THE CONTEMPORARY INTERNATIONAL LAW STATUS OF THE RIGHT TO RECEIVE ASYLUM

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I. INTRODUCTION

Clearly a state has a right to expel aliens generally, and a state has a right to grant asylum to aliens, but the question is whether an individual has a right to asylum opposable to the state's right to expel. In the literature, it is commonly understood that no such right exists. Treaty obligations discussing a "right to asylum" are understood in various ways, generally not to provide for a right to *receive* asylum but *apply for* it. However, the past few decades have shown a growth in conventions addressing asylum, especially, but not limited to, the European context. With refugee flows being an inherently international concern with a need for durable solutions, increasingly refugees are being assimilated to refugee-seekers. States are reacting or anticipating these issues by adopting domestic rights to asylum, at least for individuals qualifying as refugees. These trends suggest an evolving international consensus on *opinio juris* and state practice that refugees must receive asylum. Thus, it appears that the right to asylum for refugees exists under customary international law.

The paper will proceed broadly in two sections viewing the issue from different perspectives. In the first section, the paper will begin by examining the "right to asylum" from the perspective of the states, the authors of the Refugee Convention and similar agreements. The paper will conclude that the "right to asylum" in those agreements is directed at states, not individuals. In essence, states have a right *vis-à-vis* other states to grant asylum to aliens and not have that act be viewed as hostile.

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However, this right of the state does not necessarily exclude a right of individuals to receive asylum if convention or customary international law also demand it. Accordingly, the second section examines the right of the individual to receive asylum. In the first sub-section, the author looks at conventional law and in the following sub-sections he looks at customary international law, specifically state practice and *opinio juris*. In the conclusion, the author argues that, although there is a state right to grant asylum, there is also an individual right to receive it in certain circumstances. This conclusion is based on widespread and consistent practice granting asylum as an obligatory consequence of refuge.

II. STATE RIGHT TO GRANT ASYLUM

Only a few international treaties provide for the right to asylum. It was recognized by the Convention on Political Asylum concluded at Montevideo in 1933 by the Seventh International Conference of American States.[1] The Universal Declaration of Human Rights (hereinafter "UDHR") provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution." [2] The Vienna Declaration on Human Rights and Programme of Action similarly reaffirmed the right to seek and to enjoy asylum in 1993.[3]

However, the way in which the right to asylum is articulated in those instruments suggests that it is not meant to be a right of the individual to receive asylum, but rather a right of the state to grant it, that must be respected by other states. The Declaration on Territorial Asylum, provides that[4]

> Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

The further clarification of the right to asylum in the Convention on Territorial Asylum affirmed the "right to asylum" as a right of a state to have its grant of asylum in cases of persecution respected.[5] Also important is the International Court of Justice *Asylum case* where the court held that the question before it was "the existence of a legal obligation upon a territorial State *to recognize the validity of asylum* which has been granted against proceedings instituted by local judicial authorities".[6] Furthermore, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter "OAU Convention") states that "The grant of asylum to refugees is a peaceful and humanitarian act and shall not be

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[1] Convention on Political Asylum, Dec. 26, 1933 (entered into force Mar. 28, 1935) *available at* http://www.unhcr.org/refworld/docid/3ae6b36620.html.

[2] Universal Declaration of Human Rights, art. 14(1), *adopted as* UNGA Res. 217 A (III) (Dec. 10, 1948) (hereinafter "UDHR"). *Also see* Asian-Afr. Legal Consult. Org., *Bangkok Principles on Status and Treatment of Refugees* (Dec. 31, 1966) *adopted at* the Asian-Afr. Legal Consult. Org., 40th Sess., New Delhi, (June 24, 2001), art II(1) (hereinafter "*Bangkok Principles*") ("Everyone without any distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution").

[3] Vienna Declaration and Programme of Action, para. 23, *adopted at* the UN World Conf. on Hum. Rts (1993), UN Doc. A/CONF. 157/23 (July 12, 1993).

[4] UNGA Res. 2312 (XXII), art. 1(1) (Dec. 14, 1967).

[5] Convention on Territorial Asylum, Mar. 28, 1954, art. II, 1438 UNTS 24378:

> The respect which, according to international law, is due the jurisdictional right of each State over the inhabitants in its territory, is equally due, without any restriction whatsoever, to that which it has over persons who enter it proceeding from a State in which they are persecuted …

[6] Asylum case (Col. v. Peru), Judgment, 1950 ICJ Reps. 273 (Nov. 20)

regarded as an unfriendly act by any Member State." [7] The right is thus principally a right among states, i.e. that states may not view the grant of asylum to one of their nationals as an unfriendly act. Granting asylum by a state to such a person, and refusal to return that person, is not an internationally wrongful act against other states, including the state of nationality. Perhaps this right of states goes hand-in-hand with the lack of a norm establishing that creating refugee flows is an internationally wrongful act.[8]

This right to grant asylum and have it respected is, however, explicitly limited to certain situations, widely described as "persecution". However, the definition of persecution is still rather unclear. In his second report on the expulsion of aliens, the Special Rapporteur of the International Law Commission noted that[9]

> There is no limit placed on the forms of persecution that can result in the granting of asylum, in contrast to the forms of persecution which open the way to refugee status. In recent years, for example, persecution on the basis of gender or gender-linked practices has been advanced as the basis for claims of asylum.

It would appear that persecution can include race, religion, social group status, etc. A further note is that the definition of persecution may also include persecution of persons struggling against colonialism.[10]

As will be discussed in more detail below, many states have integrated their refugee obligations and asylum grants into the same legal framework and process, so that individuals qualifying as refugees under international law (or municipal incorporation of international law obligations) may receive asylum under municipal law based on the same facts. Since many states apply the same meaning of "persecution" under international refugee law to their determination of "asylum" under municipal law, we might conclude that there is *opinio juris* (derived from legal expression of synonymous meaning) and practice (derived from application of the same meaning) that the two meanings of persecution have converged. The conclusion from this analysis might be that states have a right to grant asylum to individuals qualifying as refugees or otherwise persecuted.

Excepted from protection are persons not subject to persecution, but rather prosecution. In such cases, the state may very well have an obligation to extradite the person for prosecution. The Declaration on Territorial Asylum also states that[11]

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[7] Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa, *adopted by* the Assembly of Heads of St. & Gov't, Sept. 10, 1969, art. 2(2), 1001 U.N.T.S. 45 (entered into force June 20, 1974) (hereinafter "OAU Convention"). *Also see Bangkok Principles*, *supra* note 2, art. II(3):

> The grant of asylum to refugees is a humanitarian, peaceful and non-political act. It shall be respected by all other States and shall not be regarded as an unfriendly act so long as its humanitarian, peaceful and non-political nature is maintained

[8] *See* Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532 (1986) (arguing that there is no norm that a state that creates refugee situation has breached a duty to other states burdened by flow).

[9] *See* Maurice Kamto, *Second report on the expulsion of aliens*, U.N. Doc. A/CN.4/573 at 97. *Also see* Convention on Territorial Asylum, art. II.

[10] Universal Declaration of Human Rights, art.14(1); UNGA Res. 2312 (XXII), Declaration on Territorial Asylum, art. 1(1) (Dec. 14, 1967).

[11] *Id.*

> Those who are the subject of "prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations" pursuant to article 14, paragraph 2, of the Universal Declaration of Human Rights.

Thus the grant of asylum to an individual sought for prosecution might be potentially regarded as an unfriendly act between states.

In addition, the right to grant asylum also seems to be explicitly recognized for situations of war. Neutral states might have a right to grant asylum to persons fleeing conditions of war: "The right to neutral asylum is the right of a neutral State to grant, within its jurisdiction, shelter to those seeking refuge from the calamities of war." [12] However, the use of the terms "shelter" and "refuge" as synonyms for "asylum" do confuse the meaning somewhat.

Aside from these explicit provisions for a state right to grant asylum, the right may also extend to other situations, which will be discussed in more detail in the section below on state practice regarding the right of the individual to receive asylum. It is difficult to imagine that if states provide for municipal grants of asylum for a wider range of causes than provided above, that they are not also asserting permission under international law for themselves to issue such a grant and not have that grant be considered wrongful. However, before turning to that discussion, we should next consider whether the right of the state to grant asylum is paired with a right of the individual to receive it.

III. INDIVIDUAL RIGHT TO RECEIVE ASYLUM

Next we can consider whether this right, primarily a state right in relation to other states, provides a right for an individual to receive asylum. Although it is agreed that the right, as discussed above, is primarily a right of states, that determination does not exclude any right of individuals.

