



ARTICLES

The Contemporary International Law Status of the Right to Receive Asylum

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ABSTRACT

This article will consider whether contemporary international law has evolved to a point where there is now an individual right to receive asylum opposable to the state's right to expel. In the literature, it is commonly understood that no such right to receive asylum exists. Instead, where treaties might provide for a 'right to asylum', the usual interpretation is not that the person has a right to *receive* asylum but rather a right to *apply for* it. This article questions whether this conclusion is still correct in the light of contemporary developments in the law.

There are a significant number of considerations pointing to a right to receive asylum. In the drafting of Universal Declaration of Human Rights and Refugee Convention, there was already considerable disagreement over whether there should be a right to receive asylum but in the end a more conservative wording was adopted. However, some subsequent human rights treaties following the UDHR have explicitly provided for the right to receive asylum. The practice of states has also evolved, partly under the influence of these treaty regimes. States are increasingly providing for a right to receive asylum in their domestic law and assimilating refugees to asylum seekers, often granting asylum as the automatic result of a positive refugee status determination. The bulk of these practices are converging into a widespread and consistent practice with strong *opinio juris* on point. These trends suggest a crystallizing customary international law right to receive asylum, albeit limited to refugees.

1. 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 of the individual exists. Instead, while recognizing refugee status is mandatory, the granting of asylum has been long understood as a discretionary prerogative of states. Treaty obligations discussing a 'right to asylum' are understood in various ways, generally not to provide for a right to *receive* asylum but to *apply for* it. However, the past few

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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 asylum seekers. States are reacting to 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 as a norm under customary international law.

This article will proceed broadly in two sections viewing the issue from different perspectives. The following section begins by examining the 'right to asylum' from the perspective of states and the authors of the Refugee Convention and similar agreements. The author concludes that the 'right to asylum' in those agreements is, firstly, a right of states. In essence, states have a right vis à vis other states to grant asylum to aliens and for that act not to be viewed as hostile.

However, this right of the state does not necessarily exclude a right of individuals to receive asylum if conventional or customary international law also demand it. Accordingly, the third section examines the right of the individual to receive asylum. Its first sub-section looks at conventional law and, in the following sub-sections, it looks at customary international law, specifically, state practice and *opinio juris* in connection with the major treaty regimes, converging state practice granting asylum to refugees, and the blurring distinctions between refugees and asylees. In the conclusion, the author argues that, although there is a state right to grant asylum, there is now also an individual right of refugees to receive it.

2. 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 (UDHR), 1948, provides that '[e]veryone 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, an obligation to respect the grant of asylum by other states, and a right of the individual to enjoy asylum if granted. Consulting the *travaux préparatoires* of the UDHR, considerable discussion is seen over whether the right to asylum as articulated in article 14 amounted to a right of the individual to receive asylum. When the matter came to the Third Committee, the United Kingdom⁴ and Saudi Arabia⁵

¹ Convention on Political Asylum, 26 Dec 1933 (entered into force 28 Mar 1935).

² Universal Declaration of Human Rights, art 14(1), UNGA res 217 A (III), 10 Dec 1948. See also Asian-African Legal Consultative Organization, 'Bangkok Principles on Status and Treatment of Refugees', 31 Dec 1966 (adopted at the Asian-African Legal Consultative Organization, 40th Sess, New Delhi, 24 June 2001) art II(1) (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, UN doc A/CONF.157/23, 12 July 1993.

⁴ UN doc A/C.3/355.

⁵ *ibid.*

opposed the text explicitly providing for a right to receive asylum, whereas Uruguay,⁶ Lebanon,⁷ and Pakistan⁸ supported it. In the end, the Committee voted to strike the text on the right to receive asylum and leave only the right to enjoy it, if granted.⁹ In the second session of the Drafting Committee, the Committee proposed that the UDHR include the 'right to seek and be granted in other countries asylum from persecution',¹⁰ among other states, the Philippines, Sweden, Italy, and the Holy See supporting this text.¹¹ The USSR argued that the right to seek asylum was meaningless without the right to receive it,¹² but the Netherlands opposed the text as outside the human rights scope of the document.¹³ The United Kingdom opposed it, specifically arguing that the right to control the entry of foreigners was a state's right.¹⁴ The end result was the text that provided for a right to enjoy, but not to receive, asylum. Commentators on the UDHR have concluded that this negotiating history reaffirms that granting asylum was viewed as a right inherent in state sovereignty.¹⁵

In the *travaux préparatoires* of the Refugee Convention, the same reasoning that the right to asylum is a right of states, not persons, is found. The President of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons understood that while article 14 of the UDHR focused on the right of the individual to seek and enjoy asylum, the proposed text of the preamble to the Refugee Convention, then under discussion, and which was eventually adopted as proposed, focused on the right of the state to grant asylum.¹⁶ The United Kingdom representative to the Conference, endorsing the Belgian and French views, argued that the rights in the Refugee Convention were individual rights, which were distinct from the right of the state to grant or withhold asylum.¹⁷ At the time of drafting the Refugee Convention, it would seem that the delegates still understood the right to asylum in the UDHR as not encompassing a right to receive asylum.

Turning to other documents discussing the right to asylum, the same approach considering the right to grant asylum as a prerogative of the state is found. The Declaration on Territorial Asylum provides that:

⁶ UN doc E/AC.32/SR.25.

⁷ *ibid.*

⁸ *ibid.*

⁹ UN doc E/AC.3/SR.26 (recording that only Bolivia voted against). See also Morten Kjærum, 'Article 14' in Gudmundur Alfredsson & Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999).

¹⁰ Kjærum, *ibid.*

¹¹ E/CN.4/SR.57, 3 June 1948, 8. See also Siegfried Wiessner, 'Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory' (1986) 56 *Miss LJ* 447 ('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').

¹² E/CN.4/SR.85.

¹³ *ibid.*

¹⁴ E/CN.4/SR.56.

¹⁵ Kjærum, above n 9; 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* (CUP 1999) 81; Alice Edwards, 'Human Rights, Refugees, and the Right "to Enjoy" Asylum' (2005) 17 *IJRL* 293.

¹⁶ UNGA, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-first Meeting, 29 Nov 1951, UN doc A/CONF.2/SR.31, para 5 (Refugee Conference Record), discussing proposed preamble text para 5.

¹⁷ *ibid.*, Summary Record of the Thirteenth Meeting, 22 Nov 1951, UN doc A/CONF.2/SR.13.

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.¹⁸

The further clarification of the right to asylum in the Convention on Territorial Asylum that grants of asylum must 'be respected' affirmed the right to asylum as understood in the UDHR.¹⁹ Furthermore, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) states that '[t]he grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.'²⁰ The Principles Concerning Treatment of Refugees adopted by the Asian-African Consultative Organization (Bangkok Principles) reaffirm the same.²¹ Also important is the International Court of Justice (ICJ) *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.'²²

Thus, even though the documents cited above articulate the right to asylum as a human right, it is only limited to the right to apply and enjoy, whereas the right to grant is a right of the state. It should be understood that the 'right' of the state, in this sense, means that the grant of asylum by a state to a qualifying 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.²³

This right to grant asylum and have it respected is, however, explicitly limited to certain situations, widely described as 'persecution'. Of course, states may grant asylum to individuals who are not refugees,²⁴ but situations where persecution is absent might then be considered unfriendly acts. 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:

¹⁸ UNGA res 2312 (XXII), 14 Dec 1967, art 1(1).

¹⁹ Convention on Territorial Asylum, art II: '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 ...'

²⁰ Organization of African Unity Convention on the Specific Aspects of Refugee Problems in Africa, 10 Sept 1969, art 2(2), 1001 SUNTS 45 (entered into force 20 June 1974) (OAU Convention).

²¹ Bangkok Principles, above n 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 nonpolitical nature is maintained:')

²² *Asylum Case (Columbia v Peru)*, 1950 ICJ Reps 273. In that case, there was an additional concern: since the asylum had been granted while the individual was within an embassy, the person also needed recognition of asylum and safe passage out of the host state. The Court was not able to find a rule of customary international law, or even regional customary international law, providing for this additional obligation on the part of the host state.

