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CHALLENGING CONSTANT AMBIGUITY: MODERN LEGAL APPROACHES TO ASYLUM

Abstract: *Legal understandings of asylum vary and remain to a great extent ambiguous. This is because asylum takes different legal forms in different legal dimensions: general international law, international human rights law, EU law, and constitutional law. All the above-mentioned dimensions are strictly linked and combined. Yet the ways in which asylum has been addressed, especially in the doctrine, often overlook this complexity. This article is aimed at assessing the modern legal approaches to the institution of asylum in international, European, and domestic legal orders, with reference to the positions taken by the late Janusz Symonides and in this way commemorating his recent passing away.*

Keywords: asylum, international refugee law, Janusz Symonides, refugee status

INTRODUCTION

Exactly thirty-five years ago, i.e. in 1986, the Polish Yearbook of International Law published an article by the late Professor Janusz Symonides on territorial asylum.[1] It was an English version of a text published one year earlier in Polish in the renowned Sprawy Międzynarodowe (International Affairs) quarterly.[2] Although Symonides had not published more extensively on asylum earlier, both texts – and especially its original Polish version – became a point of reference in Polish scholarly publications in the field of international law and international relations for many subsequent years. Its influential role increased even more when it was republished – with a slightly modified title – in another referential publication in the Polish legal literature: an extensive collection of texts edited by Roman Wieruszewski and entitled *Human Rights. A Legal Model*.[3] This volume appeared in 1991 – at the beginning of the transformation process of the

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[1] J. Symonides, *Territorial Asylum*, XV Polish Yearbook of International Law 217 (1986).

[2] J. Symonides, *Azyl terytorialny* [Territorial asylum], 9 Sprawy Międzynarodowe 19 (1985).

[3] J. Symonides, *Prawo do azylu* [Right to asylum], in: R. Wieruszewski (ed.), *Prawa człowieka. Model prawny*, Ossolineum, Wrocław: 1991, pp. 615-630.

Polish political system from totalitarian to democratic, and was one of the first and, at the time, definitely the most extensive and systematizing publication in Polish on human rights after the end of the times of censorship in place during the communist era. As such, it became an important point of reference in the debates concerning the introduction of human rights guarantees into the Polish legal system, above all in the constitutional debate of the 1990s that eventually resulted in the adoption in 1997 of a new Constitution for the democratic Poland. Article 56 of the Constitution is a provision on asylum and refugee status which may be characterized as specific and, as such, will be analysed below.

Thirty-five years can constitute an epoch and, obviously, the international legal regulations on asylum have been significantly evolving over that time, especially vis-à-vis the constant development of international human rights guarantees and the emergence of a European Union legal framework on asylum. Yet the legal foundations of asylum remain very much the same and Symonides' analysis retains validity, as it represents the high quality and nuanced precision that always characterized his legal writings. I personally very much benefited from Symonides' publications, as well as from numerous discussions I had with him, which is why I intend the present text to be a way of expressing my gratitude and of commemorating his recent passing away.

This article is aimed at assessing the modern legal approaches to the institution of asylum in the international, European, and domestic legal orders, with reference to the positions taken by Symonides in the above-mentioned texts.[4]

1. THE CONCEPT OF ASYLUM

Legal understandings of asylum vary and still remain to a great extent ambiguous. This is because asylum takes different legal forms in different legal dimensions: general international law, international human rights law, EU law, and constitutional law. As far as the latter is concerned, the modalities in which the right to asylum is construed in the constitutions of particular states vary significantly as well. Obviously, all the above-mentioned dimensions are strictly linked and combined. However, the ways in which asylum has been addressed, especially in the doctrine, often overlook this complexity. What's more, one may get the impression that some of the modern doctrinal approaches to asylum, being aimed at strengthening the legal position of an individual vis-à-vis a state, depart significantly from its current actual legal standing and from the states' practice. I believe this is the case, for example, in two modern approaches which will be addressed more broadly in this text. One claims to perceive asylum as a general principle of international law,[5] whereas the other

[4] The references in this text will be to the English version only, as published in the Polish Yearbook of International Law in 1986.

[5] M.-T. Gil-Bazo, *Asylum as a General Principle of International Law*, 27(1) International Journal of Refugee Law 3 (2015), pp. 3 et seq.

considers a constitutionalized right to asylum as an effective alternative to the protection of refugees.[6]

The basic distinction regarding asylum in international law amounts to defining it as a right of a state on the one hand, and as a right of an individual on the other. This distinction remains valid today. Yet following the (r)evolution of international law since World War II, brought about by the emergence and constant development of the human rights protection framework,[7] it is the latter that has gradually taken precedence in the modern legal discourse. Indeed, the legal protection of an individual plausibly forms one of the main characteristics of modern international law, and states' interests must, in many cases, give way to them. However, the states' interests still matter significantly and they should not be overlooked. This is precisely so in the context of asylum. Asylum understood as a sovereign right of a state retains its validity. What's more, it is claimed here that, as such, it may be beneficial to the protection of an individual as well.