It has been argued that the right to seek asylum provides procedural protections for the individual requesting asylum (or at least procedural rights to apply for asylum[13]) and perhaps even an implied right to the grant of asylum itself.[14] "The right to seek and enjoy asylum is not an empty

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[12] *See* Inst. Int'l L., Resolution on neutrality, art. 5 (Sept. 1906), 21 ANN. 375 (1906).

[13] *See* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 202-203 (2d ed., 1996, reprint. 1998); C. D. de Jong, *The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later*, 10 INT'L J. REF. L. 688, 689 (1998); Alice Edwards, *Tampering with Refugee Protection: The Case of Australia*, 15 INT'L J. REF. L. 192, 197 (2003):

> Articles 1 and 33 read together place a duty on States parties to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination. Access to asylum procedures is also debatably an implied right under the 1951 Convention (although such procedures are not necessary to accord refugee protection), and is an accepted part of State practice. It has been asserted that without appropriate asylum procedures, obligations of non-refoulement, including rejection at the frontier, could be infringed

[14] *See* D. JOLY, HAVEN OR HELL? ASYLUM POLICIES AND REFUGEES IN EUROPE 1 (1996) (also adding that "[S]tates do not have a completely free hand in deciding whom to admit with regard to refugees", which suggests that the authors are not discussing a right to asylum but rather a right to refugee status); Richard Plender & Nuala Mole, *Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments*, *in* F. NICHOLSON AND P. TWOMEY (EDS.), REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 364 (Cambridge University Press, 1999); T. Einarsen, *The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum*, 2 INT'L J. REF. L. 361 (1990).

phrase".[15] It has been documented that early proposals for the provision of a true right to receive asylum in the UDHR were rejected,[16] although Goodwin-Gill does not accept this interpretation of the preparatory works.[17] Subsequent regional treaties addressing the matter have on occasion been more explicit by requiring the grant of asylum in certain cases, such as the Organization of American States Convention (hereinafter "OAS Convention"),[18] the African Charter on Human and Peoples' Rights (hereinafter "AfrCHPR"),[19] and the American Convention on Human Rights (hereinafter "AmCHR").[20]

Some have argued that there is no right to receive asylum inherent in the way the "right" to asylum has been articulated.[21] This right might be seen as merely a right to receive asylum from a state willing to grant it, although we must consider whether the evolution of human rights law from primarily an inter-state obligation of treatment of persons to, in some instances, a private right of action held by the individual, has occurred in asylum law.[22] First, we can look at conventional law and customary international law obliging asylum, in particular cases of refugee status determinations, then we can turn to state practice providing a right to asylum.

A. CONVENTIONAL LAW OBLIGING ASYLUM FOR REFUGEES

Certainly some international agreements explicitly provide for a right of an individual to receive asylum, principally, the American Declaration on the Rights and Duties of Man,[23] OAS Convention,[24] AmCHR,[25] and the AfrCHPR.[26] However, in these cases the treaties permit states

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[15] *See* Plender & Mole, *Beyond*, *supra* note 14 at 81; Alice Edwards, *Human Rights, Refugees, and the Right 'to Enjoy' Asylum*, 17(2) INT'L J. REFUGEE L. 293 (June 2005).
[16] *See id.*
[17] *See* GOODWIN-GILL, REFUGEE, *supra* note 13 at 175 (citing the French delegate during the *travaux préparatoires* "right to asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it"); Exec. Comm. Concl. No. 82(XLVIII) on "Safeguarding Asylum", para. (b) (1997) ("reaffirms that the institution of asylum ... derives directly from the right to seek and enjoy asylum set out in Article 14(1)").
[18] OAS Convention, art. 22(9) (providing the right "to seek and be granted asylum in a foreign country").
[19] African Charter on Human and Peoples' Rights, art. 12(3), *adopted* 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, *reprinted at* 21 I.L.M. 58 (hereinafter "AfCHPR") (providing 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").
[20] American Convention on Human Rights, *adopted* 22 November 1969, art. 22(7) (entered into force 18 July 1978), 114 UNTS 123, OAS TS No. 36 (hereinafter "AmCHR") ("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").
[21] *See Bangkok Principles*, *supra* note 2, art. II(2) ("A State has the sovereign right to grant or to refuse asylum in its territory to a refugee in accordance with its international obligations and national legislation"); Siegfried Wiessner, *Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447 (Dec. 1986) ("The farthest-reaching prescription was Art. 14 of the 1948 Universal Declaration of Human Rights. It proclaimed a human right 'to seek and to enjoy in other countries asylum from persecution'. A proposal to extend this guarantee to a 'right to seek and to be granted asylum' was voted down. Thus the admission of refugees remained at the discretion of states" - Only the Vatican, Sweden and Italy backed this proposal).
[22] A. GRAHL-MADSEN, TERRITORIAL ASYLUM 2 (1980) (considers that while the right of asylum had traditionally referred to the right of states to grant asylum, it was undeniable that the evolution of International Law and State practice in relation to refugee protection, allows one to speak of a right of the individual to (be granted) asylum).
[23] American Declaration on the Rights and Duties of Man, art. 27.
[24] OAS Convention, art. 22(9).
[25] AmCHR, art. 22(7).

to apply their municipal law in implementing their treaty obligations, so application is not consistent.[27] For example, AmCHR states that: [28]

> 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.

Despite these shortcomings, it is clear that these treaties provide for an individual right to asylum, supplementing the traditional state right to grant asylum. In sum, three of the six inhabited continents on the earth, with certain exceptions, have some conventional obligation to grant asylum.

However, other instruments have failed to provide for the right as explicitly. The UDHR merely states that "Everyone has the *right to seek and to enjoy* in other countries asylum from persecution."[29] This formula provides both a right to seek, suggesting at least a right to apply, and a right to enjoy, suggesting at least a right not have such status removed. Similarly, the Refugee Convention,[30] European Convention on Human Rights (and its additional protocols) (hereinafter "ECHR")[31] and the Declaration on Territorial Asylum[32] do not provide for a right to receive asylum explicitly.[33]

Turning specifically to the European Union, initially proposals for inclusion of a right to asylum in European law were rejected at the European Council Meeting in Tampere in 1999.[34] However, in 2000 the EU promulgated the Charter of Fundamental Rights of the European Union (hereinafter "Charter"), which provided for a right to asylum in article 18.[35] It was said that the right to asylum in it was based on the right to asylum provided in the UDHR and the Refugee Convention.[36] Specifically, [37]

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[26] AfrCHPR, art. 12(3).
[27] *See* Wiessner, *Blessed*, *supra* note 21.
[28] AmCHR, art. 22(7) (author's emphasis).
[29] UDHR, art. 14(1) (author's emphasis).
[30] Convention relating to the Status of Refugees, Geneva, July 28, 1951, 189 UNTS 137 (entered into force 22 Apr. 1954), *as amended by* the Protocol Relating to the Status of Refugees, 21 Jan 1967, 606 UNTS 267 (entered into force 4 Oct 1967) (hereinafter collectively "Refugee Convention").
[31] [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Council of Eur., C.E.T.S. No. 5 (entered into force Sept. 3, 1953) (hereinafter "ECHR"), *amended by* Protocol No. 7, art. 1, Nov. 22, 1984, Council of Eur., C.E.T.S. No. 117; *also as amended by* Protocol No. 4, art. 3(1), Sept. 16, 1963, Council of Eur., C.E.T.S. No. 46 (entered into force May 2, 1968).
[32] Convention on Territorial Asylum, Caracas, Mar. 28, 1954, art. II, 1438 UNTS 24378
[33] *See* Wiessner, *Blessed*, *supra* note 21.
[34] *See* Plender & Mole, *Beyond*, *supra* note 14.
[35] Charter of Fundamental Rights of the European Union, 2010 O.J. C 364/01 (Dec. 18, 2000).
[36] María-Teresa Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*, 27(3) REF. SURV. Q. 33-52 (2008).
[37] Draft Charter of Fundamental Rights of the European Union, Charte 4473/00, Convent 49, art. 18(2) "Right to asylum", Explanation:

> The text of the Article is based on TEC Article 63 which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland annexed to the Treaty of Amsterdam and to Denmark to determine the extent to which those Member States implement Community law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the EC Treaty.

> [t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution.