²³ Luke T Lee, 'The Right to Compensation: Refugees and Countries of Asylum' (1986) 80 AJIL 532 (arguing that there is no norm that a state that creates a refugee situation has breached a duty to other states burdened by flow).

²⁴ See, eg, Alexei Barrionuevo, 'Brazil's President Offers Asylum to Woman Facing Stoning in Iran' *NY Times* (1 Aug 2010) (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'). See also the variety of US legal bases for granted asylum in addition to recognized refugee status, Immigration and Nationality Act (INA) s 207(b), 8 USC s 1157(b); INA s 101(a)(42)(B), 8 USC s 1101(a)(42)(B); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub L No 101-167, 103 Stat 1195, Title V, s 599D; Consolidated Appropriations Act, 2004, Pub L No 108-199, 118 Stat 3, Div E, Title II, s 213 (23 Jan 2004), and so forth.

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.²⁵

Therefore, persecution includes certain forms of mistreatment on the basis of race, religion, social group status, and so forth. Persecution in this sense, that is whether the grant of asylum could be considered an unfriendly act, might include acts directed against persons struggling against colonialism.²⁶ Thus, the definition of persecution in this sense might be broader than the definition for qualification as a refugee.

As will be discussed in more detail below, many states have integrated their refugee obligations and asylum grants into the same domestic legal framework and process, so that individuals qualifying as refugees receive asylum automatically under municipal law when the person qualifies as a refugee. Since many states apply the same meaning of 'persecution' under international refugee law to their determination of 'asylum' under municipal law, it can be concluded 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 would 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 general, it is well accepted that prosecution is distinct from persecution, and does not, in principle, support a finding of persecution. The Declaration on Territorial Asylum states that 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' cannot invoke the right to asylum, pursuant to article 14, paragraph 2, of the Universal Declaration of Human Rights.²⁷

That being said, prosecution can amount to persecution in certain circumstances. If asylum was granted on the basis of genuine prosecution abroad that does not amount to persecution, then the state granting the asylum could not rely on the treaty protection of the asylum grant. Thus, while the state's grant of asylum would stand, the asylum might be potentially regarded as an unfriendly act between states.

In addition, the right to grant asylum 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.'²⁸ However, the mixing of the terms 'shelter' and 'refuge' with 'asylum' does confuse the meaning somewhat.

Aside from these explicit provisions for a state right to grant asylum, the right may also extend to other situations, as discussed in section 3.2.2 below on state practice

²⁵ See Maurice Kamto, Second report on the expulsion of aliens, UN doc A/CN.4/573 at 97. See also Convention on Territorial Asylum, art II.

²⁶ UDHR, art 14(1); Declaration on Territorial Asylum, art 1(1).

²⁷ *ibid.*

²⁸ *Institut de Droit International*, res of Sept 1906 on neutrality, art 5, (1906) 21 Ann 375 ('Le droit d'asile neutre est le droit de l'Etat neutre de donner, dans les limites de sa juridiction, retraite à ceux qui cherchent un refuge contre les calamités de la guerre') (IDI res). Also see generally Hugo Storey, 'Armed Conflict in Asylum Law: The "War-Flaw"' (2012) 31 RSQ 1.

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 issuing such a grant and for that grant not to be considered unfriendly. However, at this point, whether the right of the state to grant asylum is paired with a right of the individual to receive it will be considered.

3. INDIVIDUAL RIGHT TO RECEIVE ASYLUM

This section considers whether the right to apply for and enjoy asylum has now evolved to provide a right for an individual to receive asylum. Although, as discussed above, the right to asylum is a right of states to grant, that determination does not exclude a right of individuals to receive it. It has been argued that the right to seek asylum provides procedural protections for the individual requesting asylum²⁹ and that it might also imply the right to the grant of asylum itself,³⁰ 'The right to seek and enjoy asylum is not an empty phrase.'³¹ Goodwin-Gill, among others, has rejected the interpretation of the UDHR as excluding the right to receive asylum.³² Others, however, have argued that there is no right to receive asylum inherent in the way the 'right' to asylum has been articulated,³³ an interpretation that is correct insofar as the state right to grant asylum aspect is concerned.

In considering whether the evolution of international law from primarily a system of inter-state obligation to one that includes rights held by individuals has occurred in asylum law,³⁴ this section will first look at conventional law and then at customary international law obliging asylum, in particular, at cases of refugee status determination.

3.1 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,³⁵ Organization of American States Convention (OAS Convention),³⁶ African

²⁹ Guy S Goodwin-Gill, *The Refugee in International Law* (2nd edn, OUP 1996, reprint 1998) 202–03; CD de Jong, 'The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later' (1998) 10 IJRL 688, 689; Alice Edwards, 'Tampering with Refugee Protection: The Case of Australia' (2003) 15 IJRL 192, 197.

³⁰ D Joly, *Haven or Hell? Asylum Policies and Refugees in Europe* (Palgrave Macmillan 1996) 1, (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); Plender & Mole, above n 15, 364; T Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum' (1990) 2 IJRL 361.

³¹ See Plender & Mole, above n 15, 81; Edwards, above n 15.

³² Goodwin-Gill, above n 29, 175 (citing the French delegate's statements in 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'); Executive Committee Conclusion 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)').

³³ Bangkok Principles, above n 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').

³⁴ A Grahl-Madsen, *Territorial Asylum* (Oceana 1980) 2 (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).

³⁵ American Declaration on the Rights and Duties of Man, art 27.

³⁶ OAS Convention, art 22(9) (providing the right 'to seek and be granted asylum in a foreign country').

Charter on Human and Peoples' Rights (AfrCHPR),³⁷ and American Convention on Human Rights (AmCHR).³⁸ For example, the AmCHR states that:

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.³⁹

However, in these cases the treaties permit states to apply their municipal law in implementing their treaty obligations, so application is not consistent.⁴⁰ Despite these shortcomings, it is clear that these treaties provide for an individual right to asylum, supplementing the traditional state right to grant asylum. Surveying these instruments, it is found that three of the six inhabited continents, 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.'⁴¹ 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. This understanding is reaffirmed by the discussion of the *travaux préparatoires* above, where proposals to articulate a right to receive asylum were proposed but refused. Similarly, the Refugee Convention,⁴² European Convention on Human Rights (and its additional protocols) (ECHR),⁴³ and the Declaration on Territorial Asylum⁴⁴ do not provide for a right to receive asylum explicitly.⁴⁵

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 1999.⁴⁶ However, in 2000, the EU promulgated the Charter of Fundamental Rights of the European Union (Charter), which provided for a right to asylum in article 18.⁴⁷ 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.⁴⁸ Specifically:

³⁷ African Charter on Human and Peoples' Rights, 27 Jun 1981, art 12(3), OAU doc CAB/LEG/67/3/Rev.5, 21 ILM 58 (AfrCHPR) (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').

³⁸ American Convention on Human Rights, 22 Nov 1969, art 22(7) (entered into force 18 Jul 1978), 114 UNTS 123, OAS TS no 36 (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').

³⁹ AmCHR, *ibid*, art 22(7) (author's emphasis).

⁴⁰ Wiessner, above n 11.

⁴¹ UDHR, art 14(1) (author's emphasis).

⁴² Convention relating to the Status of Refugees, Geneva, 28 July 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) (collectively, Refugee Convention).

⁴³ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov 1950, CETS no 5 (entered into force 3 Sept 1953) (ECHR), amended by Protocol No 7, art 1, 22 Nov 1984, CETS no 117; Protocol No 4, art 3(1), 16 Sept 1963, SCETS no 46 (entered into force 2 May 1968).

⁴⁴ Convention on Territorial Asylum, art II.

⁴⁵ Wiessner, above n 11.

⁴⁶ See Plender & Mole, above n 15.

