debate

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. Accordingly, International instruments on the matter have repeatedly reaffirmed the sovereign right of states to grant asylum and the correlative duty of other states to respect it.⁹

On the contrary, the legal nature of asylum as a right of individuals remains one of the most controversial matters in refugee studies. There is consensus in the English-speaking literature that denies the existence of a right to be granted asylum in international law (beyond the right to seek it in order to comply with the principle of *non-refoulement*). Often that position will be stated (although not analysed) in works considering refugees, as one of the premises on which the analysis is founded.¹⁰

Since Grahl-Madsen's 1980 book on territorial asylum,¹¹ the legal literature in English has abandoned the debate on asylum and mostly focuses on the various categories of protected individuals (rather than in the institution of protection itself), this is, refugees within the meaning of the 1951 Convention on Refugee Status and more recently those benefiting from complementary protection. This approach contrasts sharply with the lively debate in the literature in other languages -notably Spanish- that considers extensively the institution of asylum alongside refugee status.¹²

⁹ See for example, the Havana Convention on Asylum (adopted 20 Feb. 1928) 132 LNTS 323; the Montevideo Convention on Political Asylum (adopted 26 Dec. 1933, entered into force 28 Mar. 1935) OASTS 34; the Convention on Diplomatic Asylum (adopted 28 Mar. 1954, entered into force 29 Dec. 1954) OASTS 18; and the Convention on Territorial Asylum (adopted 28 Mar. 1954, entered into force 29 Dec. 1954) OASTS 19.

¹⁰ G.S. Goodwin-Gill & J. McAdam *The Refugee in International Law* (3rd ed., Oxford University Press, Oxford 2007) 414-415; J. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge 2005); C. Harvey 'The Right to Seek Asylum in the European Union' (2004) 1 *European Human Rights Law Review* 17-36; A. Hurwitz *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, Oxford 2009) 16.

¹¹ A. Grahl-Madsen *Territorial Asylum* (Almqvist & Wiksell and Oceana Publications, London 1980).

¹² D. Alland and C. Teitgen-Colly *Traité du droit d'asile* (PUF, Paris 2002); H Gross Espiell 'Análisis jurídico comparativo de las legislaciones sobre asilo en América Latina y los instrumentos internacionales y regionales', *Estudios Básicos de Derechos Humanos Tomo V* (Instituto Interamericano de Derechos Humanos, San José de Costa Rica 1996) pp. 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, *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, San José de Costa Rica 2004) pp. 126-160.; F.M. Mariño Menéndez 'El asilo y sus modalidades en Derecho internacional', in F.M. Mariño Menéndez (ed.) *Derecho de extranjería, asilo y refugio* (Ministerio de Asuntos Sociales, Madrid 1995); F. Lenzerini 'Diritto d'asilo e esclusione dellos *status* di rifugiato. Luci e ombre nell'approccio della Corte di giustizia dell'Unione Europea' (2011) XCIV(1) *Rivista di Diritto Internazionale* 103-135; 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... op. cit.* pp. 54-56.

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.

Indeed, the duality of approach may well reflect different legal cultures and traditions, which in turn result in different understandings of international law itself. It is worth noting that 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, that rule human relations in every society and whose observance may be imposed in a coercive manner’ (author’s translation). 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’ (author’s translation). In other words, the actual legal provisions (*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.

It is not the purpose of this paper to elaborate on different conceptions of the Law. Yet, it is important to alert the reader to the underlying premises that inform different perspectives of international law, 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.

In sum, after the failure of the 1977 UN Conference on Territorial Asylum, the English speaking literature has abandoned the debate on asylum and has focused on refugee status instead. This approach, together with the legal and constitutional traditions of English speaking countries across the world -for instance, the value of precedent of judicial decisions, an understanding of the division of powers and their roles in treaty making, as well as an absence of a tradition of general principles as a binding source of municipal law- may inform the perspective of this body of literature on what international law says (and fails to say) about refugee protection.