Therefore, although the Charter provides for a "right to asylum", it might be only limited to the right as described in the UDHR and Refugee Convention, i.e. a weak right to apply and perhaps enjoy asylum. However, the object and purpose of the Charter is the protection of individually held rights, so it is arguable that the Charter contemplates a private right to asylum (only in refugee situations) parallel to the state right to grant asylum. It could also be argued that the Charter understands the right to asylum in the UDHR and Refugee Convention to have already been expanded through customary international law to provide for an individual right. That being said, the UDHR and Refugee Convention also had the object and purpose to provide for individual rights, but without rights of individual enforcement, so the object and purpose of the Charter, on the one hand, and UDHR and Refugee Convention, on the other hand, are somewhat misaligned. In any event, through the adoption of the Charter, we might see the growing development of an individual right. Of course, the Charter has now been incorporated into EU law through the Lisbon Treaty.[38]

In 2004, the EU also introduced Council Directive 2004/83/EC governing a common policy on refugee status (hereinafter "Qualification Directive").[39] Some have argued that although the Qualification Directive obliges EU Member States to recognize refugee status in certain circumstances, it also implicitly provides for a right to receive asylum.[40] This Directive requires EU Member States to adopt laws and regulations providing for the implementation of the Qualification Directive prior to October 10, 2006.[41] At that point, if not done, the Directive is directly applicable in the legal order of the relevant Member States.[42] Interestingly, the right to receive asylum was initially rejected by the Commission, though later reintroduced, before the agreement on the final language.[43]

The precise language of the Qualification Directive orders EU Members States to 'grant refugee status to a third country national or a stateless person, who qualifies as a refugee'.[44] The Directive

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[38] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 Dec. 2007, 2007 OJ C 306/01 (17 Dec. 2007).

[39] EC Council Directive 2004/83/EC 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 ("Qualification Directive") (Apr. 29, 2004), 2004 OJ L 304/12 (Aug. 30, 2004); Case C-465/07, Elgafaji, Judgment (Eur. Ct. Just., Feb. 17, 2009); Joined Cases C-175, 176, 178 & 179/08, Salahadin Abdulla et al., Judgment (Eur. Ct. Just., Mar. 2, 2010). *Also see* 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); Eur. Council Refs. & Exiles, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Doc. IN1/10/2004/ext/CN, (Oct. 2004).

[40] *See* María-Teresa Gil-Bazo, *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, New Issues in Refugee Research, Research Paper No. 136 (Nov. 2006) (hereinafter "Gil-Bazo, *Refugee Status Research Paper*").

[41] *See* Qualification Directive, *supra* note 39, art. 38.

[42] Case 9/70, Grad, (1970) ECR 825, para 5.

[43] *See* Doc. 10596/02 ASILE 36 (July 9, 2002).

[44] Art. 13. *Also see* Art. 18 ("Member States shall grant *subsidiary protection status* to a third country national or a stateless person eligible for subsidiary protection").

does not create a private enforcement right, so it is not entirely clear whether the right is held by the individual or is owed to the EU. In any event, the Directive does provide for a right to refugee status. However, the right to refugee status is not the same as the right to asylum. Before examining the Qualification Directive alone in any further detail, we should at this point examine the common commingling of refugee status and asylum in many instruments.

B. COMMINGLING ASYLUM AND REFUGEE STATUS

As a final analysis of *opinio juris*, we turn to the frequent and casual intermixing of the notions of refuge and asylum, suggesting that states regard asylum as the obligatory consequence of refuge. There is a considerable amount of international agreements and other legislation that appears to blur and mix the notions of refugee status and asylum. Many states have used the Refugee Convention definition of refugee as the basis for domestic legislation granting asylum.[45] Accordingly, any person qualifying as a refugee under the Convention necessarily qualifies for asylum in the state concerned.

In the EU Council Directive 2004/83/EC, the precise language orders EU Members States to "grant refugee status to a third country national or a stateless person, who qualifies as a refugee".[46] The next question is what kind of status is understood by the Qualification Directive's right to refuge. The Directive acknowledges the declaratory theory of refugee status (i.e. that refugee determination by the state is merely declarative of the already existing refugee status under international law) so the UN High Commission for Refugees (hereinafter "UNHCR") has interpreted the grant of "refugee status" in the Qualification Directive to mean merely the grant of rights and obligations of refugee status.[47] The rights of refugee status and asylum differ, so this suggests that the Directive does not provide for a right to asylum, just a right to recognition of refugee status. However, the legal basis for the Qualification Directive is the Treaty of Amsterdam provision which grants the EC/EU the competence to establish a common policy of asylum.[48] The Directive itself notes that it is adopted in pursuit of the right to asylum under the Charter,[49] so the Directive obliges states to grant refugee status as a part of a common asylum policy and in line with the Charter, which appears to be a weak right to apply for and enjoy asylum. The Qualification Directive, therefore, could be understood to provide a right to asylum for refugees only. Furthermore, what is additionally significant for the Charter is that it appears to be the understanding in Europe that the Refugee Convention itself provides a private individual right to asylum since the Charter was meant to only incorporate the Refugee Convention into EU law.[50]

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[45] *See* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS v (1991).

[46] Art. 13. *Also see* Art. 18 ("Member States shall grant *subsidiary protection status* to a third country national or a stateless person eligible for subsidiary protection").

[47] *See* UNHCR, *Annotated Comments*, *supra* note 39.

[48] *See* Treaty on European Community, art. 63(1)(c); Qualification Directive, *supra* note 39, prmbl. ("Whereas: (1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community …)

[49] *See* Qualification Directive, *supra* note 39, prmbl. (" Whereas: … (10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members…).

[50] *Also see e.g.* Inst. de Dr. Int'l , Res. of Sept. 1950, 43-II ANN. (Sept. 1950) (hereinafter "IDI Resolution") (referring to EU legislation that focuses on confining asylum to refugees qualifying under the Refugee

This kind of commingling of the two notions is common in other European agreements. Article 1 of the Schengen Agreement defines an asylum applicant as any alien requesting refugee status recognition under the Refugee Convention. [51] This definition suggests that any person seeking refuge and the protections of *non-refoulement* is necessarily also requesting a grant of asylum. As such, it might also suggest an *opinio juris* that the two categories have converged in the sense that any person qualifying as a refugee should necessarily receive asylum.

In addition to Europe, Resolutions of the UN General Assembly have frequently commingled the notions of asylum and refugee status generally calling for states to not jeopardize the "institution of asylum" by not seeking ways to return "refugees",[52] appearing to assume that refugees

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Convention and excluding other beneficiaries of *non-refoulement* such as individuals at risk of torture, but does not seem to question that the Refugee Convention does not necessarily demand asylum for refugees).

[51] *See* Maurice Kamto, *Third report on the expulsion of aliens*, U.N. Doc. A/CN.4/581.

[52] *See e.g.*:

- UN GA Res. 44/137 (Dec. 15, 1989):

3. *Calls upon* all States to refrain from measures that jeopardize the institution of asylum, in particular the return or expulsion of refugees and asylum-seekers contrary to fundamental prohibitions against these practices …

- UN GA Res. 45/140 A (Dec. 14, 1990)

3. *Calls upon* all States to refrain from taking measures that jeopardize the institution of asylum, in particular returning or expelling refugees and asylum-seekers contrary to fundamental prohibitions against these practices …

- UNGA Res. 46/106 (Dec. 16, 1991)

4. Calls upon all States to refrain from taking measures that jeopardize the institution of asylum, in particular by returning or expelling refugees and asylum-seekers contrary to the fundamental prohibitions against these practices …

- UN GA Res. 47/105 (Dec. 16, 1992)

4. *Calls upon* all States to refrain from taking measures that jeopardize the institution of asylum, in particular by returning or expelling refugees contrary to the fundamental prohibitions against these practices, …

- UNGA Res. 48/116 (Dec. 20, 1993)

5. *Expresses* deep concern regarding serious threats to the security or the well-being of refugees, including incidents of refoulement, unlawful expulsion, physical attacks and detention under unacceptable conditions, and calls upon States to take all measures necessary to ensure respect for the principles of refugee protection as well as the humane treatment of asylum-seekers in accordance with internationally recognized human rights norms

- UNGA Res. 50/149 (Dec. 21, 1995)

7. *Expresses its concern* regarding instances, in some parts of Africa, where the fundamental principle of asylum is jeopardized as a result of unlawful expulsion, refoulement, or other threats to life, physical security, dignity and well-being

- UNGA Res. 51/71 (Dec. 12, 1996)

5. *Expresses* concern at instances where the fundamental principle of asylum is jeopardized by the unlawful expulsion or refoulement, or the threat to life, physical security, integrity, dignity and the well-being of refugees

- UNGA Res.51/75 (Dec. 12, 1996)