⁴⁷ Charter of Fundamental Rights of the European Union, [2010] OJ C 364/01, 18 Dec 2000 (European Charter).

⁴⁸ 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' (2008) 27 RSQ 33–52.

[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.⁴⁹

Therefore, although the European Charter provides for a 'right to asylum', it might be only limited to the weak right to seek asylum as described in the UDHR and Refugee Convention. 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 in refugee situations. 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 same object and purpose to provide for individual rights, but without rights of individual enforcement. Thus the object and purpose of the Charter, on the one hand, and the UDHR and Refugee Convention, on the other hand, are somewhat misaligned. In any event, through the adoption of the Charter, the growing development of an individual right might be seen. Of course, the Charter has now been incorporated into EU law through the Lisbon Treaty.⁵⁰

In 2004, the EU also introduced Council Directive 2004/83/EC governing a common policy on refugee status (Qualification Directive).⁵¹ 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.⁵² Interestingly, the right to receive asylum was initially rejected by the Commission, though later reintroduced, before the agreement on the final language.⁵³

The precise text of the Qualification Directive orders EU member states to 'grant refugee status to a third country national or a stateless person, who qualifies as a refugee.'⁵⁴ The Directive 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 in further detail, customary international law will be examined.

⁴⁹ Draft Charter of Fundamental Rights of the European Union, Charte 4473/00, Convent 49, art 18(2) 'Right to asylum', Explanation.

⁵⁰ 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.

⁵¹ 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), 29 Apr 2004 [2004] OJ L 304/12 30 Aug 2004; Case C-465/07, *Elgafaji* (ECJ 17 Feb 2009); Joined Cases C-175, 176, 178 & 179/08, *Salahadin Abdulla et al* (ECJ, 2 Mar 2010). See also 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 (Annotated Comments); European Council of Refugees and 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' ECRE doc IN1/10/2004/ext/CN, Oct 2004.

⁵² María-Teresa Gil-Bazo, 'Refugee status, subsidiary protection, and the right to be granted asylum under EC law', *New Issues in Refugee Research* no 136, Nov 2006.

⁵³ See EU doc 10596/02 ASILE 36, 9 Jul 2002.

⁵⁴ Art 13. See also art 18 ('Member States shall grant *subsidiary protection status* to a third country national or a stateless person eligible for subsidiary protection').

3.2 Customary international law obliging asylum for refugees

Alongside conventional law, customary international law is the other major source of public international law.⁵⁵ As is well known, customary international law is established by state practice with the necessary *opinio juris sive necessitatis*.⁵⁶ State practice is the objective element, where states actually engage in the practice in question in a consistent and widespread manner.⁵⁷ *Opinio juris* is the subjective belief on the part of states that they are obliged to act in that way.⁵⁸ Both state practice and *opinio juris* may be shown by reference to compliance with a treaty regime.⁵⁹ Furthermore, while there is no commonly agreed upon number of states that must engage in a particular practice, it is widely accepted that the practice should be representative of the usual practice by states.⁶⁰

Based on the above, this article will examine state practice and *opinio juris* of states providing for a right to asylum. First, it will examine the impact of the conventional obligations discussed above on the formation of customary international law. Secondly, it will look at the widespread and consistent practice of states in granting asylum to qualified refugees. Lastly, it will examine the frequent commingling of the notions of asylum, *non-refoulement*, and refugees.

3.2.1 Impact of conventional obligations on customary international law

The convergent practice of the American Declaration,⁶¹ OAS Convention,⁶² AfrCHPR,⁶³ AmCHR,⁶⁴ and European Charter⁶⁵ in providing for the right to asylum is already suggestive that a representative practice and *opinio juris* may have formed or be forming, especially where the *travaux préparatoires* demonstrated that those

⁵⁵ See Statute of the ICJ, art 38, 16 June 1945. See also A D'Amato, *The Concept of Custom in International Law* (Cornell 1971); Hugh Thirlway, *International Customary Law and Codification* (Springer 1972); International Law Association, 'Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (2000) 713 (ILA Statement of Principles).

⁵⁶ *SS 'Lotus' (France v Turkey)*, 1927 PCIJ ser A no 10, 18; *Asylum Case*, above n 22, 276–77; *North Sea Continental Shelf cases* (Germany/Denmark; Germany/Netherlands) 1969 ICJ Repts 3, 44, para 77; *Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v US)* (Merits) (Nicaragua case), 1986 ICJ Repts 14, para 207; Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313, 315.

⁵⁷ *Asylum Case*, *ibid*; Ian Brownlie, *Principles of Public International Law* (5th edn, OUP 1998) 4–11.

⁵⁸ *Nicaragua case*, above n 56; *North Sea Continental Shelf cases*, above n 56; *Right of Passage over Indian Territory case (Portugal v India)*, Merits, 1960 ICJ Repts 6, 42–43; *Asylum Case*, *ibid*, 277; *Lotus case*, above n 56, 28; Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 75.

⁵⁹ *North Sea Continental Shelf cases*, above n 56, 4, para 71; ILA Statement of Principles, above n 55, Principles 24–27 (arguing that while there is no presumption that a treaty is codifying or crystallizing customary international law, it is an acknowledged phenomenon); *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Repts 226, 256–58, paras 74–82 (Nuclear Weapons advisory opinion); *Nicaragua case*, above n 56, 97–98 (paras 183–85); *Fisheries Jurisdiction cases* (Merits), 1974 ICJ Repts 3, 22–23, paras 51–52; *Tunisia/Libya Continental Shelf case*, 1982 ICJ 18, 38, para 24.

⁶⁰ *Fisheries case*, 1951 ICJ Repts 131, 138; *North Sea Continental Shelf cases*, above n 56, 43; *Asylum Case*, above n 22, 276–77; Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1958) 368. ILA Statement of Principles, above n 55, Principle 14, Commentary (e); Jean-Marie Henckaerts & Louise Doswald-Beck, Int'l Comm Red Cross, *Customary International Humanitarian Law* (vol 1, xlv, CUP 2005) (surveying a selection of representative states for each point of law, which has been widely accepted as correctly stating the law on the matter); Shaw, above n 58, 80 (citing situations where the practice of only one or two states could be potentially determinative).

⁶¹ American Declaration on the Rights and Duties of Man, art 27.

⁶² OAS Convention, art 22(9) (providing the right 'to seek and be granted asylum in a foreign country').

⁶³ AfrCHPR, art 12(3) (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').

⁶⁴ AmCHR, art 22(7) ('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').

⁶⁵ European Charter.

instruments sought to further define and develop the right to seek and enjoy asylum provided in the UDHR.⁶⁶ Of course, practice under these various treaty regimes is not entirely consistent and many violations have been reported. That being said, due to the enforcement mechanisms available under these regimes, especially where individual complaints are possible, it must be considered that practice under these regimes is in fact more consistent than that under other treaty regimes with less effective enforcement.⁶⁷ Deviations from the treaty obligations can be more definitely characterized in a judgment as unlawful, which, in line with the *Nicaragua* case, would reaffirm the norm as existing under customary international law. In any event, customary international doctrine does not require universal consistency.⁶⁸ Considering the above American, African, and European instruments provide for an individual right to receive asylum, there is now converging practice across multiple continents on a right to receive asylum.⁶⁹ Though it has been consistently held that state practice does not need to be completely uniform, the practice of specially interested states has been highlighted as particularly representative.⁷⁰ This author has previously argued that states that entertain more significant numbers of asylum seekers should be considered specially affected.⁷¹ In making this argument, this author observed that the number of individuals seeking protection in a state varies widely, but the statistics are reported by the United Nations High Commissioner for Refugees (UNHCR).

Within these numbers, the UNHCR has documented the levels of applications for asylum.⁷² In 2012, the United States was the largest recipient of asylum claims in the world with 83,400 applications, amounting to 17 per cent of all applications worldwide.⁷³ The next four countries receiving the most claims were Germany (64,500 or 13 per cent), France (54,900 or 11 per cent), Sweden (43,900 or 9 per cent), and the United Kingdom (27,400 or 6 per cent).⁷⁴ These five countries received 57 per cent of all asylum applications.⁷⁵ Other major recipients of asylum applications included Switzerland, Canada, Belgium, Austria, Turkey, Australia, Italy, Norway, Greece and Poland (each receiving between 2 and 5 per cent of the total).⁷⁶ In particular, the

⁶⁶ Gil-Bazo, above n 48.