Asylum and refugee status: separate but related institutions

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). Asylum as a right of states is a well-established institution of international law.

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, this is, the problem posed by the presence of non-nationals in the territory of a state with no effective legal link to another state. 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 an effective legal link with the state of their nationality.

Today, refugees enjoy a distinct and unique standard of protection under international law, which is based on 1951 Refugee Convention and its 1967 Protocol,¹³ as well as the legal standards of regional scope developed in Africa, Latin America, and more recently Europe.

Therefore, the international refugee regime predates the establishment of the international regime for the protection of human rights born in the UN era. When the language of human rights made its appearance in the international scene, so did the question of the legal nature of asylum as a human right.

Article 14 of the Universal Declaration of Human Rights establishes that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.' Yet, to date this provision has not found its way into legally binding international instruments. While the United Nations era led to the consolidation of the international regime for the protection of refugees born under the auspices of the League of Nations, it also confirmed its separation from asylum as an institution for protection.

It is important to note that the development of legally binding human rights standards in the UN era was not only influenced by the political context where it took place, namely, the Cold War, but also by a legal one in so far as asylum is concerned. It was precisely the existence of international obligations towards refugees that made states reluctant to agree to an express obligation to grant asylum, in fear that they may need to admit to their territory numerous groups of people subject to a status regulated internationally.

Therefore, while the institution of asylum had been historically known and practised, paradoxically, the establishment of an international regime for the protection of its beneficiaries resulted in the rejection of the express recognition of an obligation of states to grant asylum to refugees under international law. It is at this time when asylum and refugee protection become separate matters, as refugee protection emerged as a matter of international law, while asylum for individuals fleeing persecution remained a matter of national sovereignty, as it had been for centuries.

The main contribution of international human rights law to the protection of refugees has been precisely to amend the situation just described. The lack of recognition of asylum as a human right of universal scope has been compensated by the adoption of legally binding international provisions of regional scope. Article 22(7) of the American Convention on Human Rights¹⁴ recognises the right of every person 'to seek and be granted asylum,' and article 12(3) of the African Charter on Human and Peoples' Rights refers to the right of every individual 'to seek and obtain asylum.'¹⁵ Article 18 of the Charter of Fundamental Rights of the European Union on the right to asylum completes this regional picture.¹⁶

¹³ Adopted 31 January 1967, entered into force 4 October 1967; 606 UNTS 267.

¹⁴ Adopted 22 November 1969, entered into force 18 July 1978; 114 UNTS 123.

¹⁵ Adopted 27 June 1981, entered into force 21 October 1986; OAU Doc. CAB/LEG/67/3 rev. 5, printed in (1982) 21 I.L.M.

¹⁶ For an analysis of Article 18, see MT Gil-Bazo 'The Charter of Fundamental Rights...', *op. cit.*

Therefore, against the understanding that the international regime for the protection of human rights does not recognise a right to asylum for refugees, this statement must be qualified. The right to asylum is today a human right of individuals guaranteed by international instruments of regional scope, which coexists with the already established right of states to grant it. Today, two thirds of the States Parties to the 1951 Refugee Convention and/or its Protocol are also bound by an obligation under international law (of regional scope) to grant asylum. In other words, by virtue of international human rights law, asylum is no longer merely a matter of state discretion.

Together with the protection of the right to asylum, a further significant contribution of international human rights law to the protection of forced migrants is given by the way in which individuals who fall outside the protection of the refugee regime can invoke the protection offered by norms of international human rights law in order to prevent their forced removal or the denial of entry into the state's territory, as well as the enjoyment of a standard of protection.

Under international human rights law, states have an obligation to respect internationally recognised rights to all individuals, including non-nationals, who are within their territories and subject to their jurisdiction, without discrimination. When immigration control measures may result in a violation of internationally recognised human rights states may be obliged to allow entry and to refrain from removing forcibly individuals who are not nationals, and to afford them a minimum standard of treatment.