Distressed at the widespread violations of the principle of non-refoulement and of the rights of refugees, in some cases resulting in the loss of their lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been subjected to refoulement and expulsion in highly dangerous situations

- UNGA Res. 52/101 (Feb. 8, 1999), Res. 53/126 (Dec. 9, 1998)

4. *Expresses concern* at instances where the fundamental principle of asylum is jeopardized by the unlawful expulsion or refoulement or by threats to the life, physical security, integrity, dignity and well-being of refugees

necessarily apply for and receive asylum. Human rights treaty monitoring bodies also do not appear to make a firm distinction between refugees and asylum-seekers.[53] Proposals and

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- UNGA Res. 52/103 (Dec. 12, 1997)

5. *Reaffirms* that everyone is entitled to the right to seek and enjoy in other countries asylum from persecution, and, as asylum is an indispensable instrument for the international protection of refugees, calls on all States to refrain from taking measures that jeopardize the institution of asylum, in particular by returning or expelling refugees or asylum-seekers contrary to international human rights and to humanitarian and refugee law

- UNGA Res. 53/125 (Dec. 9, 1998)

5. *Reaffirms* that, as set out in article 14 of the Declaration, everyone has the right to seek and enjoy in other countries asylum from persecution, and calls upon all States to refrain from taking measures that jeopardize the institution of asylum, in particular by returning or expelling refugees or asylum-seekers contrary to international standards; …

8. *Condemns* all acts that pose a threat to the personal security and wellbeing of refugees and asylum-seekers, such as refoulement, unlawful expulsion and physical attacks, and calls upon all States of refuge, in cooperation with international organizations where appropriate, to take all necessary measures to ensure respect for the principles of refugee protection, including the humane treatment of asylum-seekers

- UNGA Res. 54/146 (Dec. 17, 1999), Res. 55/74 (Dec. 4, 2000)

6. *Reaffirms* that, as set out in article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and calls upon all States to refrain from taking measures that jeopardize the institution of asylum, in particular by returning or expelling refugees or asylum-seekers contrary to international standards; …

9. *Condemns* all acts that pose a threat to the personal security and wellbeing of refugees and asylum-seekers, such as refoulement, unlawful expulsion and physical attacks, and calls upon all States of refuge, in cooperation with international organizations where appropriate, to take all necessary measures to ensure respect for the principles of refugee protection, including the humane treatment of asylum-seekers

- UNGA Res. 54/147 (Dec. 17, 1999), Res. 55/77 (Dec. 4, 2000), Res. 56/135 (Dec. 29, 2001), Res. 57/183 (Dec. 18, 2002)

11. *Expresses its concern* about instances in which the fundamental principle of asylum is jeopardized by unlawful expulsion or refoulement or by threats to the life, physical security, integrity, dignity and well-being of refugees

Also see Eberhard Jahn, *Refugees, in* 4 RUDOLF BERNHARDT, DIR., ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 72, 73 (2001)

> Although the term refugees is normally applied to uprooted people outside their country of origin, it is sometimes also used in referring to the so-called 'national refugees' or 'internally displaced persons', i.e. persons who are living in a refugee-like situation although they have remained within the internationally recognized borders of their country or who, having left their home country, have taken refuge in another country which grants them the same status as their own nationals. These "refugees" can evidently not be placed under international protection, but there may be a need for international assistance. Thus in various instances the General Assembly has requested UNHCR to extend humanitarian assistance in such situations.

[53] *See* Edwards, '*Enjoy*', *supra* note 15. Furthermore, the UNHCR Executive Committee in 1997 "reiterate[d] ... the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments". Exec. Comm. Concl. No. 82 (XLVIII) on Safeguarding Asylum, 1997, para. (d)(vi); Concl. Nos. 19 (XXXI) of 1980, para. (c); 22 (XXXII) of 1981, para. B; and 36 (XXXVI) of 1985, para. (f); A v. Aust'lia, HRC Comm. No. 560/1993; Mutombo v. Switz., CAT Comm. No. 13/1993; Khan v. Pakistan, CAT Comm. No. 15/1994; Ismail Alan v. Switz., CAT Comm. No. 21/1995; Aemei v. Switz., CAT Comm. No. 34/1995; Tala v. Swe., CAT Comm. No. 43/1996; Pauline Muzonzo Paku Kisoki v. Swe., CAT Comm. No. 41/1996; Tapia Paez v. Sweden, CAT Comm. No. 39/1996; Korban v. Swe., CAT Comm. No. 88/1997; Halil Haydin v. Swe., CAT Comm. No. 101/1997; Elmi v. Aust'lia, CAT Comm. No. 120/1998; Soering v. UK, Ser. A 161, 7 July 1989; Chahal v. UK, Judgment 70/1995/576/662, 15 Nov. 1996; Ahmed v. Aust., Judgment 71/1995/577/663, 17 Dec. 1996; Amuur v. Fr., Reports 1996-III, 25 June 1996.

recommendations by the UN have often conceived of refugee status as requiring the grant of asylum.[54]

Mubanga-Chipoya, in his final report on the right of everyone to leave any country, stated that the use of the term "asylum" includes the obligation of states to admit a person to the territory of a State, to allow the person to remain there, to refuse to expel, to refuse to extradite and not to prosecute, punish or otherwise restrict the person's liberty.[55] These are all rights accruing from refugee status.

The UNHCR further assimilates the rights of refugee status to the grant of asylum.[56] It often refers to refugees as "asylum-seekers".[57] As has been observed by the Court of Appeals of England, that the interpretation of the Refugee Convention by the UNHCR "is particularly helpful" in the absence of a tribunal with authority to definitively interpret the Convention.[58] Therefore, the assimilation of refugee rights to asylum may be the correct interpretation of the Refugee Convention.

Perhaps this usage reflects a growing global *opinio juris* that the formally distinct categories of refugee and asylum-seeker are converging and demand equivalent treatment, i.e. that individuals qualifying as refugees must be granted asylum. The only alternative reading of these statements is sloppy drafting, which is difficult to sustain on such a wide scale. It would appear that there is *opinio juris* confirming that refugees qualifying as such necessarily deserve asylum.

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[54] Final Act of the UN Conference on the Status of Refugees and Stateless Persons, sec. IV D, 189 UNTS 37, *reprinted in* UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/IP/4/Eng/REV.1, Annex I (1979, re-edited 1992) ("UNHCR, HANDBOOK")

> Considering that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position, [the conference] … Recommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.

[55] C.L.C. Mubanga-Chipoya, Final Report, *The Right of Everyone to Leave any Country, including His Own, and to Return to His Country*, UN Doc. E/C.4/Sub.2/1988/35, at 103-6 (June 1988). *Also see* IDI Resolution, *supra* note 55 (defining asylum as the protection accorded by a State to an individual who comes to seek it).

[56] UNHCR, *Annotated Comments* at 10-11.

[57] UNHCR, Exec. Comm. Concl. No. 82 (XLVIII) on Safeguarding Asylum, 1997

> gradations of treatment allowed by the [Refugee] Convention ... serve as a useful yardstick in the context of defining reception standards for asylum-seekers. At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum-seekers in so far as they relate to humane treatment and respect for basic human rights

[58] *See* R v Sec'y St Home Dep't, Immigr. Appls Trib., *ex parte* Robinson, Case No. FC3 96/7394/D, para. 11 (Ct. Appl. Engl. & Wales, July 11, 1997):

> There is no international court charged with the interpretation and implementation of the Convention, and for this reason the Handbook on Procedures and Criteria for Determining Refugee Status, published in 1979 by the Office of the United Nations High Commissioner for Refugees, is particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice.

We should next examine the combined impact of all of these instruments. Considering the above American, African and European instruments that already provide for an individual right to receive asylum (or arguably provide for such a right), there are now a significant number of states from disparate regions of the world that are bound to grant asylum.[59] However, the extent of the right to asylum is more limited. It would appear that there is a very good argument for a customary international law obligation to grant asylum, but that would only extend to those qualifying as refugees. Before examining state practice on point, it is helpful here to consider the *non-refoulement* obligation closer.

C. *NON-REFOULEMENT* OBLIGATION AND ASYLUM

Under international law, a state will have an obligation, not necessarily to grant asylum, but an obligation to refrain from *refoulement* (among other obligations) when the person qualifies under the Refugee Convention or otherwise qualifies for subsidiary protection. At the outset of this section, it is important to observe that asylum is a grant of a certain status under municipal law and the obligation of *non-refoulement* is an obligation of international law.[60] However, we can wonder whether the right to *non-refoulement* for those who do qualify under the Refugee Convention or other conventions may have evolved into a true right to asylum.