⁶⁷ *Nicaragua* case, above n 56, 97–98, para 184 (“The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States”).

⁶⁸ *Libya/Malta Continental Shelf* case, 1985 ICJ Reps 13, 33, para 34; *The Paquete Habana*, 175 US 677 (1900). Applying the same test, but finding that the practice was not consistent enough, see Reservations to the Genocide Convention, 1951 ICJ Reps 15, 25; *Asylum Case*, above n 22, 277.

⁶⁹ Gil-Bazo, above n 52.

⁷⁰ *Fisheries* case, above n 60, 138; Hersch Lauterpacht, *The Development of International Law by the International Court* 368 (CUP 1958); Henckaerts & Doswald-Beck, above n 60, xlv–xlv; ILA Statement of Principles, above n 55, Principle 14, Commentary (e).

⁷¹ William Thomas Worster, ‘The Evolving Definition of the Refugee in Contemporary International Law’ (2012) 30 Berkeley JIL 101, 116–17.

⁷² See generally UNHCR, G Sopronyi, ‘Asylum Trends 2012: Levels and Trends in Industrialized Countries’ (2012), available at <http://unhcr.org/asylumtrends/UNHCR%20ASYLUM%20TRENDS%202012_WEB.pdf>.

⁷³ *ibid* at 2, 20–21, 29–30.

⁷⁴ *ibid*. Another way to view these statistics is to look at the number of asylum seekers per 1,000 inhabitants of the state concerned. From this perspective, Malta receives the most at 21.7 per 1,000, with Sweden at 16.4, Liechtenstein at 16.1, Norway and Cyprus at 12.4, Switzerland at 11.7, Luxembourg at 11.5, Belgium at 8.9, Austria at 8.5, and Greece at 5.7. *ibid* at 13.

⁷⁵ *ibid* at 2.

⁷⁶ *ibid* at 12.

member states of the EU received 296,700 new asylum claims in 2012 alone, amounting to approximately 60 per cent of the total applications.⁷⁷

As of the end of 2013, the UNHCR reported that the states hosting the highest number of asylum seekers, as opposed to applicants for asylum, were South Africa, Germany, France, Greece, Canada, Uganda, Austria, Switzerland, Angola, the United States, the United Kingdom, Sweden, Egypt, Belgium, Thailand, Ecuador, Italy, Turkey, and Malaysia.⁷⁸ The numbers of refugees were highest in Pakistan, Iran, Germany, Kenya, Syria, Ethiopia, Chad, Jordan, China, and Turkey. The highest numbers of persons of concern (total population including refugees, asylum-seekers, stateless persons, and internally displaced persons) were in Colombia, Democratic Republic of the Congo, Syria, Pakistan, Sudan, Iraq, Afghanistan, Myanmar, Somalia, and Kenya.⁷⁹

When assessing the practice of these specially interested states, a largely converging practice is found. It is helpful to observe that Tanzania, Chad, Kenya, Uganda, Sudan, and the Democratic Republic of the Congo, among others, are parties to the OAS Convention. On the other hand, many of these specially interested states have also adhered to the Bangkok Principles,⁸⁰ which specifically state that asylum is the sovereign prerogative of the state.⁸¹ That being said, some of the states have adhered to both the Bangkok Principles and the OAS Convention,⁸² leaving some uncertainty about how to resolve the two. For example, Pakistan argued in favor of an individual right to receive asylum in the UDHR, yet later adhered to the Bangkok Principles.⁸³ Furthermore, as will be seen in a subsequent section, many of these states have domestic legislation providing for a right of refugees to receive asylum. In order to resolve these potential conflicts, it should be noted that the obligation to grant asylum to the specific class of persons that qualify as refugees in the OAS Convention is *lex specialis* the general rule affirmed in the Bangkok Principles protecting states' discretion in granting asylum. Therefore, there is convergent practice and *opinio juris* of a significant number of specially interested states, in the OAS Convention context, that the specific class of refugees have a right to receive asylum.

Turning to the European Union Directives, although the *North Sea Continental Shelf* cases, and related cases, did not specifically address the impact of EU Directives on the formation of customary international law, due to their comparable nature as binding law, an analogy can be drawn.⁸⁴ As noted above, the EU promulgated the Qualification Directive in 2004, which requires EU member states to grant refugee status. This Directive requires EU member states to adopt laws and regulations providing for the implementation of the Qualification Directive prior to 10 October 2006.⁸⁵ At that

⁷⁷ *ibid* at 12.

⁷⁸ These statistics are available at <<http://popstats.unhcr.org>>.

⁷⁹ *ibid*.

⁸⁰ Specifically, Iran, Pakistan, Jordan, Tanzania, China, Kenya, Saudi Arabia, Uganda, Sudan, and India.

⁸¹ Bangkok Principles, above n 2, art II(2).

⁸² Specifically, Tanzania, Kenya, Uganda, and Sudan

⁸³ UN doc E/AC.32/SR.25.

⁸⁴ Resolutions of the United Nations General Assembly are a different matter, though informative here. The ICJ has held that these resolutions constitute strong evidence of the existence of a rule of law. *Nicaragua* case, above n 56, 14; Nuclear Weapons advisory opinion, above n 59, 254, para 70. The ILA went even further and concluded that a UNGA resolution on point created a rebuttable presumption of the relevant customary international law rule. ILA Statement of Principles, above n 55, Principle 28, Commentary (c).

⁸⁵ See Qualification Directive, above n 51, art 38.

point, if not done, the Directive is directly applicable in the legal order of the relevant member states.⁸⁶ Although there is sometimes resistance by states against the transposition or implementation of directives in domestic law, the Qualification Directive has been transposed in all of the member states, albeit with some states making minor modifications,⁸⁷ suggesting that the member states may have held an *opinio juris* in regards to those obligations. Thus, taken together, the practice and *opinio juris* in the OAS Convention context and that in the EU, amount to an emerging consensus on whether or not a right to asylum exists under customary international law.

3.2.2 *State practice providing a right to asylum*

In addition to looking at practice within treaty regimes, another question that must be asked is whether the extensive state practice of providing for asylum, which almost always includes refugees, could amount to a customary international right to receive asylum, at least for refugees. Many states assimilate the application for refugee status determination into the application for asylum, granting asylum as the automatic consequence for individuals determined to be refugees.⁸⁸ This list of states includes many

⁸⁶ Case 9/70, *Grad*, [1970] ECR 825, para 5.