Asylum defined traditionally – as it was formulated in 1950 by the Institute of International Law – amounts to "the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it."[8] Thus it is about a state granting to an alien leave to enter and to remain on its territory, resulting generally in the exclusion of extradition or expulsion to the country of origin.[9] As this understanding is confined to a state's territory, it is referred to as territorial asylum, distinct from diplomatic asylum.[10] Therefore, initially territorial asylum was perceived solely as a consequence of the territorial sovereignty of a state, and therefore as a sovereign right of a state. The element of protection was an intrinsic part of the institution, yet it was completely dependent on a state's assessment and left to its discretion. Importantly, this is still the case in modern international law, as states remain free to grant protection on their territory to anyone they wish. They are also free to regulate this competence in domestic legal orders, including the constitutionalization of asylum. However, states' discretion has become significantly limited, both in a positive

[6] S. Meili, *The Constitutional Right to Asylum*: *the Wave of the Future in International Refugee Law?*, 41 Fordham International Law Journal 383 (2018), pp. 383 et seq.

[7] "The post-war turn to rights in international law" as it is also referred to, *see e.g.* J. von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 European Journal of International Law 903 (2008).

[8] "Article premier: "Dans les présentes Résolutions, le terme 'asile' désigne la protection qu'un Etat accorde sur son territoire ou dans un autre endroit relevant de certains de ses organes à un individu qui est venu la rechercher," Institut de droit international, *L'asile en droit international public* [*à l'exclusion de l'asile neutre*], Session de Bath – 1950.

[9] *Cf.* K. Hailbronner, J. Gogolin, *Asylum, Territorial*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. I, Oxford University Press, Oxford: 2012, pp. 716 et seq., para. 4. The authors claim that "[territorial asylum] does not necessarily entail or imply a right of residence or a right to remain in the territory for the individual."

[10] Symonides devoted a part of his text to an in-depth analysis of diplomatic asylum and its non-recognition in general international law. Symonides, *supra* note 1, pp. 220-224. *See also* P. Shah, *Asylum, Diplomatic*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. I, Oxford University Press, Oxford: 2012, pp. 713 et seq.

way (the emergence of international legal obligations to grant protection to particular categories of individuals), and in a negative way (the emergence of an international legal obligation to exclude some categories of individuals from protection). As far as the latter is concerned, states' discretion is limited by the exclusion from protection of those engaged in atrocity crimes and/or in activities contrary to the purposes and principles of the United Nations. As for the former, the discretion is limited firstly by introduction of a legal framework for the international protection of refugees (international refugee law), and subsequently by the emergence and evolution of human rights protection standards amounting to the prohibition of an alien's transfer (in whatever legal form) to those territories where his or her fundamental human rights might be endangered. These processes will be referred to in section 3 below.

Importantly, asylum as the right of a state entails a corresponding duty incumbent upon other states: the duty to accept the asylum granted by any other state. Indeed, as is stated in the preamble of the Declaration on Territorial Asylum of 1967, the grant of asylum is "a peaceful and humanitarian act and (…), as such, it cannot be regarded as unfriendly by any other State."[11] Without acceptance of this corresponding duty, the right to grant asylum would be voidable, as is the right to diplomatic asylum in universal international law. Save in some regional treaty arrangements among Latin America states, the right of a state to grant protection to an alien within its diplomatic premises has never been recognized in universal international law. Although occasionally such protection is granted on humanitarian grounds and, to some extent, may appear effective due to the well-established (under customary law and under the 1961 Vienna Convention on Diplomatic Relations[12]) principle of the inviolability of diplomatic mission premises, it does not enjoy the status of a legally accepted entitlement of a state. And from this perspective the right to territorial asylum as the right of a state is – as it has been already stated above – beneficial also to the protection of an individual because it must not be legally denied by other states and because, as such, it forms a means of protection.

As a means of protection, asylum has been, nevertheless, perceived in modern international law – and especially in its doctrine – mainly from the individualistic perspective: i.e. as a right of an individual. Yet no such right has been introduced by any universal international treaty so far, and the fiasco in this respect of the 1977 Conference on Territorial Asylum still remains symbolic. Also, the proposals to introduce the right to be granted asylum to general human rights instruments have not been successful, neither on the universal nor the regional level. In fact, all we have in this regard is the non-binding provision of the 1948 Universal Declaration of Human Rights (UDHR). Its Art. 14(1) states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." The problem is that Kay Hailbronner and Jana Gogolin are entirely correct when they claim that the provision of Art. 14(1) UDHR – especially while taking into account its drafting history – "does not mean much more than what

[11] Resolution 2312 (XXII) of the UN General Assembly, adopted on 14 December 1967.
[12] Signed 18 April 1961, entered into force 24 April 1964, 500 UNTS 95.

is already regulated in Art. 13 [UDHR],"[13] i.e. that "[e]veryone has the right to leave any country, including his own, and to return to his country." And, indeed, the right to seek and to enjoy asylum is conceptually different from the right to be granted asylum.