There is handful of treaties providing for *non-refoulement*: the Refugee Convention;[61] the Fourth Geneva Convention[62]; the Principles Concerning Treatment of Refugees;[63] the Declaration on Territorial Asylum; [64] the OAU Convention; [65] and the Cartegena Declaration.[66] Some authors have argued that the obligation of *non-refoulement* now also exists under customary international law for situations of humanitarian concern or human rights violations.[67]

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[59] *See* Gil-Bazo, *Refugee Status Research Paper*, supra note 40.

[60] *See* U.N. Secretariat, Memorandum, *Expulsion of aliens*, U.N. Doc. A/CN.4/565 (July 10, 2006) (hereinafter "UN Memo on expulsion") ("The national laws of other States use the term 'asylum' in a broader sense to encompass more than just 'refugees'").

[61] Refugee Convention, art. 33.

[62] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287 (entered into force Oct. 10, 1950).

[63] *Bangkok Principles*, *supra* note 2, art. III.

[64] *See* GOODWIN-GILL, REFUGEE, *supra* note 13 at 118 ("the first convention that made reference to the principle that refugees should not be returned to their country of origin was the 1933 Convention relating to the International Status of Refugees, although this Convention was only ratified by 8 States")

[65] OAU Convention, art. 11(3).

[66] *See* Cartagena Declaration on Refugees, *adopted at* the Colloq. on the Int'l Prot. of Refugees in Centr. Am., Mex. & Panama, Cartagena, Colombia, Nov. 19-22, 1984, sec. III, para. 5, *reprinted in* 2 UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS 206, 208 (1995).

[67] *See* UN Memo on expulsion, *supra* note 60

> Irrespective of the status of individuals as refugees, a restriction with regard to return (and also to expulsion) appears to derive, under international law, from the requirement to protect the individuals' life and personal security in the process. Thus return should not be effected if it involves creating a danger to these paramount values, for instance by turning away a boat that is not seaworthy.

(citing Giorgio Gaja, *Expulsion of Aliens: Some Old and New Issues in International Law*, 3 CURS. EUROMED. BANCAJA DE DER. INT'L 283, 291 (1999). *See also* Joseph Spring v. Switz., Bundesgericht [Fed. Sup. Ct.] 126 II 145-69 (Jan. 21, 2000) *reprinted at* ILDC 351 (CH 2000) (holding that the principle of *non-refoulement* was not part of customary international law in 1943); Brian Gorligk, *The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees*, 11 INT'L J. REF. L. 479-495 (1999); Kay Hailbronner, *Non-Refoulement and 'Humanitarian' Refugees: Customary International*

In addition, some authorities have found *non-refoulement* to be a *jus cogens* human rights norm in situations of persecution and torture, cruel, inhuman or degrading treatment described in the International Covenant on Civil and Political Rights, Convention Against Torture, and ECHR.[68]

The *non-refoulement* obligation is not limited to the mere return of the refugee to the state of persecution. It has been found that *refoulement* is prohibited to any state from which the individual would be subsequently refouled to a state of persecution, i.e. "indirect refoulement".[69] In essence, the rule prohibits return to "any other country where he runs a risk of being expelled or returned."[70] In addition, the *non-refoulement* obligation also requires that refugees not be refused admission to the state of refuge in the first place.[71] However, other policies that have similar effects to *refoulement* have not been found to be violations of the obligation, such as visa restrictions on certain nationals, sanctions against carriers for transporting persons without proper documentation, and the transfer of asylum seekers intercepted on the high seas elsewhere.[72]

In addition, the Refugee Convention contains an obligation to, "as far as possible facilitate the assimilation and naturalization of refugees"[73] which might be taken as an obligation to provide for a durable residence and integration such as more usually associated with asylum. It is unclear whether this obligation can properly be understood to constitute part of the *non-refoulement* obligation or is additional to it.

In addition, those fleeing persecution must be provided with certain rights under the Refugee Convention if they qualify as a refugee. Those rights resemble, in many ways, the rights that

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Law or Wishful Legal Thinking?, 26 VA. J. INT'L L. 857-896 (1985-6); Deborah Perluss & J. F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551-626 (1985-6).

[68] UNHCR Exec. Comm., Concl. No. 6 (XXVIII) Non-refoulement (1977) ; UNHCR, *Note on International Protection*, UN doc. A/AC.96/830 (Sept. 7, 1994).

[69] Case No. AWB 04/30154, Judgement (Dist. Ct. Zwolle, Neths, Sept. 29, 2004) (wherein the court referred to the law review article Skordas & Sitaropoulos, *Why Greece is not a Safe Host Country for Refugees*, 2004(16) INT'L J. REF. L. 25-52); Case No. AWB 04/57933, Judgment (Dist. Ct. Zwolle, Neths., Feb. 10, 2005) (referring to letter of the Greek Council for Refugees, a letter of the Dutch Refugee Council and a report of UNHCR (Nov. 2004) that expulsion to Greece could result in indirect *refoulement*); European Council on Refugees and Exiles, *ECRE Country Report 2004* (2005), *available at* http://www.ecre.org/files/CR04.pdf.

[70] Mutombo v. Switz., UN Doc. CAT/C/12/D/13/1993, para. 10 (Comm. Ag. Tort., Apr. 27, 1997). *Cf.* Salah Sheekh v. Neths., Appl. No. 1948/04 (Eur. Ct. Hum. Rts., Jan. 11, 2007)

> The indirect removal of an alien to an intermediary country did not affect the responsibility of the expelling contracting state to ensure they were not, consequently, exposed to treatment contrary to Article 3 of the ECHR. There was no reason to hold differently where expulsion was to a different area of the country of origin.

[71] Convention relating to the International Status of Refugees, Oct. 28, 1933, CLIX LNTS 3663, art. 3

> Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees … It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin.

[72] The policies sometimes include actual *refoulement*. The US Supreme Court in determined that the government could return Haitians directly to Haiti, without access to a refugee determination, if the Haitians were interdicted on the high seas. *See* Haitian Ref. Ctr. v. Sales, 509 U.S. 155 (1993).

[73] UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/IP/4/Eng/REV.1, Ann. II (1979, re-edited 1992).

individuals receive upon the receipt of a grant of asylum.[74] Some have argued that the practice of "asylum" should be read broadly to include any practice of *non-refoulement*, or other subsidiary protection, and its related rights: [75]

> Indeed, if asylum is defined as the protection accorded by a State to an individual who comes to seek it, the name that this protection status may receive is irrelevant, as long as it includes - at a minimum - the right to enter, the right to stay, the right not to be forcibly removed and the recognition of the fundamental rights of the individual.
>
> Furthermore, despite the trend in European Union (EU) instruments to refer to asylum in relation to Geneva Convention refugees only, asylum as an institution is not restricted to the category of individuals who qualify for refugee status. Rather on the contrary, this institution predates the birth of the international regime for the protection of refugees and has been known and practised throughout history protecting different categories of individuals.

This author does not believe that this is an accurate understanding of the *non-refoulement* obligation as provided in the Refugee Convention. Firstly, the quote above appears to conflate asylum and *non-refoulement* at the outset by arguing that those who qualify as refugees receive asylum (although it does so only insofar as the EU appears to already conflate the two notions). *Non-refoulement* is provided in Article 33 of the Refugee Convention whereas the assimilation obligation and the obligations requiring certain rights are provided elsewhere. From the very structure of the Convention, it would appear that *non-refoulement* is simply one of the rights that refugees enjoy, not an umbrella status under municipal law. Therefore, under conventional law, states must not return the person and must also provide some incidental rights specifically enumerated under the Refugee Convention, which is not the equivalent to a grant of asylum.

> It is common knowledge that neither under the Geneva Refugee Convention of 1951 nor under public international law there is a right to be granted asylum. The right to seek and to enjoy asylum from persecution does not entail an obligation to be granted protection. The drafting history of the Geneva Convention as well as subsequent States practice show that the sovereign right of States to control admission to their territory is not restricted by the right to seek and to enjoy asylum. The prohibition of non-refoulement … may be considered as the only exception to the principle that States may restrict the admission of foreigners to their territory.[76]

However, this quote does not contemplate that other conventional law may provide for a right to asylum, supplementing the Refugee Convention. Furthermore, the quote does not fully appreciate the degree to which the *opinio juris* of states, as expressed through the UN (and UNHCR) and EU (Schengen), evidences a merger of refugee status and asylum.