A sound body of case-law has been developed over the years examining the application of certain international human rights law provisions to the protection of forced migrants. In particular, the following rights have been object of examination by international monitoring bodies: the right to life; freedom from torture, [cruel,] inhuman or degrading treatment or punishment; the right to liberty and security; the right to a fair trial; the right to enter one's own country; the right to respect for family life; the right to non-discrimination; the right to procedural guarantees within forced removal proceedings; and the right to an effective remedy against human rights violations.

This feature of international human rights law has come to be known as 'complementary protection'. There is no internationally agreed definition of complementary protection as the term is not defined in any international instrument. This term has emerged since the mid-1990s to describe the phenomenon mostly in European states to offer alternative forms of protection. Contrary to the choice made by other regions in the world - Africa and the Americas- to adopt international refugee definitions that expand the protection of the UN Refugee Convention and its Protocol, European states have been resorting to alternative forms of protection outside the international refugee regime, such as 'subsidiary protection', 'humanitarian protection' and 'temporary protection'.

What all these initiatives have in common is their complementary nature in relation to the refugee regime enshrined in the 1951 Refugee Convention and its Protocol. Complementary protection is also used to define the way in which international human rights law has expanded the categories of individuals who qualify for international protection beyond Article

1 of the UN Refugee Convention and are therefore entitled to the status guaranteed by the Convention itself.¹⁷

These categories of protected persons constitute the ‘refugees’ in a broader sense and they also benefit from the right to asylum, which despite a trend emerging in the EU, is by no means solely restricted to the protection of refugees within the meaning of the 1951 Refugee Convention.

Since international law is always in the making, the further interaction of both regimes in strengthening the status of refugees as subjects of international law needs to be observed carefully in order to interpret the evolving nature of states’ obligations under international law in relation to ‘refugees’ in the broad sense.

The refugee as a subject of international law

In the recent past, the nature of individuals as subjects of international law has been denied, and with it, their ability to be the subject of rights and duties in the international legal order. Even when international treaties may recognise rights to individuals, such rights could only be enforced in the domestic legal order since active *locus standi* in international law was reserved to the state only.

Grahl-Madsen analysed the matter extensively in 1972. In his opinion, even if individuals are not as such excluded from holding international rights and duties, they are not considered subjects of international rights and duties under a traditional understanding of international law. Most international norms that individuals benefit from would not have been conceived to confer rights to the individual, but rather to the state of his nationality or to the one that has recognised his protection. Therefore, the subjects of rights in international law would be states and not individuals. In his view, it is implicit that an individual without international procedural capacity is not a holder of rights under international law, and therefore it is not appropriate to speak about individuals as subjects of rights in international law.¹⁸

A different position was expressed by Krenz in 1966. In his view, ‘to deny the existence of a right merely because its enforceability is difficult or impossible, or only attainable through the medium of a foreign instance, would mean denying legal force to many rules of international law, or even to the system altogether.’¹⁹ In his view, ‘[i]n spite of weighty arguments to the contrary, there remains at present little doubt that, under certain circumstances, individual persons become proper subjects of the law of nations, with clearly circumscribed rights and duties. This has been recognised as an important development in the nature and technique of international law and, although the means of enforcement tend to lag behind, it is believed that a way has been opened for the rapid improvement of the status of individuals vis-à-vis that of their states. There is no lack of indications in that direction.’²⁰

At present, and by virtue of developments in international law (notably in international human rights law and international criminal law), it is generally accepted that individuals

¹⁷ J. McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford 2007).

¹⁸ A Grahl-Madsen, *The Status of Refugees... op. cit.*, at 7.

¹⁹ F. E. Krenz, ‘The Refugee as a Subject of International Law’ (1966) *International and Comparative Law Quarterly* 90-116, at 96.