⁸⁷ Austria: Asylum Act (*Asylgesetz*) 2005, 1 Jan 2006; Belgium: Royal Decree of 3 Oct 2006, Law of 15 Sept 2006 modifying the Law of 12 Dec 1980 on territorial access, stay, establishment and removal of foreigners, Royal Decree of 27 Apr 2007; Bulgaria: Asylum and Refugees Act Amendment, 29 Jun 2007; Croatia: Aliens Act; Cyprus: Refugee Law No 6(1)/2000, 28 Jan 2000, amended by Law No 112(I), 2007; Czech Rep: Act no 165/2006, 1 Sept 2006; France: Act no 2003-1176 of 10 Dec 2003, amending Act no 25-893 of 25 July 1952; Germany: Law on the Transposition of EU Directives on Immigration and Asylum 2007, 27 Aug 2007, Immigration Act 2004, 1 Jan 2005; Greece: Presidential Decree 96/2008, Off Gazette 92 A, 25 Jul 2008; Hungary: Act LXXX of 28 June 2007 on Asylum, Government Decree no 301/2007 (XI.9) of 9 Nov 2007 on the implementation of Act LXXX; Ireland: Statutory Instrument no 518 of 2006, 9 Oct 2006; Italy: Legislative Decree on transposition of the Directive 2004/83/EC, 1 Jan 2008; Luxembourg: Law regarding the right to asylum and other forms of protection, 5 May 2006; Netherlands: Aliens Act 2000, Aliens Decree 2000; Poland: Act of 13 June 2003 on granting protection to aliens on the territory of the Republic of Poland, Journal of Laws of 2003, no 128, item 1176, amended by Act of 18 Mar 2008 amending the Act on granting protection to aliens in the territory of the Republic of Poland and other acts, Journal of Laws of 2008, no 70, item 416; Portugal: Law no 27/2008 of 30 June 2008 (Asylum Law); Romania: Asylum Law 122/2006 of 18 May 2006, Government Decree no 1251/2006 for approval of Methodological Norms of Asylum Law, 13 Sept 2006; Slovakia: Act no 480/2002 as amended, 1 Jan 2007; Slovenia: International Protection Act, 4 Jan 2008; Spain: Asylum Act 12/2009 as amended; Sweden: Aliens Act (SFS 2005:716) as amended; United Kingdom: Refugee or Person in Need of Protection (Qualification) Regulations 2006 (SI 2525/2006), 9 Oct 2006. Also note that Denmark, while not formally bound by the Qualification Directive due to an opt out, has amended the Aliens Act 2005 to be consistent with the Directive.

⁸⁸ Albania, Law on Asylum (1998), art 7; Algeria, Décret no 1963-274; Angola, Law no 8 (1990) arts 4, 21; Argentina, 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; Belarus, Law on Aliens (1999) art 29; Law on Refugees (1995) arts 8, 15, 17; Belgium, Loi sur l'accès des étrangers (1980) art 7, 56; Belize, Refugees Act (1991) arts 3, 14; Benin, Ordonnance no 1975-41 art 4; Bolivia, Decreto Supremo no 19640 (1983) art 5; Bosnia and Herzegovina, Law on Immigration and Asylum (1999) art 34; Botswana, Refugees Act (1968) s 9(1); Brazil, Lei no 9.474 (1997) arts 36, 37; Cambodia, Law on Immigration (1994) art 3; Canada, Immigration Act (1976) s 53; Chile, Decreto-Ley no 1094 (1975) art 39; PR China, Civil Law (1986) art 142; Colombia, 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) arts 1, 2(m); Czech Republic, Act no 325 on Asylum (1999) s 91; Denmark, Aliens Act (1997) arts 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; Equatorial Guinea, Fundamental Law art 18; Estonia, Law on refugees (1997) arts 7, 21; Finland, Aliens' Act (1991) arts 38, 41; France, Law of 30 Dec 1993; Debré Law of 24 Apr 1997, Law of 11 May 1998; Law of 10 Dec 2003; Gabon, Ordonnance no 64/1976, art 2; Georgia, Law on Refugees (1998) art 82; Germany, Asylum Procedure Act (1992) s 2; Aliens Act (1991) arts 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)

of the states that the author has identified as specially interested, specifically Syria,⁸⁹ Iran,⁹⁰ Germany,⁹¹ Tanzania,⁹² China,⁹³ the United Kingdom,⁹⁴ the United States of America,⁹⁵ Uganda,⁹⁶ Sudan,⁹⁷ the Democratic Republic of the Congo,⁹⁸ Canada,⁹⁹ France,¹⁰⁰ and Nepal.¹⁰¹

art 24; Guatemala, Ley no 22 (1986) art 26; Hungary, Act LXXXVI (1993) s 32, as amended by Act CXXXIX (1997) s 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, Decree Law No 416 (1989) art 7; Japan, Immigration, Control and Refugee Recognition Act (1951) art 53; Kazakhstan, Presidential Decree no 3419; Presidential Decree, 15 July 1996; Kyrgyzstan, Resolution no 340 (1996) s 22; Latvia, Law on Asylum Seekers and Refugees (1998) arts 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) arts 11, 12, 13; Liberia, Refugee Act (1993) ss 12(1), 13; Lithuania, Law on Refugee Status (1995) art 9; FYR Macedonia, 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, arts 1, 2; Malawi, Refugee Act (1989) art 10; Mali, Loi no 1998-40, arts 8, 9, 10; Mexico, Ley General de Polación (1974) art 42(VI); Moldova, Law on Legal Status of Foreign Citizens and Apatrides (1994, as amended 1999) arts 29, 32; Morocco, Décret no 2-57-1256 du 2 safar 1377 (1957) arts 1, 5; Mozambique, Refugee Act (1991) arts 13, 14; Namibia, Refugees (Recognition and Control) Act (1999) art 26; Nepal, Nepal Treaty Act (1990) art 9; New Zealand, Crimes of Torture Act (1989); Immigration Act (1987) s 129(X); Nigeria, National Commission for Refugees, etc. Decree (1989) art 1; Norway, Immigration Act (1991) ss 4, 15, 16; Panama, Decreto Ejecutivo No 23 (1998) arts 53, 73; Paraguay, Ley no 470 (1975) art 141; Peru, Decreto presidencial no 1 (1985) arts 1, 2; Poland, Act on Aliens (1997) s 53; Portugal, Law no 15 (1998) arts 1, 6; Decree-law no 59 (1993) arts 67, 72; Romania, Ordinance on the Status and Regime of Refugees (2000) art 23(m); Russia, Law on Amendments and Additions to the Law on Refugees (1997) arts 10(1), 12(4); Law on Refugees (1997) arts 8, 18; Rwanda, Law No 34/2001 of 5 July 2001 regarding refugees, OG no 24 ter (15 Dec 2001) art 1; Senegal, Décret no 1978-484, arts 3, 4, 5, 6; Sierra Leone, The Non-Citizens (Registration, Immigration and Expulsion) Act (1965) art 4(f); Slovakia, Act no 283 (1995) art 4; Law on Stay of Foreigners (1995) art 15; Slovenia, Law on Asylum (1999) arts 1, 6, 7; Aliens Act (1999) art 51; Foreigners Act (1991) art 33; Somalia, Presidential Decree No 25 (1984) art 6(3); South Africa, Refugees Act (1998) arts 2, 28; Spain, Real decreto 203 (1995) art 12; Ley 5 (1984) art 19; Sudan, Regulation of Asylum Act (1974) arts 6, 7; Suriname, Aliens Act (1991) arts 8, 16(3); Swaziland, The Refugees Control Order (1978) art 10(4); Sweden, Aliens Act (1989) 529 c 8(1); Switzerland, Loi sur l'asile (1998) art 5; Syria, Legislative 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); Turkey, Asylum Regulation 1994; Turkmenistan, Law on refugees (1997) arts 2, 3; Uganda, Control of Alien Refugees Act (1960) arts 6, 20(3); Ukraine, 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 s 207(a), 1231(b)(3); 8 USC s 1157(a); Uruguay, Decreto legislativo sobre refugiados políticos (1956) art 4; Ley 13.777 (1969), Estatuto de los Refugiados; Vietnam, Ordinance on Entry ... of Foreigners ... (1992) arts 2(1), (3); Yemen, Law no 47 (1991) s 38(5); Zambia, Refugee (Contract) Act (1970) arts 10(4), 11(2); Zimbabwe, Refugee Act (1983) art 13. Legislative Decree no 29, Entry and Exit of Aliens (1970) art 29(E).

⁸⁹ Ordinance relating to Refugees (1963) art 12.

⁹⁰ Basic Law of the Federal Republic of Germany, art 16(1).

⁹¹ Refugees Act (1998) art 28(4).

⁹² Civil Law (1986) art 142.

⁹³ Immigration and Asylum Act (1999) ss 11, 12, 15, 71. However, recall the UK's opposition to the general right to asylum under the UDHR. UN docs A/C.3/355, E/CN.4/SR.56.

⁹⁴ INA ss 207(a), 1231(b)(3); 8 USC s 1157(a).

⁹⁵ Control of Alien Refugees Act (1960) arts 6, 20(3).