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[74] *E.g.* rights related to freedom of religion (Art. 3), property (Art. 13), artistic rights and industrial property (Art. 14), association (Art. 15), access to courts (Art. 16), wage-earning employment (Art. 17), self-employment (Art. 18), recognition of professional diplomas (Art. 19), and welfare, social security and education (Arts. 20 to 24). UNHCR, *Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems*, Global Consults. on Int'l Protect., 3d mtg, UN Doc. EC/GC/01/17, para. 3 (Sept. 4, 2001).

[75] *See* Gil-Bazo, *Refugee Status Research Paper*, *supra* note 40 (citing IDI Resolution, *supra* note 50).

[76] Kay Hailbronner, *Comments on: The Right to Leave, the Right to Return and the Question of a Right to Remain*, *in* VERA GOWLLAND-DEBBAS, ED., THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPLORARY INTERNATIONAL LAW ISSUES 114 (1994).

D. STATE PRACTICE OF PROVIDING A RIGHT TO ASYLUM

Another question we must ask is whether the extensive state practice of providing for asylum, which almost always includes refugees, could amount to a customary international right of asylum at least for refugees. In addition to the usage of the UN, many states assimilate the application for refugee status determination into the application for asylum, granting asylum if refugee status is proved.[77] Of course, states may grant asylum to individuals who are not refugees.[78] However, many states provide in their municipal law (sometimes even constitutional law) for the obligatory grant of asylum to individuals qualifying as refugees.[79] Some of these

[77] *See e.g.* US practice in this regard.

[78] *See e.g.* Alexei Barrionuevo, *Brazil's President Offers Asylum to Woman Facing Stoning in Iran*, N.Y. TIMES (1 Aug. 2010) *available at* http://www.nytimes.com/2010/08/02/world/americas/02brazil.html?_r=1&ref=world (the President of Brazil justified the offer of asylum by stating "If my friendship and affection for the president of Iran matters, and if this woman is causing problems there, we will welcome her here in Brazil … Nothing justifies the state taking someone's life … Only God can do that."). *Also see e.g.* the variety of U.S. legal bases for granted asylum in addition to recognized refugee status: emergency flow of displaced people due to "grave humanitarian concerns or is otherwise in the national interest", Immigration and Nationality Act (hereinafter "INA") § 207(b), 8 USC §1157(b); President may designate emergency flow even if still within country of nationality, INA §101(a)(42)(B); 8 USC §1101(a)(42)(B), *e.g.*, US designated 3500 Cubans as refugees while still in refuge in the Peruvian Embassy in Havana; Congress may designate certain groups as refugees if they can satisfy lower burden of proof "credible basis for concern about the possibility of persecution" Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, 103 Stat. 1195, Title V, §599D (Nov. 21, 1989); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, Div E, Title II, § 213 (Jan. 23, 2004) (e.g. nationals of the USSR, Vietnam, Laos, Cambodia, Ukraine and Iran, who share certain common characteristics; Fiscal Year 2008 National Defense Appropriations Act, Pub. L. No. 110-181, Title XII, Subtitle C, §1243 (Iraqis employed by the US Government for operations in Iraq); Bring Them Home Alive Act, Pub. L. No. 106-484, 114 Stat. 2195, 146 Cong. Rec. H10703-04 (Nov. 9, 2000) (Certain nationals who personally deliver a living American prisoner-of-war to U.S. authorities including nationals of the Vietnam, North Korea, Laos, Cambodia, China, USSR); Pub. L. No. 107-258, 116 Stat. 1738 (Oct 29, 2002) (extended to include nationals of Iraq or the Middle East).

[79] *See e.g.*

- Albania, Constitution (1976), art.5; Law on Asylum (1998), art.7
- Algeria, Constitution, (1996) s.123; Décret No. 1963-274
- Andorra, Constitution (1993, arts. 3(3), (4)
- Angola, Law on the Amendment of the Constitution, No. 23 (1992) arts. 21(3), 26; Law No. 8 (1990) arts. 4, 21
- Argentina, Constitution (1994) art. 31; Decreto No. 1023 (1994) art.171
- Armenia: Law on Refugees (1999) art.19
- Australia, Migration Act (1958) s.36
- Austria, Aliens Act (1997) Art.57(1),(2); Asylum Act (1997) Art.21
- Azerbaijan, Constitution (1995) Art.69, 70
- Bahrain, Constitution (1973) Art.37
- Belarus, Constitution (1994) Art.8; Law on Aliens (1999) Art.29; Law on Refugees (1995) Art.8, 15, 17
- Belgium, Loi sur l'accès des étrangers (1980) Art.7, 56
- Belize, Refugees Act (1991) Art.3, 14
- Benin, Constitution (1990) Art.147; Ordonnance No. 1975-41 Art.4
- Bolivia, Decreto Supremo No. 19640 (1983) Art.5
- Bosnia and Herzegovina, Constitution (1994) Ch.VII Art.3, Annex; Law on Immigration and Asylum (1999) Art.34

- Botswana, Refugees Act (1968) s.9(1)
- Brazil, Lei no. 9.474 (1997) Art.36, 37
- Cambodia, Law on Immigration (1994) Art.3
- Cameroon, Constitution (1996) Art.45
- Canada, Immigration Act (1976) s.53
- Cape Verde, Constitution (1992) Art.7, 11
- Central African Republic, Constitution (1990) Art.69
- Chile, Decreto-Ley no. 1094 (1975) Art.39
- PR China, Civil Law (1986) Art.142
- Colombia, Constitution (1991) Art.93; Decreto no. 1598 (1995) Art.17
- Congo, Acte Fondamentale (1997) Art.81; Décret no. 1978-266 Art.4
- DR Congo, Ordonnance-loi no. 1983-033 Art.2
- Costa Rica, Ley general de migración y extranjería (1986) Art.64, Decreto ejecutivo no. 14845-G (1983) Art.17, 18
- Croatia, Constitutional Law of Human Rights and Freedoms (1992) Art.1, 2(m); Constitution (1990) Art.33, 134
- Cyprus, Constitution (1960) Art.32, 169
- Czech Republic, Act No. 325 on Asylum (1999) s.91
- Denmark, Aliens Act (1997) Art.31, 48a
- Djibouti, Ordonnance no. 77053/P.R./A.E. (1977) Art.4
- Dominican Republic, Decreto presidencial no. 2330 (1984) Art.12, 13
- Ecuador, Decreto no. 3301 (1992) Art.27, 34
- El Salvador, Constitution (1983) Art.144
- Equatorial Guinea, Fundamental Law Art.18
- Estonia, Law on refugees (1997) Art.7, 21
- Ethiopia, Constitution (1995) Art.9
- Fiji, Constitution Amendment Act (1997) Art.34(5), 43
- Finland, Constitution (1919, as amended 1995) s.7; Aliens' Act (1991) Art.38, 41
- France, Constitution (1958), preamble; Law of Dec. 30, 1993; Debré Law of April 24, 1997, Law of May 11, 1998; and Law of Dec. 10, 2003
- Gabon, Ordonnance no. 64/1976 Art.2
- Georgia, Law on Refugees (1998) Art.82
- Germany, Basic Law (1949, as amended 1998) Art.25; Asylum Procedure Act (1992) s.2; Aliens Act (1991) Art.48, 51, 53(1), 53(6)
- Ghana, Refugee Law (1992) Art.1, 11
- Greece, Presidential Decree no.61 (1999) Art.1; Inter-Ministerial Decree No. 4803/7A (1992) Art.7; Law No. 1975 (1991) Art.24
- Guatemala, Constitution (1985) Art.27, 46; Ley no. 22 (1986) Art.26
- Haiti, Constitution (1987) Art.276-2
- Honduras, Constitution (1982) Art.18
- Hungary, Constitution (1990) Art.7; Act LXXXVI (1993) s.32, as amended by Act CXXXIX (1997) Art.61
- Indonesia, Circular Letter of the Prime Minister no. 11/R.I/1956 Art.1
- Iran, Ordinance relating to Refugees (1963) Art.12
- Iraq, Loi sur les réfugiés politiques no.51 (1971), Art.4
- Ireland, Immigration Act (1999) s.3; Refugee Act (1996) Art.5
- Italy, Constitution (1947) Art.10; Decree Law No. 416 (1989) Art.7
- Japan, Immigration, Control and Refugee Recognition Act (1951) Art.53
- Kazakhstan, Constitution (1995) Art.4, 12(4); Presidential Decree No.3419; Presidential Decree, 15 July 1996
- Kyrgyzstan, Constitution (1996) Art.12, 14, 16; Resolution No.340 (1996) s.22