Thus, as Symonides put it already in the mid-1980s, "the institution of asylum is both the right of the state to grant asylum and the right of the individual to request it. But we should note a clear trend towards limiting the freedom of decision of the state in cases when the claims of the individual are justified. Also the right to seek asylum is still not tantamount to the right to it, since no legally binding international obligation to grant asylum in justifiable circumstances is operative as yet."[14] This statement remains valid today, notwithstanding the evolutions of international refugee law and international human rights law that have introduced crucial legal safeguards for an individual seeking international protection. Yet, these safeguards do not amount – at least not explicitly – to a right to be granted asylum.

In the absence of any explicit treaty provisions on asylum it is generally accepted that asylum as the right of a state forms an established customary legal norm. Indeed, as Symonides put it: "There is no doubt that the granting of asylum within the scope of international law lies entirely within the competence of the State. As it is the State that determines the basis for granting to an alien asylum on its territory, and decides on granting or refusing asylum, the grant of asylum is a right of the State."[15] This is a sovereign right of any state, recognized by other states. Both *usus* and *opinio juris* remain unambiguous in this respect.

The legal nature of asylum as an individual right is far less clear. As was stated above, there are no treaty provisions imposing on a state a duty to grant asylum to an individual. Neither respective states' practice nor *opinio juris* exist in this respect. Indeed, there are concrete limitations incumbent on states under the non-refoulement principle (both as a treaty and customary norm under international refugee law and international human rights law), but they are conceptually different from the concept of a right to be granted asylum. Note that the non-refoulement principle permits the transfer of an alien seeking international protection to other states (territories) where an individual's fundamental rights would not be endangered. The non-refoulement principle is not about granting asylum. It is about the protection from persecution and from other fundamental human rights' violations. Thus, statements such as "although there is no established right to asylum, under special circumstances, an individual might effectively be granted a right to asylum"[16] does not necessarily contribute to legal clarity.

Notwithstanding the above, the doctrinal desire to strengthen the legal position of an individual seeking international protection vis-à-vis a state seems to be overwhelming. One of the most intriguing efforts in this regard was proposed in 2015 by María-Teresa

[13] Hailbronner, Gogolin, *supra* note 9, para. 12. Indeed, it should be noted that the preamble of the 1967 Declaration on Territorial Asylum explicitly links the provisions of Art. 14 and Art. 13.2 UDHR.

[14] Symonides, *supra* note 1, p. 226 (footnotes omitted).

[15] *Ibidem*, p. 224 (footnotes omitted).

[16] Heilbronner, Gogolin, *supra* note 9, para. 33.

Gil-Bazo, who submitted that "asylum constitutes a general principle of international law that is legally binding when it comes to the interpretation of the nature and scope of states' obligations towards individuals seeking protection."[17]

Gil-Bazo claimed that "the long historical tradition of asylum as an expression of sovereignty has now been coupled with a right of individuals to be granted asylum of constitutional rank, which in turn is recognised by international human rights instruments of regional scope" and, in consequence, "asylum constitutes a general principle of international law and, as such, it is legally binding when it comes to the interpretation of the nature and scope of states' obligations towards individuals seeking protection."[18]

The main problem with references to general principles of law is that they remain – as Roman Kwiecień put it – "the most enigmatic sources of international law"[19] or – as even more cautiously formulated by Przemysław Saganek – "the most mysterious element discussed in the context of sources of international law."[20] Indeed, although the position of general principles of law in international law seems to be consistently rising in the international legal discourse, their legal status is far from clear. What's more, the very terminology is confusing, as references are made by various authors to either "general principles," "general principles of law" or to "general principles of international law." Saganek was perfectly right in remarking that the very terminological choices may predetermine their legal status.[21] Gil-Bazo's text is not free from such ambiguity.

For practical reasons it is impossible to refer in the present text more broadly to the theoretical background of general principles of (international) law. However, the assertion is widely made that general principles of law form an autonomous source of international law, alongside treaties and customs.[22] Yet it is submitted here that in terms of methodological precision general principles of law as a formal source of international law should be clearly distinguished from general principles of international

[17] Gil-Bazo, *supra* note 5.

[18] *Ibidem*, p. 28.

[19] R. Kwiecień, *General Principles of Law: The Gentle Guardians of Systemic Integration of International Law*, XXXVII Polish Yearbook of International Law 235 (2017), p. 235.

[20] P. Saganek, *General Principles of Law in Public International Law*, XXXVII Polish Yearbook of International Law 243 (2017). The texts by Kwiecień and Saganek are parts of a Mini Symposium on general principles of law published in the Polish Yearbook of International Law. *See also* A. Kozłowski, *Systematicity of General Principles of (International) Law – an Outline*, XXXVII Polish Yearbook of International Law 225 (2017), and I. Skomerska-Muchowska, *Some Remarks on the Role of General Principles in the Interpretation and Application of International Customary and Treaty Law*, XXXVII Polish Yearbook of International Law 255 (2017).