⁹⁶ Regulation of Asylum Act (1974) arts 6, 7.

⁹⁷ Ordonnance-loi no 1983-033 art 2.

⁹⁸ Immigration Act (1976) s 53.

⁹⁹ Constitution (1958), preamble; Law of 30 Dec 1993; Debré Law of 24 Apr 1997; Law of 11 May 1998; Law of 10 Dec 2003.

¹⁰⁰ Nepal Treaty Act (1990) art 9.

Some states are even more explicit under municipal law and specifically articulate that, for those qualifying as refugees, asylum is a right. These states include Albania, Belarus, Belgium, Brazil, Bulgaria, Cuba, the Czech Republic, France, Germany, Haiti, Hungary, Italy, Mexico, the Netherlands, Nicaragua, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Ukraine.¹⁰² The former states of the USSR and Yugoslavia¹⁰³ 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, 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.

Some authors have observed that there is wide divergence in the practical application of these various rights under municipal law.¹⁰⁷ Indeed, this is the case. This author believes that divergence in practical 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* and state practice that states have adopted a legal regime of asylum for those qualifying as refugees in general.

The bulk of this practice demonstrates largely convergent state practice and *opinio juris* that states grant asylum to refugees. In the Special Tribunal for Lebanon (STL) Interlocutory Decision on the Applicable Law (STL Terrorism Decision),¹⁰⁸ the appeals

¹⁰² Albania: 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); Belarus: Constitution (1937), art 104; Belgium: Constitution, art 191; Brazil: Constitution (1946), art 141, para 33; Bulgaria: Constitution (1947), art 84; Cuba: Constitution (1940), art 31; Czech Republic: Constitution, art 43; France: Constitution (1958), preamble. See also Constitution (1946), preamble, para 4; Law of 30 Dec 1993; 'Debré' Law of 24 Apr 1997; Law of 11 May 1998; and Law of 10 Dec 2003; Germany: Basic Law of the Federal Republic of Germany, art 16(1); Haiti: Constitution (1946), art 30; Hungary: Constitution, art 65(1); Italy: Constitution (1947), art 10, sentence no 25028/2005 (Ct Cass, 25 Nov 2005) (asylum seeker must first follow the administrative procedure in order to be recognized as a refugee under the Geneva Convention or under the Italian Constitution before making an application to obtain constitutional asylum before the Civil Court); Mexico: Constitution (1917), art 15; Netherlands: Constitution, art 2; Nicaragua: Constitution (1948), art 27; Poland: Constitution, article 56(2); Portugal: Constitution (1976) (as amended 1997), article 33(7); Romania: Constitution (1948), art 35; Slovakia: Constitution, art 53; Slovenia: Constitution, art 48; Spain: Constitution, art 13; Ukraine: Constitution (1937), art 109.

¹⁰³ USSR: Constitution (1936), art 129; Former Yugoslavia: Constitution (1946), art 31.

¹⁰⁴ Brazil, Constitution (1946), art 141, para 33; Cuba, Constitution (1940), art 31; France, Constitution (1958), preamble; Constitution (1946), preamble, para 4; Czech Republic, Constitution, art 43; Germany, Basic Law (1949), art 16; Haiti, Constitution (1946), art 30; Hungary, Constitution, art 65(1); Mexico, Constitution (1917), art 15; Nicaragua, Constitution (1948), art 27.2; Portugal, Constitution (1976) (as amended 1997), art 33(7); Slovak Republic, Constitution, art 53; Slovenia, Constitution, art 48.

¹⁰⁵ Constitution, 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 ...').

¹⁰⁶ Constitution, art 56(2).

¹⁰⁷ A Grahl-Madsen, *The Status of Refugees in International Law* (Sijthof 1972) 102; S Sinha, *Asylum and International Law* (Springer 1971) 277.

¹⁰⁸ Case no STL-11-01/1, Interlocutory Decision on the Applicable Law (STL, Appls Ch, 16 Feb 2011).

chamber held that where there is consonant practice, there should be a presumption of *opinio juris*, citing Max Sørensen.¹⁰⁹ In its 'Statement of Principles Applicable to the Formation of Customary International Law',¹¹⁰ the International Law Association (ILA) agreed that such a presumption of *opinio juris* may be warranted in those circumstances.¹¹¹ Ben Saul, however, criticized the customary international law analysis of the STL for this analysis.¹¹² Specifically, he argued that, along similar reasoning, murder was now an international crime since it was also a crime in every national jurisdiction.

Saul certainly makes a valid criticism, but overlooks two aspects of the STL 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 offence or to 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 instant case on the right to asylum, there is considerable international consensus on the protection to be accorded to refugees. Some of the international legal obligations mentioned above explicitly provide for a right to be granted asylum for refugees. 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.¹¹³ 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.

¹⁰⁹ *ibid* para 101: 'According to him [Max Sørensen] one should assume as a starting point the *presumption* of the existence of *opinio juris* whenever a finding is made of a consistent practice; it would follow that if one sought to deny in such instances the existence of a customary rule, one must point to the reasons of expediency or those based on comity or political convenience that support the denial of the customary rule' (citing M Sørensen, 'Principes de droit international public' 1976-III *Receuil Des Cours* Hague Acad 51).

¹¹⁰ ILA Statement of Principles, above n 55.

¹¹¹ *ibid* Principle 40 (holding that 'if there is a good deal of State practice, the need (if such there be) also to demonstrate the presence of the subjective element is likely to be dispensed with'). However, see the ILA's follow up remark that this presumption does not lie where 'there are grounds for considering that the practice does not count towards the formation of a rule - eg because it is a usage of mere comity', *ibid* at fn 98.

¹¹² See Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon invents an International Crime of Transnational Terrorism' (2011) 24 LJIL 677 (criticizing the STL Terrorism Decision).

¹¹³ Maurice Kamto, Third report on the expulsion of aliens, UN doc A/CN.4/581.

However, since states were always free to continue to distinguish between a discretionary grant of asylum and their *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.

3.2.3 *Non-refoulement obligation and asylum*

Under international law, a state will have an obligation, not necessarily to grant asylum, 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.¹¹⁴ The President of the UN Conference on the Refugee Convention concluded that *refoulement* is distinct from and does not include the grant of asylum.¹¹⁵ However, the question is whether the right to *non-refoulement* for those who do qualify under the Refugee Convention, or other conventions, may have truly evolved into a right to asylum. There is a handful of treaties providing for *non-refoulement*: the Refugee Convention,¹¹⁶ the Fourth Geneva Convention,¹¹⁷ the Principles Concerning Treatment of Refugees,¹¹⁸ the Declaration on Territorial Asylum,¹¹⁹ the OAU Convention,¹²⁰ and the Cartagena Declaration.¹²¹ 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.¹²²

¹¹⁴ UN Secretariat, Memorandum, Expulsion of aliens, UN doc A/CN.4/565, 10 Jul 2006 (UN Memo on expulsion) ('The national laws of other States use the term "asylum" in a broader sense to encompass more than just "refugees"').

¹¹⁵ Refugee Conference Record, above n 16, Summary Record of the Thirty-fifth Meeting, 3 Dec 1951, UN doc A/CONF.2/SR.35, 11, 13, 21.

¹¹⁶ Refugee Convention, art 33.

¹¹⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug 1949, 75 UNTS 287 (entered into force 10 Oct 1950).

¹¹⁸ Bangkok Principles, above n 2, art III.

¹¹⁹ See Goodwin-Gill, above n 29, 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').

¹²⁰ OAU Convention, art 11(3).

¹²¹ Cartagena Declaration on Refugees, 19–22 Nov 1984, s III, para 5, reprinted in 2 UNHCR, Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons 206, 208 (1995).

¹²² UN Memo on expulsion, above n 114: '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', 1999-III *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1999) 283, 291. See also *Joseph Spring v Switz*, *Bundesgericht* [Fed Sup Ct] 126 II 145–6, 21 Jan 2000, ILDC 351 (CH 2000) (holding that the principle of *non-refoulement* was not part of customary international law in 1943); Brian Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 *IJRL* 479–95; Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' (1985–86) 26 *VJIL* 857–96; Deborah Perluss & JF Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1985–86) 26 *VJIL* 551–626.