- Latvia, Law on Asylum Seekers and Refugees (1998) Art.22(2), 30; Law on the Entry and Residence of … Stateless Persons (1992) Art.60; Regulations on the Procedure of Temporary Residence for Persons Who Have Been Detained for Illegal Residence (1992) s.6.3
- Lebanon, Loi réglementant l'entrée et le séjour des étrangers au Liban (1962) Art.31
- Lesotho, Refugee Act (1983) Art.11, 12, 13
- Liberia, Refugee Act (1993) s.12(1), 13
- Libya, Constitution (1951) Art.191
- Liechtenstein, Constitution (1862) Art.31
- Lithuania, Law on Refugee Status (1995) Art.9
- FYR Macedonia, Constitution (1992) Art.118; Act on Movement and Residence of Aliens (1992) Art.39
- Madagascar, Décret no.1994-652 Art.38; Décret no.1962-006 Art.2; Loi no. 1962-00 Art.1, 2
- Malawi, Refugee Act (1989) Art.10
- Mali, Constitution (1992) Art.116; Loi no. 1998-40 Art.8, 9, 10
- Mauritania, Constitution (1991) Art.80
- Mexico, Ley General de Polación (1974) Art. 42(VI)
- Moldova, Law on Legal Status of Foreign Citizens and Apatrides (1994, as amended 1999) Art.29, 32
- Mongolia, Constitution (1992) Art.10, 18
- Morocco, Décret no.2-57-1256 du 2 safar 1377 (1957) Art.1, 5
- Mozambique, Refugee Act (1991) Art.13, 14
- Namibia, Constitution (1990) Art.144; Refugees (Recognition and Control) Act (1999) Art.26
- Nepal, Nepal Treaty Act (1990) Art.9
- Netherlands, Constitution (1995) s.93
- New Zealand, Crimes of Torture Act (1989); Immigration Act (1987) s.129(X)
- Nicaragua, Constitution (1995) Art.42
- Nigeria, National Commission for Refugees, etc. Decree (1989) Art.1
- Norway, Immigration Act (1991) s.4, 15, 16
- Panama, Decreto Ejecutivo No. 23 (1998) Art.53, 73
- Paraguay, Ley no.470 (1975) Art.141
- Peru, Constitution (1993) Art.36, Decreto presidencial no.1 (1985) Art.1, 2
- Poland, Constitution (1997) s.56, 91; Act on Aliens (1997) s.53
- Portugal, Constitution (1976) Art.8; Law No.15 (1998) Art.1, 6; Decree-law No.59 (1993) Art.67, 72
- Romania, Constitution (1991) Art.11, 18; Ordinance on the Status and Regime of Refugees (2000) Art.23(m)
- Russia, Constitution (1993) Art.15(4), 63; Law on Amendments and Additions to the Law on Refugees (1997) Art.10(1), 12(4); Law on Refugees (1997) Art.8, 18
- Rwanda, Loi sur les conditions d'entrée et de séjour des étrangers (1963) Art. 1
- Senegal, Décret no. 1978-484 Art.3, 4, 5, 6
- Sierra Leone, The Non-Citizens (Registration, Immigration and Expulsion) Act (1965) Art.4(f)
- Slovakia, Constitution (1992) Art.11, 153; Act No.283 (1995) Art.4; Law on Stay of Foreigners (1995) Art.15
- Slovenia, Constitution (1991) Art.8, 153; Law on Asylum (1999) Art.1, 6, 7; Aliens Act (1999) Art.51; Foreigners Act (1991) Art.33
- Somalia, Presidential Decree No.25 (1984) Art.6(3)
- South Africa, Constitution (1996) ss.231, 232; Refugees Act (1998) Art.2, 28
- Spain, Constitution (1978) Art.96; Constitutional Law on the rights and freedoms of aliens in Spain … (2000); Art. 3; Real decreto 203 (1995) Art.12; Ley 5 (1984) Art.19
- Sudan, Regulation of Asylum Act (1974) Art.6, 7
- Suriname, Aliens Act (1991) Art.8, 16(3)
- Swaziland, The Refugees Control Order (1978) Art.10(4)

states go even further under municipal law (again even constitutional law) and command that, for those qualifying as refugees, asylum is a right. These states include Albania,[80] Belarus,[81] Belgium,[82] Brazil,[83] Bulgaria,[84] Cuba,[85] the Czech Republic,[86] France,[87] Germany,[88] Haiti,[89] Hungary,[90] Italy,[91] Mexico,[92] the Netherlands,[93] Nicaragua,[94] Poland,[95] Portugal,[96] Romania,[97]

- Sweden, Aliens Act (1989) 529 Ch.8(1)
- Switzerland, Constitution (1999) Art.25(2), (3); Loi sur l'asile (1998) Art.5
- Syria, Leg. Decree No.29, Entry and Exit of Aliens (1970) Art.29(E)
- Tajikistan, Law on Refugees (1994) Art.10
- Tanzania, Refugees Act (1998) Art.28(4)
- Togo, Constitution (1992)Art.140
- Tunisia, Constitution (1959) Art.32
- Turkey¸ Constitution (1982) Art.90
- Turkmenistan¸ Law on refugees (1997) Art.2, 3
- Uganda, Control of Alien Refugees Act (1960) Art.6, 20(3)
- Ukraine, Constitution (1996) Art.9, 26; Law No.38118-XII (1994) Art.14
- United Kingdom, Immigration and Asylum Act (1999) ss.11, 12, 15, 71; Immigration Rules (1994) s.329
- United States, INA sec. 207(a), 1231(b)(3); 8 USC §1157(a)
- Uruguay, Decreto legislativo sobre refugiados políticos (1956) Art. 4; Ley 13.777 (1969), Estatuto de los Refugiados
- Uzbekistan, Constitution (1992) Art.23
- Venezuela, Constitution (1961) Art.116
- Vietnam, Ordinance on Entry… of Foreigners… (1992) Art.2(1), (3)
- Yemen, Law No.47 (1991) s.38(5)
- Former Yugoslavia, Constitution (1992) Art.16, 66
- Zambia, Refugee (Contract) Act (1970) Art.10(4), 11(2)
- Zimbabwe, Refugee Act (1983) Art.13

[80] Constitution (1946), art. 36 ([Citizens of foreign States] "who are persecuted for their activities on behalf of democracy, national liberation, rights of the workers, or scientific and cultural freedom"). Replaced by Constitution (1976).
[81] Constitution (1937), art. 104, ([foreigners] "persecuted for defending the interests of the working people or for scientific activities, or for their struggle for national liberation").
[82] Constitution, art. 191 ("All foreigners on Belgian soil benefit from that protection provided to persons and property, save for those exceptions provided for by law").
[83] Constitution (1946), art. 141, para. 33
[84] Constitution (1947), art. 84, ("[foreigners] persecuted for defending democratic principles, for struggling for their national liberation or for the freedom of scientific and cultural activity").
[85] Constitution (1940), art. 31
[86] Constitution, Article 43 ("The Czech and Slovak Federal Republic shall grant asylum to citizens of other countries, persecuted for asserting political rights and freedoms. Asylum may be denied to a person who acted contrary to fundamental human rights and freedoms.")
[87] Constitution (1958), preamble ("any man persecuted in virtue of actions in favour of liberty may claim the right of asylum in the territories of the Republic"). *Also see* Constitution (1946), preamble, para. 4 ("Any man persecuted for his actions to promote freedom shall have the right to asylum on French territory"); Law of Dec. 30, 1993; "Debré" Law of April 24, 1997, Law of May 11, 1998; and Law of Dec. 10, 2003.
[88] Basic Law of the Federal Republic of Germany, art. 16(1) ("Persons persecuted on political grounds enjoy the right of asylum.")
[89] Constitution (1946), art. 30
[90] Constitution, art. 65(1) ("foreign citizens who … are subject to persecution on the basis of race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to persecution is well founded.")

Slovakia,[98] Slovenia,[99] Spain,[100] and Ukraine.[101] The former states of the USSR[102] and Yugoslavia[103] also provided a right to asylum, although it is unclear whether those states actually engaged in practice reflective of the right granted under law.

It is also notable that in some of the state provisions for asylum, the state refers to the grant of asylum as intended to protect refugees or those otherwise persecuted.[104] Italy is broader than that

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[91] Constitution (1947), art. 10 (" … Foreigners to whom the actual exercise of the democratic freedoms guaranteed by the Italian Constitution is denied in their own country, shall be entitled to the right of asylum within the territory of the Republic, under conditions laid down by law …"); Sentence no. 25028/2005 (Ct. Cass., Nov. 25th, 2005) (asylum seeker must first follow the administrative procedure in order to be recognised as a refugee under the Geneva Convention or under the Italian Constitution before making an application to obtain constitutional asylum before the Civil Court).