[21] Saganek, *supra* note 20, p. 243.

[22] Rüdiger Wolfrum noted that the contrary view, arguing "against the incorporation of general principles amongst the sources of international law has become obsolete"; R. Wolfrum, *General International Law (Principles, Rules and Standards)*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. IV, Oxford University Press, Oxford: 2012, pp. 344 et seq., para. 22. And the assertion that general principles of law form an autonomous source of international law is not only exclusively derived from the formulation of Art. 38(1)(c) of the ICJ Statute.

law. The latter form principles in a prescriptive meaning of the term: they belong to the international legal order (thus they are of a treaty or customary character, or – yes, indeed – may take the status of general principles of law) and form general rules playing a principal role in that order (also because they emanate the very extra-legal values creating the axiological basis of international law, such as safeguarding and maintaining international peace and security, as well as international justice). Most commonly, general principles of international law are referred to as those listed in Art. 2 of the UN Charter and in the 1970 UNGA Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[23] Thus, general principles of international law amount to its normative core, but do not form a separate formal source of international law.[24] One can also speak of general principles of particular branches of international law – and this is exactly the case of the non-refoulement principle in international refugee law.

Gil-Bazo – although referring to general principles of international law and referring in this context to Sir Gerald Fitzmaurice's well-known Hague lecture[25] – perceived the legal nature of asylum as a right of individuals (the right to be granted asylum) as independent from treaty or custom and constituting a general principle of law, and as such binding upon states irrespective of their express recognition. The author elaborated on the religious and historical foundations of asylum, and first and foremost on the position of asylum in the national constitutions of numerous states, and claimed that "asylum aims to protect higher values in which the state itself is founded: national liberation, justice, democracy, and human rights" and that "this conception of asylum does not exist exclusively within any given domestic legal order. On the contrary, it is intimately linked with international law."[26]

Indeed, general principles of law as a separate source of international law are, to a great extent (though not exclusively[27]), derived from municipal legal orders, i.e. principles accepted by all legal orders. As such – and taking into account the subsidiary character of general principles of law in international law in the sense that their crucial function is to address a situation of *non liquet* – they mainly (but, again, not exclusively) are of a procedural character, and as well encompass the main rules of legal relations in general and

[23] Resolution 26/25 (XXV) of the UN General Assembly, adopted on 24 October 1970.

[24] This approach is also well illustrated in the ICC Statute, whicht explicitly distinguishes between principles (and rules) of international law (Art. 21(1)(b) and general principles of law (Art. 21(1)(c)).

[25] G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des cours de l'Académie de droit international de La Haye (1957-II). One has to note, however, that Fitzmaurice's approach was not to address general principles of law as a source of international law. And indeed, general principles of law are principles of international law in the sense that they should be viewed as part of international law. *Cf.* G. Gaja, *General Principles of Law*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. IV, Oxford University Press, Oxford: 2012, pp. 370 et seq., paras. 4-6.

[26] Gil-Bazo, *supra* note 5, p. 26.

[27] *Cf. e.g.* the extensive classification of general principles as proposed by Wolfrum (Wolfrum, *supra* note 22, paras. 28-53).

legal logic. As such they are accepted by all states "irrespective of their express recognition," but not irrespective of states' implied consent, although – as Wolfrum put it – "such consent is expressed for the various types of principles constituting a source of international law in different forms."[28] In no way should general principles of law be adduced in order to impose obligations upon states irrespective of, or contrary to, their will.

Indisputably, asylum has vast religious and historical traditions and foundations and in various forms is known to many modern municipal legal orders. What's more, in a significant number of them asylum was introduced into national constitutions. But does this all make asylum a general principle of law? The answer must be negative because, firstly, the acceptance of asylum in national constitutions is not so widespread as it may seem *prima facie*;[29] and secondly, the approaches in which asylum is constitutionally regulated are not at all unanimous and it is the content that is decisive here, and – as Giorgio Gaja put it, although in a slightly different context – "in any event, [the principles'] character would depend on their content, not whether or not they find a parallel in municipal systems."[30]

Domestic regulations on asylum, in their varieties and different modalities, reflect its very essence as a sovereign right of a state. And obviously, as was mentioned above, this understanding of asylum encompasses an element of protection of an individual. It forms an intrinsic part of the institution, but it is dependent on a state's assessment and up to its discretion. This is also valid in domestic regulations with respect to asylum. States may limit themselves in this regard, introducing specific domestic regulations, including the constitutionalization of asylum. Yet, among those states that have introduced asylum into their constitutions, numerous include either references to statutory legislations, dubbed by Stephen Meili as "escape clauses"[31], or references to binding international agreements and, in consequence, (in the absence of any universal agreements on asylum as such) practically equate asylum with refugee status. Indeed, it seems hardly possible to derive from constitutional regulations a general principle of law amounting to an individual right to be granted asylum. And Gil-Bazo admitted herself that "the nuances of what specific protection asylum provides, who is entitled to benefit from it, as well as its derogations or exceptions are far from settled."[32] This is what asylum as an individual right is about. And it is the content of a principle that matters. Thus one can conclude that municipal regulations on asylum do nothing more than confirm domestically an individual's right to seek asylum and a state's competence to offer protection as

[28] *Ibidem*, para. 54.