²⁰ *Ibid*, at 115.

enjoy the status of subjects of international law. The main implication of this status is that they have *locus standi* in international law, including in principle the legal capacity to seek the enforcement of their internationally recognised rights both domestically and internationally.²¹

Asylum in the Americas

The origins of the Inter-American System of Human Rights are to be found in the 1826 Panamá Congress, that led to the adoption of the Treaty of Union, League, and Perpetual Confederation (which never entered into force, as it was only ratified by Colombia –at the time comprising the current states of Colombia, Ecuador, Panama, and Venezuela).The Treaty aimed at establishing a Latin American Confederation and it enshrined a number of principles, including legal equality between nationals and aliens.

The position of Latin American states on the treatment of aliens, including the granting of asylum, was reflected in the adoption in the early 20th century of a number of instruments, including the 1902 Convention on the Rights of Aliens, the 1928 Convention on the Status of Aliens, the 1928 Convention on Asylum, and the 1933 Convention on Political Asylum, to name a few. It is not surprising that the American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American states (Bogotá, Colombia) in April 1948, seven months before the Universal Declaration on Human Rights was adopted by the United Nations General Assembly.

Article XXVII of the Declaration enshrined the right to asylum in the following terms:

Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and *receive* asylum in foreign territory, in accordance with the laws of each country and with international agreements. (emphasis added)

The right to asylum then became legally binding by its incorporation in article 22(7) of the American Convention on Human Rights:

Every person has the right to seek and *be granted* asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes. (emphasis added)

Furthermore, despite the fact that the Declaration lacked legally binding force at the time of its adoption, the reform of the Charter of the Organisation of American states adopted by the 1967 Protocol of Buenos Aires recognised the normative nature of the Declaration in order to review the activities of all OAS Member States in the field of human rights. Its binding nature was affirmed by the Inter-American Commission on Human Rights in 1981. In a case against the USA, the Commission stated that:

As a consequence of articles 3 i, 16, 51 e, 112 and 150 of [the Charter of OAS], the provisions of other instruments and resolutions of the OAS on

²¹ A. A. Cançado Trindade, 'International Law for Humankind: Towards a New *Jus Gentium* (I)... *op. cit.* 252-317; cf. A. Orakhelashvili, 'The Position of the Individual in International Law' (2001) 31(Spring Issue) *California Western International Law Journal* 241-276.

human rights, acquired binding force. Those instruments and resolutions approved with the vote of U.S. Government, are the following: - American Declaration of the Rights and Duties of Man (Bogotá, 1948).²²

A few years later, the Inter-American Court of Human Rights elaborated on the binding force of Declaration in the context of an advisory opinion on the interpretation of the Declaration.²³ In the Court's view, although the Declaration is not an international treaty as such, it nevertheless constitutes an authoritative interpretation of the Charter of the OAS and in that sense it has acquired legally binding force for its Member States:

[I]t may be said that by means of an authoritative interpretation, the member states of the Organization have signalled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration. (para. 43)

Accordingly, 'the American Declaration is for these states a source of international obligations related to the Charter of the Organization' (para. 45).

The Inter-American Commission on Human Rights had the chance to examine a claim under the Declaration against a Member State of the OAS who is not a party to the Convention. In 1993 the Commission declared admissible the claim against the United States policy of interception at sea. In the case of *Sale v. Haitian Centres Council, Inc.*, the US Supreme Court decided (with the dissenting opinion of Justice Blackmun) that article 33 of the 1951 Convention (on *non-refoulement*) did not apply to the actions of the United States on the high seas, given that it was not intended to have extraterritorial effect.²⁴ Examining the same facts, the Inter-American Commission on Human Rights found that the USA had breached several provisions in the American Declaration on Human Rights, including the right to "seek and receive asylum" enshrined in article XXVII.²⁵

A look at state practice will shed light on the way in which Latin American states have implemented these provisions.