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 as described in the International Covenant on Civil and Political Rights, Convention Against Torture, and ECHR.¹²³

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, that is 'indirect *refoulement*'.¹²⁴ In essence, the rule prohibits return to 'any other country where he runs a risk of being expelled or returned'.¹²⁵ In addition, the *non-refoulement* obligation also requires that refugees not be refused admission to the state of refuge in the first place.¹²⁶ 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 other refusals of admission, such as the transfer of asylum seekers intercepted on the high seas elsewhere.¹²⁷

In addition, the Refugee Convention contains an obligation to, 'as far as possible facilitate the assimilation and naturalization of refugees',¹²⁸ 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.

¹²³ UNHCR Executive Committee, Conclusion no 6 (XXVIII) Non-refoulement (1977); UNHCR, Note on International Protection, UN doc A/AC.96/830, 7 Sept 1994.

¹²⁴ Case no AWB 04/30154, (Dist Ct Zwole, Neths, 29 Sept 2004) (wherein the court referred to the law review article: A Skordas & N Sitaropoulos, 'Why Greece is not a Safe Host Country for Refugees' (2004) 16 IJRL 25–52); Case no AWB 04/57933, (Dist Ct Zwole, Neths, 10 Feb 2005) (referring to letter of the Greek Council for Refugees, a letter of the Dutch Refugee Council, and a Nov 2004 report of UNHCR that expulsion to Greece could result in indirect *refoulement*); European Council on Refugees and Exiles, ECRE Country Report 2004, available at <<http://www.ecre.org/files/CR04.pdf>>.

¹²⁵ *Mutombo v Switzerland*, Communication no 13/1993, para 10 (Committee against Torture (CAT) 27 Apr 1997). Cf *Salah Sheekh v Netherlands*, Application no 1948/04 (ECHR 11 Jan 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.'

¹²⁶ Convention relating to the International Status of Refugees, 28 Oct 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.'

¹²⁷ 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. *Haitian Refugee Center v Sale*, 509 US 155 (1993). See also *R v Immigration Officer at Prague Airport and another ex p European Roma Rights Centre and others* [2004] UKHL 55 (holding that the refusal of permission at the Prague airport to board transportation for the UK was not a violation of the Refugee Convention). In support of its holding, the House of Lords cited *Sale*, above; *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, (2000) 204 CLR 1, para 136; *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, (2002) 210 CLR 1, para 42; Nehemiah Robinson, 'Convention Relating to the Status of Refugees' (Institute of Jewish Affairs, 1953); P Weis, 'The United Nations Declaration on Territorial Asylum' (1969) CYIL 92, 123–24; and Grahl-Madsen, above n 107, 94. However, see UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 2007, available at <<http://www.refworld.org/docid/45f17a1a4.html>> (concluding that this interpretation is inconsistent with the clear wording of the text and the object and purpose of the Refugee Convention).

¹²⁸ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN doc HCR/IP/4/Eng/REV.1, Ann II (1979, re-edited 1992).

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 individuals receive upon the receipt of a grant of asylum.¹²⁹ 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:

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.¹³⁰

This author does not believe that this is an accurate understanding of the *non-refoulement* obligation as provided in the Refugee Convention. First, 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.¹³¹

¹²⁹ Eg, 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, UN doc EC/GC/01/17, para 3, 4 Sept 2001.

¹³⁰ Gil-Bazo, above n 52 (citing IDI res, above n 28).

¹³¹ 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 Contemporary International Law Issues* (Springer 1994) 114.

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 (namely the UN High Commission for Refugees (UNHCR) and EU (namely Schengen), and directly (in the case of the delegates to the UN Conference on the Status of Refugees), evidences a merger of refugee status and asylum.

3.2.4 *Commingling asylum and refugee status*

Notions of asylum and refugee status are frequently and casually intermixed in international instruments and domestic law, sometimes to the degree that they appear to be used as synonyms, suggesting that states are comfortable regarding asylum as the obligatory consequence of refugee status.

For example, many states have used the Refugee Convention definition of a refugee as the basis for domestic legislation granting asylum.¹³² This practice goes beyond the obligation to accord *non-refoulement* treatment to refugees, instead it links two separate considerations, asylum and refugee status. The domestic grant of asylum becomes the automatic consequence of recognition of refugee status. In addition, some states grant asylum to persons that the UNHCR has determined are refugees, again going beyond the basic *non-refoulement* obligation to granting asylum under domestic law.¹³³

It could be that this easy commingling of the notions of refuge and asylum is the correct interpretation of the Refugee Convention. The UNHCR assimilates the rights of refugee status to the grant of asylum.¹³⁴ In addition, and very importantly, in an Annex to the Final Act of the Refugee Convention, the delegates to the convention that drafted the convention itself specifically observed that the receipt of refugees by states was an act of granting asylum.¹³⁵ Therefore, it might be that it has always been wrong to understand the Refugee Convention as excluding a right to asylum. Or, more correctly, that the Refugee Convention left open the possibility of future evolution, including the assimilation of refugee rights and asylum, such that this interpretation is the appropriate and modern one.

In EU Council Directive 2004/83/EC, the precise language orders EU member states to 'grant refugee status to a third country national or a stateless person, who qualifies as

¹³² James C Hathaway, *The Law of Refugee Status* (Lexis 1991) v.

¹³³ Eg, Kemal Kirişçi, 'The Legal Status of Asylum Seekers in Turkey: Problems and Prospects' (1991) 3 IJRL 510–28. The author is grateful to Meltem Ineli Ciger for drawing his attention to the Turkish system of protection.

¹³⁴ UNHCR, Annotated Comments, above n 51, 10–11. See also Jahn Eberhard, 'Refugees' in Rudolf Bernhardt (dir), *Encyclopedia of Public International Law* (vol 4, OUP 2001) 72, 73. The UNHCR also often refers to refugees as 'asylum-seekers'. Eg, UNHCR, Executive Committee Conclusion 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'.

¹³⁵ Final Act of the UN Conference on the Status of Refugees and Stateless Persons, s IV D, 189 UNTS 37, reprinted in UNHCR Handbook, Annex I: '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'. 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. *R v Secretary of State for the Home Department ex p Robinson*, Case no FC3 96/7394/D, para 11 (Ct Appl Eng & Wales, 11 July 1997).

a refugee.¹³⁶ 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 (that is, that refugee determination by the state is merely declarative of the already existing refugee status under international law) so the UNHCR has interpreted the grant of 'refugee status' in the Qualification Directive to mean merely the grant of rights and obligations of refugee status.¹³⁷ 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 that grants the EC/EU the competence to establish a common policy of asylum.¹³⁸ The Directive itself notes that it is adopted in pursuit of the right to asylum under the Charter,¹³⁹ so the Directive obliges states to grant refugee status as part of a common asylum policy and in line with the Charter, which appeared 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 seems 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.¹⁴⁰

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.¹⁴¹ 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 shows 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 European instruments, international agreements have been interpreted to provide for commingling. For example, article 22 of the Convention on the Rights of the Child (CRC) provides that:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall ... receive appropriate protection and humanitarian assistance.¹⁴²

¹³⁶ Art 13. See also art 18 ('Member States shall grant *subsidiary protection status* to a third country national or a stateless person eligible for subsidiary protection').

¹³⁷ See UNHCR, Annotated Comments, above n 51.

¹³⁸ Treaty on European Community, art 63(1)(c); Qualification Directive, above n 51, preamble ('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 ...').

¹³⁹ Qualification Directive, *ibid*, preamble ('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 ...').

¹⁴⁰ Eg, *Institut de Droit International*, res of Sept 1950, 43-II Ann, Sept 1950 (referring to EU legislation that focuses on confining asylum to refugees qualifying under the Refugee 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).

¹⁴¹ Kamto, Third report, above n 113.