[29] And interestingly enough, there are actually not so many of them. Meili notes that only thirty-five percent of world's constitutions include asylum provisions. Meili, *supra* note 6, p. 386 and sources referred to therein, including: L. Kowalczyk, M. Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 Cornell Law Review 1219 (2017).

[30] Gaja, *supra* note 25, para. 21.

[31] By "escape clauses" Meili refers to constitutional provisions "allowing the right to be interpreted according to [statutory] national law," Meili, *supra* note 6, p. 390. Meili refers in this context to the example of the Polish Constitution, which is more broadly analysed below in section 4 of the present text.

[32] Gil-Bazo, *supra* note 5, p. 28.

recognised in international law.[33] No limitations exist in this respect in international law, save for those deriving from both treaty and customary norms of international refugee law and international human rights law. And they are momentous, indeed.

2. ASYLUM, REFUGEE PROTECTION AND HUMAN RIGHTS[34]

Not surprisingly, asylum was incorporated into the UDHR in large part because this document was motivated by – and here we can refer to its preamble – "barbarous acts which have outraged the conscience of mankind" resulting from World War II. Another result of the World War II was the enormous increase in numbers of displaced persons seeking protection internationally. But the formulation of Art. 14(1) UDHR leads to an interpretative ambiguity. Obviously, as has been set forth above, the right to seek and to enjoy asylum is conceptually and essentially different from the right to be granted asylum.[35] Notwithstanding the foregoing, its content remains unclear. And it may be claimed that this ambiguity was welcomed by states, as at that time they were not ready to undertake any clearly settled – not to mention legally binding – commitments vis-à-vis individuals in this respect. And not that much has changed since then. States' reluctance to legally bind themselves – in the context of granting protection to aliens – still remains one of the factors, and a very important one, shaping modern international refugee law.

The key issue for a proper understanding of the mechanisms for granting international protection to individuals is the relationship between two principal institutions: asylum and refugee status. The former has been already analysed above, but it is worth emphasising here that indeed the development of a human rights protection framework starting after World War II led to perceiving asylum from the individualistic perspective, i.e. as a right of an individual. Art. 14 UDHR played a pivotal role in this process, as it anchored asylum in international refugee law and international human rights law, both with individualistic foundations. But it should be recalled that in the interwar period the early international refugee law instruments were not individualistic at all, but were aimed at the protection of particular (mainly ethnic) groups. This approach

[33] Thus, Goodwin-Gil's and McAdam's assertion of 2007 still remains fully legitimate: "In regard to asylum (…) the argument for obligation fails, both on account of the vagueness of the institution and of the continuing reluctance of States formally to accept such obligation and to accord a right of asylum enforceable at the insistence of the individual" (G.S. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Oxford University Press, Oxford: 2007, p. 358).

[34] This section is based on parts of my previous publication in Polish, shortened and modified accordingly: M. Kowalski, *Znaczenie art. 14 Powszechnej Deklaracji Praw Człowieka dla międzynarodowego prawa uchodźczego* [The meaning of Art. 14 of the Universal Declaration of Human Rights for international refugee law], in: M. Florczak-Wątor, M. Kowalski (eds.), *70 lat Powszechnej Deklaracji Praw Człowieka*, Księgarnia Akademicka, Kraków: 2019, pp. 79-90.

[35] It should not be overlooked that the first draft of Art. 14(1) included the "right to seek and be granted asylum," but it was rejected by states and altered. Goodwin-Gill, McAdam, *supra* note 33, p. 358.

was changed and resulted in the adoption of the 1951 Geneva Convention on Refugee Status, and subsequently the 1967 New York Protocol introducing an individualistic definition of a refugee as an individual at risk of persecution and entitled to a set of rights (as well as duties) in the form of refugee status.