Asylum in the practice of Latin American states

A look into the practice of the states in Latin America shows that asylum is deeply grounded in their constitutional frameworks. Worded in different ways, the constitutions of Bolivia, Brazil, Costa Rica, Cuba, the Dominican Republic, Ecuador, Colombia, El Salvador,

²² Resolution 23/81, Case 2141 (United States), 6 March 1981; published in *Annual report of the Inter-American Commission on Human Rights 1980-1981* (OEA/Ser.L/V/II.54 Doc. 9 rev. 1, 16 October 1981), para. 16.

²³ Advisory Opinion OC-10/89 *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights Requested by the Government of the Republic of Colombia* 14 July 1989; Series A No 10.

²⁴ *Sale v. Haitian Centres Council, Inc.*, 113 S. Ct. 2549, pp. 18–21.

²⁵ *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997 (Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997)), para. 188.

Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Venezuela all recognise the right to asylum.

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.’²⁶ 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 higher value of asylum was elaborated upon by the Costa Rican Supreme Court in a judgment of 1998.²⁷ 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 in an inviolable space for the protection of individuals of other countries when they are persecuted by reason of their political or ideological preferences or actions, a principle enshrined in article 31 of the Constitution, and that as such it constitutes a fundamental right [of individuals].

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’ that are at the basis of a democratic state founded on the rule of law.

Some of the American constitutions contain a generic recognition of the right to asylum but then refer its development to the law. Article 36 of the Colombian Constitution states that ‘the right of asylum is recognised in the terms established by the law.’ Colombia’s legislation specifically refers to the international treaties that the country is a Party to. The reference to the role of the international legal framework in the interpretation of the constitutional provision on asylum can also be found in the rulings of Colombia’s Constitutional Court.

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.’²⁸ Later on, in a judgment of 2003, the Court made express reference to the 1954 Caracas Convention and the American Declaration as international instruments that lie at the basis of the legal framework for the interpretation of article 36.²⁹

²⁶ This is the author’s translation. Likewise, all legal provisions cited for the countries considered in this paper are translated by the author.

²⁷ *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 of 4 September 1998.

²⁸ *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*, Constitutional Court, judgment No. C-396/95 (Expediente No. L.A.T. 038), of 7 September 1995, at section E(2).

²⁹ *Acción de tutela promovida por Reza Pirhadi contra el Ministerio de Relaciones Exteriores y el Departamento Administrativo de Seguridad DAS*, Constitutional Court, Judgment T-704/03 (expediente T-738454), of 14 August 2003, at 8-9.

The reference to the international legal framework appears in other constitutional orders too. Article 27 of the Constitution of Guatemala states that the country ‘recognises the right to asylum and grants it in accordance with international practice.’

Constitutional provisions in Latin America often include a prohibition of forced removal (drafted in different terms), thus reinforcing the understanding that the right to asylum goes beyond the prohibition of *refoulement*. Article 29 of the Bolivian Constitution thus recognises ‘the right to seek and obtain asylum or refuge’ (para. I) while para. II of the same provision specifically states that individuals who have been granted asylum or refuge shall not be expelled or removed to a country where their life, integrity, safety or freedom are at risk.

The scope of protection of asylum *ratione personae* differs from country to country. While most constitutions simply contain a statement that the right to asylum is recognised to foreigners, other constitutions include a delimitation of who can benefit from such recognition. Article 13 of the Cuban Constitution probably provides the most detailed and widest scope of application:

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

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 43 of the 1992 Constitution of Paraguay recognises asylum to ‘every person persecuted for political reasons [...] as well as for his opinions or beliefs.’

This broad range of beneficiaries of asylum reflects the historical tradition of the institution as offering protection on a variety of grounds, including but not only, those that give raise to refugee status.

On the other side of the spectrum, article 28 of the El Salvador Constitution simply states that the country ‘grants asylum to foreigners who wish to reside in its territory.’ No reference to persecution is made. Yet, the reference to residence is relevant, as it speaks to the protection aspect of the institution, allowing individuals to reside in the state of asylum.