[92] Constitution (1917), art. 15.

[93] Constitution, Article 2 ("… The admission and expulsion of aliens shall be regulated by Act of Parliament.")

[94] Constitution (1948), art. 27.

[95] Constitution, Article 56(2) ("Foreigners who … seek protection from oppression …").

[96] Constitution (1976) (as amended 1997), Article 33(7) ("aliens and stateless persons who are persecuted, or under a serious threat of persecution, in consequence of their activities on behalf of democracy, social or national liberation, peace between peoples or liberty or human rights of individuals.")

[97] Constitution (1948), art. 35 ("persecuted for their activity in the cause of democracy, scientific or cultural work or action in the pursuit of national liberation").

[98] Constitution, Article 53 ("The Slovak Republic shall grant asylum to aliens persecuted for the exercise of political rights and freedoms. Such asylum may be denied to those who have acted in contradiction with fundamental human rights and freedoms. A law shall lay down the details.")

[99] Constitution, Article 48 ("Within the limits of the law, the right of asylum shall be recognised for foreign nationals and stateless persons who are subject to persecution for their commitment to human rights and fundamental freedoms. ")

[100] Constitution, Article 13 ("... 4. The law shall lay down the terms under which citizens from other countries and stateless persons may enjoy the right to asylum in Spain.")

[101] Constitution (1937), art. 109 ("persecuted for defending the interests of the working people or for their scientific activities or for their struggle for national liberation").

[102] Constitution (1936), art. 129 ("persecuted for defending the interests of the working people or for their scientific activities or for their struggle for national liberation").

[103] Constitution (1946), art. 31 ("persecuted on account of their struggle for the principles of democracy, for national liberation, the rights of the working people or the freedom of scientific and cultural work"

[104] *See*

- Brazil, Constitution (1946), art. 141, para. 33
- Cuba, Constitution (1940), art. 31;
- France, Constitution (1958), preamble ("Any man persecuted for his actions to promote freedom shall have the right to asylum on French territory"); Constitution (1946), preamble, para. 4 ("any man persecuted in virtue of actions in favour of liberty may claim the right of asylum in
- the territories of the Republic")
- Czech Republic, Constitution, Article 43 ("The Czech and Slovak Federal Republic shall grant asylum to citizens of other countries, persecuted for asserting political rights and freedoms. Asylum may be denied to a person who acted contrary to fundamental human rights and freedoms")
- Germany, Basic Law (1949), Article 16 ("Persons persecuted on political grounds enjoy the right of asylum …")
- Haiti, Constitution (1946), art. 30;
- Hungary, Constitution, Article 65(1) ("In accordance with the conditions established by law, the Republic of Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum to foreign citizens who, in their native country or the

granting asylum to those who cannot exercise democratic freedoms, presumably including those persecuted on discriminatory grounds.[105] Hungary is similar granting the right to those suffering oppression.[106] The formerly Communist states cited above protected individuals from persecution for defending the interests of the working people, struggling for the principles of democracy or national liberation, or struggling for the freedom of scientific and cultural activity.[107]

However, others have observed that there is wide divergence in the practical application of these various rights under municipal law.[108] This author believes that divergence in conditions of application only affects the question of who qualifies as a refugee and the burden of proof of such, but does not undermine the *opinio juris* held by the state that it must grant asylum to those qualifying as refugees.

To these examples of state practice under municipal law, we can add the international legal obligations mentioned above, some of which explicitly provide for a right to be granted asylum. In sum, it would seem that a great number of states believe that they are obliged to grant asylum (and/or are already under an international legal obligation to do so) and commingle asylum with refugee status. This suggests that refugees may have the right to receive asylum.

Article 2 ("Asylum") of the OAU Convention draws a distinction between refugees who may or may not receive asylum, and also affirms that asylum is in the discretion of the territorial state, not an international legal obligation.[109] Because states have widely adopted provisions granting refugees a right to asylum under municipal law, the OAU Convention provision may have become eclipsed in the last forty years by the subsequent expression of *opinio juris* by states individually. In addition, states may have the discretion to grant asylum to groups beyond refugees, affirming that it can be a discretionary act.

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country of their usual place of residence, are subject to persecution on the basis of race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to persecution is well founded")

- Mexico, Constitution (1917), art. 15;
- Nicaragua, Constitution (1948), art. 27. 2
- Portugal, Constitution (1976) (as amended 1997), Article 33(7) ("The right of asylum is guaranteed to aliens and stateless persons who are persecuted, or under a serious threat of persecution, in consequence of their activities on behalf of democracy, social or national liberation, peace between peoples or liberty or human rights of individuals")
- Slovak Republic, Constitution, Article 53 ("The Slovak Republic shall grant asylum to aliens persecuted for the exercise of political rights and freedoms. Such asylum may be denied to those who have acted in contradiction with fundamental human rights and freedoms. A law shall lay down the details.")
- Slovenia, Constitution, Article 48 ("Within the limits of the law, the right of asylum shall be recognised for foreign nationals and stateless persons who are subject to persecution for their commitment to human rights and fundamental freedoms")

[105] Constitution, Article 10 (" … Foreigners to whom the actual exercise of the democratic freedoms guaranteed by the Italian Constitution is denied in their own country, shall be entitled to the right of asylum within the territory of the Republic, under conditions laid down by law … ")
[106] Constitution, Article 56(2).
[107] *See supra.*
[108] *See* A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 102 (1972); S. SINHA, ASYLUM AND INTERNATIONAL LAW 277 (1971).
[109] *See* Kamto, *Third report*, *supra* note 51.

However, since the states were always free to continue to distinguish between a discretionary grant of asylum and their mere *non-refoulement* obligations, but chose not to, they appear to have consented to a unified regime where an obligatory recognition of refugee status necessarily results in a mandatory grant of asylum. This conclusion holds even more weight in the cases where states have expressly adopted conventions providing for a right to asylum or have adopted municipal law, even constitutional provisions, providing for a right to asylum. Therefore, of the groups that states have a right to grant asylum to, refugees appear to also have a right to receive asylum. For other groups, states may grant asylum in their discretion and such grants are not wrongful acts. There may also be some groups for whom the grant of asylum is a wrongful act, but those precise groups remain unclear.

IV. CONCLUSION

Admittedly, discovering norms of customary international law is a problematic and difficult process. Ben Saul recently criticized the customary international law analysis of the Special Tribunal for Lebanon when it found that the crime of terrorism existed under international law.[110] Specifically, he argued that, along similar reasoning, murder was now an international crime since it was also a crime in every national jurisdiction. This is certainly a well-made criticism, but it overlooks two aspects of the Special Tribunal decision (1) the considerable degree of international discussion and convergence in international fora on terrorism issues and (2) the necessarily, inherently domestic nature of murder. Setting aside cases where murder qualifies as a crime against humanity, war crime, or genocidal act, it may in fact be that transnational murder is a crime under international law, but not a "mere" domestic murder. In addition, there is no evidence of any attempt in international relations to articulate murder as an offense or create an international criminal tribunal with jurisdiction over common murder. Where there is a converging international consensus on a prohibition under international law, supplemented by consistent domestic legislation reflective of the consensus, addressing an inherently international activity, the presumption that similar action (legislation) evidences *opinio juris* applies.

In the case of the right to asylum, all signs point to its existence under customary international law. It is a clear example of an inherently international activity since qualification for asylum for a refugee is premised on that person being unable or unwilling to return to the state from which he or she came. There is an increasingly converging international consensus on the need for refugees to receive asylum, not only the more limited protection of *non-refoulement*. This consensus is expressed in the widespread conventional obligation to grant asylum for a significant portion of the world and a commingling in universal usage between refugee status and asylum. Lastly, almost all states in the world have translated these international conventional obligations and international consensus into largely consistent domestic legislation (at least insofar as refugees are covered). All of these factors suggest that, in fact, customary international law is evolving to embrace a right of the refugee to receive asylum, supplementing the state right *vis-à-vis* other states to grant asylum.

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[110] *See* Ben Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon invents an International Crime of Transnational Terrorism*, 24(3) LEIDEN J. INT'L L. 677 (Sept. 2011) (criticizing the decision in Case No. STL-11-01/I, Interloc. Dec. on the Appl. Law (Spec. Trib. Lebanon, Appls. Ch., Feb., 16, 2011)).