Granting refugee status under the 1951 Geneva Convention amounts to the recognition that an alien meeting the criteria set out in the definition of a refugee is entitled to be granted protection by excluding his or her removal to those territories where he or she could be at risk of persecution (the non-refoulement principle), as well as by guaranteeing to him or her some rights in a host country. Granting refugee status to an individual at risk of persecution becomes a form of granting international protection. Granting asylum to an individual at risk of persecution or of other human rights violations is also a form of international protection. And, if granted to an alien meeting the refugee definition criteria, asylum becomes a legal means of refugee protection. This is how the process of merging the asylum and refugee status began, and in the domestic regulations of numerous states the concept of asylum has been understood as the right of an individual to seek protection while endangered by persecution. Notions such "applying for asylum" and "applying for refugee status" or "granting asylum" and "granting refugee status" began to be synonymous in many domestic legislations. And the term "asylum-seeker" is commonly used to designate a person applying for refugee status. The same process of blurring the differences between asylum and refugee status took place in the EU law.[36] Symptomatically, Art. 18 of the Charter of Fundamental Rights of the EU (the EU Charter),[37] entitled "Right to asylum," states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union." Moreover Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU)[38] provides that "[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the [Geneva Convention] and the [New York Protocol], and other relevant treaties." Thus, the legal measures adopted under Art. 78(2) TFEU and forming the "Common European Asylum System" actually constitute the EU system of refugee protection based on the foundations of international refugee law (the 1951 Geneva Convention and the 1967 New York Protocol), supplemented by subsidiary forms of protection.

[36] Gil-Bazo rightly noted an emerging trend developing among European states (especially among the EU Member States) of blurring the distinction between asylum and refugee status "by restricting the use of the term asylum to refugees within the meaning of [the 1951 Refugee Convention], while developing alternative institutions for protection (such as temporary protection and subsidiary / complementary protection)," Gil-Bazo, *supra* note 5, p. 4.

[37] OJ C 326, 26 October 2012, pp. 391-407.

[38] *Ibidem*, pp. 47-390.

Yet, under international law the concept of asylum remains broader. This is the case also in those municipal legal orders in which the concepts of asylum, including asylum as a constitutional right, and refugee status remain differentiated. This was confirmed by the EU Court of Justice, which famously stated in the German law context that "[EU] Member States may grant a right of asylum under their national law to a person who is excluded from refugee status."[39] Nevertheless, it was exactly the formulation of Art. 14(1) UDHR that linked the right of an individual to seek and enjoy asylum with the risk of persecution and initiated the individualistic approach to asylum in the context of human rights protection.

Notwithstanding all of the above, the legal consequences of the right to seek and enjoy asylum still remain ambiguous. Especially, it is unclear whether this right has acquired the status of a customary legal norm. While generally states do not question the right of an individual to seek and enjoy asylum, what remains problematic however is the exact content of this right and what exactly an individual is entitled to. Definitely an individual has the corresponding right to leave any country, including his or her own, and to return to the country of origin as provided for in Art. 13(2) UDHR. It is also widely accepted that the individual right to seek asylum corresponds a state's duty not to jeopardize those seeking asylum. In practice however it may be challenged, as states widely apply various immigration control measures such as visa regimes, carrier sanctions, etc.

It is submitted here that the ambiguity in the legal status of the right to seek and enjoy asylum is irrelevant in the sense that it is the non-refoulement principle which is of key importance for the protection of an individual at risk of persecution. The non-refoulement principle "in the absence of a human right to be granted asylum (…), remains the cornerstone of international protection of refugees because it guarantees that refugees remain outside the reach of the country of persecution even if they are not granted asylum or are otherwise refused by the country of refuge."[40] The development of this principle under international refugee law and – even more importantly – under international human rights law is crucial in this respect.[41]

It is always worth bearing in mind that the foundations of international refugee protection lie between states' discretion and states' obligations.[42] Indeed, neither the 1951 Geneva Convention nor the 1967 New York Protocol contain any provision explicitly imposing on state-parties an obligation to grant refugee status. Nor do they contain any provision on procedural obligations aimed at determining a request for refugee

[39] Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D.* [2010], ECLI:EU:C:2010:661, para. 121.

[40] W. Kälin, M. Caroni, L. Heim, *Art. 33, para 1*, in: A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary*, Oxford University Press, Oxford: 2011, p. 1395.

[41] For more on the non-refoulement principle generally, *see e.g. ibidem,* pp. 1327 et seq.; Goodwin-Gill, McAdam, *supra* note 33, pp. 201 et seq.

[42] M. Kowalski, *International Refugee Law and Judicial Dialogue from the Polish Perspective*, in: A. Wyrozumska (ed.), *Transnational Judicial Dialogue on International Law in Central and Eastern Europe*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź: 2017, p. 367.

status. Thus, State-parties enjoy a great deal of discretion in this respect and persistently tend to secure it. Yet this discretion is limited by the non-refoulement principle as introduced in Art. 33(1) of the 1951 Geneva Convention, providing for the prohibition of expulsion or return of a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This prohibition – in the absence of an individual right to be granted asylum and, in consequence, in the absence of the corresponding positive obligation on the part of a state – results in a state's negative obligation to not take any measures that might endanger an individual by forcing his or her return to territories where he or she could be at risk of persecution. In other words, the prohibition guarantees "that refugees remain beyond the reach of a persecuting state as long as their fear of persecution remains well-founded."[43] At the same time, alongside the above-mentioned negative obligation of a state, an implied positive obligation of a state occurs as well. Under Art. 33(1) of the 1951 Geneva Convention, the prohibition of refoulement applies to refugees as defined in Art. 1(A). It undoubtedly applies also to those requesting refugee status, i.e. before the formal recognition of their status as refugees. This is especially evident in context of the generally-accepted declaratory nature of refugee status. In order not to violate the prohibition of refoulement, a host state is positively obliged to determine whether the individual concerned (an asylum-seeker) is or is not a refugee. Alternatively, a host state may – if applicable on practical grounds – transfer the individual concerned to a third-country where he or she would not be at risk of persecution nor at risk of further refoulement.