These provisions have seen their actual implementation often times, allowing dictators and other high profile individuals to flee their own country’s political unrest, often following a successful attempt to overthrow the government. Despite states’ agreement that the granting of asylum does not constitute a hostile act, practice shows that at a minimum it tends to lead to diplomatic disputes. The recent case of Wikileaks founder Julian Assange illustrates this point, as his request for asylum to Ecuador in June 2012 (still pending) has been met by enormous criticism worldwide. Assange faces prosecution on charges of rape, but he argues that the charges themselves (which he denies) have been brought as a result of his revealing classified information from a number of countries (matters that have gained him criticism but for which no prosecution has been brought).

Another recent case illustrates the duality of asylum/refugee status and the different legal nature of both institutions. The protection granted by Brazil to Cesare Battisti since 2009 raised an outcry in Italy (who had requested his extradition), a position supported by the European Parliament.³⁰ Battisti was an active member of a far-left armed group and he was convicted in Italy for acts of terrorism committed in the 70s. He fled to France and Mexico, and eventually entered Brazil where he applied for refugee status (not asylum).

In January 2009, the Minister of Justice recognised him as a refugee (against the advice of the National Committee for Asylum, CONARE), a decision found unconstitutional by the Supreme Court of Brazil a few months later as being in breach of article 1F of the 1951 Refugee Convention. Yet, the Court noted that even if refugee status could not be recognised, asylum could still be granted under article 5(LII) of the Constitution, which establishes that ‘the extradition of foreigners for political crimes or crimes of conscience shall be denied.’

Brazil’s President Lula da Silva made use of this constitutional provision in December 2010 and calling on Brazil’s sovereignty, he refused Battisti’s extradition to Italy. In June 2011 the Supreme Court affirmed the constitutionality of the decision and ordered Battisti’s release from custody. A few days later, the Brazilian National Council for Immigration granted him permanent residence.

Asylum in Africa

The African System of Human Rights is founded on the African Charter on Human and Peoples’ Rights, whose article 12(3) establishes that:

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.

The African Court on Human and Peoples’ Rights was established by virtue of Article 1 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights.³¹

To date, there is no case-law that examines article 12(3) of the Charter. An examination of state practice will show how states have been implementing this provision.

Asylum in the practice of African states

While current constitutional provisions in Latin American states reflect their own history of independence in the course of the 19th century, and therefore draw from the liberal-democratic tradition that emerged from the French Revolution, African states mostly acquired independence and full membership of the international community in the 20th century, once the international regime for the protection of refugees was already in place. In fact, the 1951

³⁰ European Parliament resolution of 5 February 2009 on the refusal to extradite Cesare Battisti from Brazil (P6_TA(2009)0056).

³¹ Adopted 9 June 1998, entered into force 25 January 2004; OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2.

Refugee Convention applied to many African states already before they became self-governing territories, by virtue of the application of article 40 of this instrument, which allowed States Parties to the 1951 Refugee Convention to extend its application to the territories for whose international relations they were responsible.³²

Together with the consolidated application of the 1951 Refugee Convention on the Status of Refugees, there is also a constitutional tradition of asylum in African states. The constitutions of Angola, Bénin, Burundi, Cape Verde, Chad, Democratic Republic of Congo, Ivory Coast, Egypt, Guinea-Conakry, Mali, and Mozambique all enshrine the right to asylum. Although other African states have enacted legislation on asylum, it is not surprising that the constitutional rank of the institution is to be found in countries with a cultural and historical link with France and Portugal (whose constitutions also enshrine a right to asylum).

As indicated above, the distinction between the two concepts is most relevant, with a constitutional right to asylum speaking to a conception of the state and the values that underpin it. 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,’ its paragraph 2 then goes on to recognise 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 defence 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 reflects the dual nature of both institutions and the conceptualization of asylum as a right (of refugees) intimately linked to the fight for national liberation.

As in the case of Latin American states, constitutional provisions in African countries may be worded in general terms. In this regard, article 50 of the 2005 Constitutional Law of Burundi and article 46 of the 1996 Constitution of Chad merely state their recognition of the right to asylum and defer its actual development to the law. Interestingly, 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.’