¹⁴² Convention on the Rights of the Child, UNGA res 44/25, 20 Nov 1989, art 22(1), 1577 UNTS 3, (entered into force 2 Sept 1990).

This article says nothing about asylum, referring only to refugee status. However, the Committee on the Rights of the Child has interpreted this article on refugees to cover 'asylum-seekers'.¹⁴³ The Committee has also interpreted the CRC to oblige states to not only receive claims for recognition of refugee status from children but also to refer such refugee claimants to the domestic asylum-granting authority,¹⁴⁴ as if such a merger of processes was normal and expected.¹⁴⁵

A number of other international and regional contexts evidence commingling. 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',¹⁴⁶ appearing to assume that 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.¹⁴⁷ 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.¹⁴⁸ These are all rights accruing from refugee status.

Perhaps all of this usage above reflects a growing global *opinio juris* that the formally distinct categories of refugee and asylum seeker are converging and demand equivalent treatment, that is to say, that individuals qualifying as refugees must be granted asylum.

¹⁴³ Committee on the Rights of the Child, General Comment no 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN doc CRC/GC/2005/6, para 66, 1 Sept 2005 ('Asylum-seeking children ... shall enjoy access to asylum procedures and other complementary mechanisms providing international protection ...'); *ibid* 76 ('Unaccompanied or separated children recognized as refugees and granted asylum do not only enjoy rights under the 1951 Refugee Convention ...').

¹⁴⁴ *ibid* para 66.

¹⁴⁵ *ibid* para 75 ('Staff involved in status-determination procedures of children ... should receive training on adopting an application of international and national refugee law ... To properly assess asylum claims of children ...').

¹⁴⁶ UNGA res 44/137, 15 Dec 1989, para 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 ...'. See also UNGA res 45/140 A, 14 Dec 1990, para 3; UNGA res 46/106, 16 Dec 1991, para 4; UNGA res 47/105, 16 Dec 1992, para 4; UNGA res 48/116, 20 Dec 1993, para 5; UNGA res 50/149, 21 Dec 1995, para 7; UNGA res 51/71, 12 Dec 1996, para 5; UNGA res 51/75, 12 Dec 1996; UNGA res 52/101, 8 Feb 1999; UNGA res 53/126, 9 Dec 1998, para 4; UNGA res 52/103, 12 Dec 1997, para 5; UNGA res 53/125, 9 Dec 1998, paras 5, 8; UNGA res 54/146, 17 Dec 1999; UNGA res 55/74, 4 Dec 2000, paras 6, 9; UNGA res 54/147, 17 Dec 1999; UNGA res 55/77, 4 Dec 2000; UNGA res 56/135, 29 Dec 2001; UNGA res 57/183, 18 Dec 2002, para 11.

¹⁴⁷ See Edwards, above n 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'. UNHCR Executive Committee Conclusion no 82 (XLVIII) on Safeguarding Asylum, 1997, para (d)(vi); Conclusion nos 19 (XXXI) of 1980, para (c); Conclusion no 22 (XXXII) of 1981, para B; and Conclusion no 36 (XXXVI) of 1985, para (f); *A v Australia*, Communication no 560/1993 (Human Rights Committee); *Mutombo v Switzerland*, Communication no 13/1993 (CAT); *Khan v Pakistan*, Communication no 15/1994 (CAT); *Ismail Alan v Switzerland*, Communication no 21/1995 (CAT); *Aemei v Switzerland*, Communication no 34/1995 (CAT); *Tala v Sweden*, Communication no 43/1996 (CAT); *Pauline Muzonzo Paku Kisoki v Sweden*, Communication no 41/1996 (CAT); *Tapia Paez v Sweden*, Communication no 39/1996 (CAT); *Korban v Sweden*, Communication no 88/1997 (CAT); *Halil Haydin v Sweden*, Communication no 101/1997 (CAT); *Elmi v Australia*, Communication no 120/1998 (CAT); *Soering v UK*, ser A no 161, 7 July 1989 (ECHR); *Chahal v UK*, 70/1995/576/662, 15 Nov 1996 (ECHR); *Ahmed v Austria*, 71/1995/577/663, 17 Dec 1996 (ECHR); *Amuur v France*, 1996-III ECR 25 June 1996.

¹⁴⁸ CLC 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, 103-6, Jun 1988. See also IDI Resolution, above n 28 (defining asylum as the protection accorded by a state to an individual who comes to seek it).

The only alternative reading of these statements is sloppy drafting, which is difficult to sustain on such a wide and consistent scale. Thus there is a growing *opinio juris* of states that refugees qualifying as such necessarily must receive asylum.

3.2.5 *Assessment of customary international law*

The bulk of the practice and *opinio juris* of representative states points to the existence of a right to asylum under customary international law; however, this right is limited to individuals qualifying as refugees. This conclusion can be reached because the receipt of asylum by a refugee is a clear example of an inherently international activity and there is an increasingly converging international *opinio juris* on the need for refugees to receive asylum, not only the more limited protection of *non-refoulement*. There are already a few international instruments that mandate a right to receive asylum and, in addition, there is widespread and consistent practice, both under conventional and domestic law, of merging refugee status determination and asylum consideration. This practice includes that of specially interested states, distributed throughout the regions and cultures of the world. In the face of this convergent practice, *opinio juris* can be presumed but, given the widespread commingling of the notions of refuge and asylum, it can be confidently concluded that the necessary *opinio juris* is certain. However, in all of these cases, the right to receive asylum is limited to refugees, not extending to other groups. These other groups will continue to only enjoy the right to seek and enjoy asylum. These factors suggest that, in fact, customary international law has evolved to embrace a right of the refugee to receive asylum, supplementing the state right vis à vis other states to grant asylum.

4. CONCLUSION

This article first examined whether the ‘right’ to asylum should be understood as a state right to grant asylum. The language of many of the instruments examined in this article appear to articulate a right for states, specifically, that states’ grant of asylum should be respected by other states and not interpreted as an unfriendly act. It seemed that this right to have the grant of asylum respected was to be limited to situations of persecution or perhaps war, and it appeared that persecution in this context was similar or the same as persecution in the refugee context. Thus, at a minimum, the grant of asylum to refugees should be seen as a right of a state not to have its acts regarded as unfriendly.

However, once it was concluded that there is a state right to grant asylum, the second question was whether there is also a substantive individual right to receive asylum. Although some of the treaties explicitly granted an individual right to asylum that could be said to be more than merely procedural, others did not and the *travaux préparatoires* were not entirely clear how the right should be understood.

To this analysis, an assessment of customary international law was added. Not only was widespread state practice and a strong suggestion of *opinio juris* in the practice under treaty regimes, but the author discovered a surprisingly consistent practice of commingling the discussion of asylum with that of refugee status. This commingling was found in both statements in international fora and international agreements, but also in domestic implementation of refugee obligations. It was suggested that this commingling would be evidence of an *opinio juris* that, at least for refugees, asylum must be understood to be a consequent right. However, the argument that *non-refoulement*

obligations generally lead to an asylum obligation was rejected. In addition, it was discovered that a great many states grant asylum as a necessary consequence of refugee status, a practice sometimes even entrenched in the domestic constitution. Many of these states articulate the right to asylum of refugees as an individual right. This considerable convergent state practice has already permitted the presumption of *opinio juris*, though such a presumption was likely not necessary, given the considerable evidence of *opinio juris* in the many other examples shown. Based on the foregoing, there is evidence of both state practice and *opinio juris* for granting asylum as an individual right of refugees.

In sum, this article finds that there are some treaties in place providing for an individual right to asylum for refugees, and there is widespread and consistent state practice and *opinio juris* that refugees have an individual right to asylum. It appears that the time has come to recognize that refugees have an individual right to receive asylum under international law. Whether this individual right to asylum will be extended to other persons protected by a *non-refoulement* obligation remains to be seen. Thus, states have both a right and a duty to grant asylum to refugees: a right to have the asylum grant respected by other states and a duty to provide asylum to the individual.