Thus, the prohibition of refoulement is absolutely crucial for the protection of an individual seeking international protection and, as such, may acquire the status of a principle of international refugee law. Indeed, the non-refoulement principle offers actual protection for those seeking international protection and, therefore, it may be plausibly claimed that it is a legal consequence of the individual right to seek and enjoy asylum as provided for in Art. 14(1) UDHR. Correspondingly, states retain some discretion, allowing them to free themselves from granting protection if an individual concerned may be transferred to a third-state. This legal construction makes it possible to introduce such mechanisms as those determining which EU Member State is responsible for examining an application for international protection lodged in one of the Member States (known commonly as the Dublin rules and based on the "one application – one Member State responsible" approach[44]), or other mechanisms such as the safe third-country or the country of first asylum notions. This is possible because under binding international law States generally do not accept the right of an individual to choose the state in which they wish to apply for (and be granted) protection. However, a host state, while com-

[43] Kälin, Caroni, Heim, *supra* note 40, p. 1335.

[44] Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013, pp. 31-59.

plying with its obligation resulting from the non-refoulement principle, must take into account the rights of an individual guaranteed under international human rights law (such as the right to respect for private and family life; special status of the vulnerable etc.), which may result in acceptance of an individual's preferences in this regard.

The above remarks referred to the non-refoulement principle as it was regulated in Art. 33 of the 1951 Geneva Convention. Yet, it is obvious that although the principle initially had only a treaty norm status, it has acquired the status of a norm of universal customary international law.[45] What's more, it may plausibly be claimed that the non-refoulement principle in its customary form is of much wider scope than the treaty norm under Art. 33 of the 1951 Geneva Convention. Its customary scope has been evolving and developing by states' practice not only under (but importantly also independently from) the 1951 Geneva Convention, but also – actually first and foremost – under other treaty and customary obligations imposing an absolute prohibition of torture, inhuman or degrading treatment or punishment, including the prohibition to transfer an individual to territories where he or she would be at risk of such a treatment. In this respect the prohibition is of an absolute nature and the exclusion clause of Art. 33(2) of the 1951 Geneva Convention does not apply. Also, it applies not only on territories but on state's frontiers as well. Moreover, and importantly, it applies not only to those meeting the criteria of the refugee definition under Art. 1(A) of the Convention, but also to every individual that in case of removal would be at risk of torture or inhuman or degrading treatment or punishment. In this context we face interpenetrating legal guarantees for an individual under both international human rights law and international refugee law, in which the former "embodies a principle of non-refoulement with a considerably wider scope of application."[46] This interpenetration is also illustrated in the EU law, as Art. 19(2) of the EU Charter guarantees that "No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment," and only this provision forms the completion of the right to asylum under Art. 18 of the EU Charter.

3. ASYLUM AS A CONSTITUTIONAL RIGHT AND THE POLISH PERSPECTIVE

While referring to the constitutional regulations on asylum, one should start with the general remark that under international law for a state to exercise its prerogative in the form of granting asylum to an alien it is not necessary to introduce asylum into its municipal legal order as a domestic institution. From the perspective of international law, asylum is about granting protection in the form of leave to enter, to remain, and not to be returned, that may be granted under domestic law in any sort of legal

[45] Kälin, Caroni, Heim, *supra* note 40, pp. 1343-1346.
[46] *Ibidem*, p. 1350.

form. Yet many states tend to regulate asylum as such in their municipal legal orders. Numerous national constitutions include provisions providing the right to asylum, and their number has been increasing. In this context Lucas Kowalczyk and Mila Versteeg wrote recently about "the global spread of constitutional asylum provisions" because – as they show – the percentage of the world's constitutions including asylum provisions increased to thirty-five percent in 2017, up from eleven percent in the wake of World War II.[47] Still, most constitutions do not introduce asylum as a constitutional right. What's more, as has been already mentioned above those that do vary significantly in their modalities, which are not at all unanimous. This aspect is indeed consequential as it makes any generalisations very difficult and demands a careful and detailed analysis of constitutional asylum provisions, with due attention to their historical and legal culture aspects. Also, constitutional provisions on asylum have been influenced by all the processes mentioned above: the development of international refugee law, international human rights law and in Europe EU law.