Yet, most constitutions provide a significant level of detail. Article 71(1) of the 2010 Angolan Constitution (included in Chapter II, on Fundamental Rights and Freedoms) 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.

³² On the colonial clause and its application, see M-T. Gil-Bazo, ‘Article 40 1951 Convention (Territorial application clause)’, in A. Zimmermann (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford 2011) 1567-1588.

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:

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

These provisions illustrate the broad range of grounds on which asylum is granted and which include and go beyond refugee status. Some of those grounds will be linked to civil or political status, such as racial or ethnic background, while others protect individuals persecuted because of their fight for national liberation or their intellectual, scientific or cultural activities.

Probably the most notorious case of asylum in the recent past is that of Charles Taylor (former President of Liberia) in Nigeria. He was indicted for war crimes and crimes against humanity by the Special Court for Sierra Leone in March 2003 for his involvement in Sierra Leone's civil war. In August 2003 he fled to Nigeria, who refused his extradition to Liberia.

The granting of asylum to Taylor was challenged before the Nigerian Federal High Court by two Nigerian victims of torture in Sierra Leone in 2004. Numerous *amicus curiae* were submitted (included by Amnesty International) arguing the unlawfulness of the decision under the 1951 Refugee Convention. Taylor was eventually extradited to The Hague to stand trial and in May 2012 he was convicted for international crimes and sentenced to fifty years of imprisonment.

Conclusion

This paper has explored the relationship between asylum and refugee status, focusing on their different legal nature, development, and current practice. It has attempted to bring asylum (as the well-established institution for protection) into debates on refugee protection (currently focusing on the categories of beneficiaries).

The African and Latin American practice therefore adds to the continental European practice of recognition of a right to be granted asylum of constitutional rank. The international regional instruments that recognise asylum refer to national legislation as the actual

framework for the implementation of the right. Likewise, many of the constitutional provisions on asylum refer to international law as the legal framework for their own interpretation. There is indeed a dynamic relationship between the two legal orders where each informs the other.

In particular, international law draws from the practice of states and it recognises general principles as one of its sources. The research has shown that the right to be granted asylum enjoys constitutional rank in numerous countries in Africa and Latin America, thus showing the contribution of these regions to the institution of asylum in international law. The value of such legal nature lies not only in the protection of the individual himself, but also in its normative character, as a principle that informs the legal system as a whole. As such, it constitutes one of the foundations of liberal democratic states based on the rule of Law.

While the right to be granted asylum as a subjective right of individuals may not be known to certain legal cultures, notably the common law, it cannot be concluded that therefore it is also unknown to international law. The picture presented in this paper offers a more nuanced and complex perspective of the practice of states across different legal cultures worldwide, a perspective that is not alien to international law and that contributes to its development as the living law of nations. Debates on what *international law* says about refugee protection must therefore take account of the rich broad context where the 1951 Refugee Convention and other international human rights treaties exist.

Having said this, further research is necessary to continue to develop the picture of asylum in state practice and its relation to international law. Notably the actual enforcement of the individual right to asylum needs further exploration. Likewise, the limitations of asylum as a right of the state require further consideration.

In this regard, the cases of Battisti in Brazil and Taylor in Nigeria raise the question of the limitations that may exist on the sovereign right of states to grant asylum (and with it the individual's right to receive it). It is uncontroversial that individuals falling under the scope of article 1F of the 1951 Refugee Convention are excluded from refugee status. However, it is also uncontroversial that international general law and constitutional law in municipal jurisdictions recognise asylum also to individuals excluded from refugee status.

Limitations to this right may be derived from treaties establishing international obligations of states (including the UN Charter and the Statute of the International Criminal Court, as well as extradition treaties). Notably, when an individual is fleeing prosecution for crimes of international law (such as war crimes and crimes against humanity) the sovereign right of states to grant asylum (in accordance with their constitutions) may be restricted by international obligations of higher rank.