The doctrinal approaches to asylum as a constitutional right vary as well. Hélène Lambert, Francesco Messineo, and Paul Tiedemann, after a careful analysis of the constitutional provisions of France, Italy and Germany, convincingly claimed that international law and EU law obligations made constitutional asylum in these states "a redundant, almost obsolete, concept."[48] But this view is not shared by other authors, including Gil-Bazo, who remarks in the historical context:

> as a matter of law, [the] conception of asylum as a duty found its first formulation in modern times in article 120 of the 1793 French Constitution, born after the French Revolution: "[Le Peuple français] donne asile aux étrangers bannis de leur patrie pour la cause de la liberté. Il le refuse aux tyrans." Far from being obsolete, despite the establishment of the refugee protection regime as a matter of international law, this provision constitutes a reference upon which constitutions around the world still formulate asylum in their bill of rights as an essential element of liberal-democratic states.[49]

Other authors, such as Stephen Meili, go even further and perceive a constitutionalized right to asylum as an effective alternative to refugee protection.[50] Much obviously depends on the particular constitutional model, and in some cases the constitutionalization of asylum may indeed strengthen the position of an individual and come to his or her rescue where refugee protection fails. This however is definitely not the case in those states in which constitutional asylum remains of a discretional nature. What's more, one should not ignore the fact that in non-democratic states some constitutional references to asylum are of an ornamental character only, and/or that they are brutally subjected to the ruling totalitarian ideologies. This was exactly the case of the ex-Soviet

[47] Kowalczyk, Versteeg, *supra* note 29, p. 1260.

[48] H. Lambert, F. Messineo, P. Tiedemann, *Comparative Perspectives of Constitutional Asylum in France, Italy and Germany: Requiescat in Pace?*, 27(3) Refugee Survey Quarterly 16 (2008).

[49] Gil-Bazo, *supra* note 5, p. 23.

[50] Meili, *supra* note 6, pp. 383 et seq.

bloc states, including Poland, in which – prior to the change of their political systems from totalitarian into democratic at the turn of the 1980s and 1990s – the 1951 Geneva Convention and 1967 New York Protocol were perceived as no more than instruments of "Western imperialism."[51] Taking into account the principal role of international refugee law and international human rights law mechanisms, as well as the mutual relationship between domestic and international legal orders, constitutional regulations on asylum should not be perceived as an alternative to refugee protection. Rather they should be as compatible as possible with international law obligations aimed at the protection of an individual. And indeed, asylum as a broader notion should not – contrary to the modern tendencies – be entirely equated with refugee status. Yet it may form a useful, albeit only complementary, form of protection.

The above-mentioned tendencies are well illustrated in the Polish context, as asylum is provided for in the Polish Constitution and this regulation is frequently evoked in international literature, but its specificity in most cases is not noticed, or even misinterpreted.[52] Thus, it is worth briefly presenting it here.

After the change of the political system in 1989 and the transitional constitutional changes, the new constitution of the democratic Poland was adopted in 1997. Art. 56 of the Constitution states that:

1. Aliens may enjoy the right of asylum in the Republic of Poland in accordance with principles specified in a statute.
2. An alien who is seeking protection from persecution in the Republic of Poland may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party.[53]

Thus, the constitutional regulation refers to both asylum and refugee status and explicitly regulates them as two separate legal institutions. As far as refugee status is concerned, domestic statutory regulations entirely reflect the obligations under the 1951 Geneva Convention, 1967 New York Protocol and – following the 2004 accession to the EU – the EU legal framework. The international protection under EU law (consisting of refugee status and subsidiary protection) remain the principal form of aliens' protection in Poland. In addition, Polish law provides for some other complementary forms of protection, such as a humanitarian stay and tolerated stay that under statutory regulations are aimed at meeting the human rights standards excluding the return of an alien.

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[51] The 1951 Geneva Convention and the 1967 New York Protocol were jointly acceded to by e.g. Hungary on 14 March 1989; Poland on 27 September 1991; then Czechoslovakia on 26 November 1991 (after the dissolution of Czechoslovakia the Czech Republic and Slovakia became state-parties to the Convention and the Protocol on 11 May 1993 and 4 February 1993, respectively). The Baltic States acceded only in 1997 (Estonia on 10 April 1997, Lithuania on 28 April 1997 and Latvia on 31 July 1997). Kowalski, *supra* note 42, p. 369.

[52] *See e.g.* Meili, *supra* note 6, p. 401.

[53] Translation by the author. Note that some available English translations of Art. 56 lack precision. *See e.g.* the English translation of the 1997 Constitution available on the website of the Sejm (the lower house of the Parliament) https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (accessed 30 May 2021).

Asylum as regulated in Art. 56(1) of the Constitution is a domestic legal institution of a different character. Although framed as a constitutional human right listed in the catalogue of "Personal Freedoms and Rights" of Chapter II of the Constitution, granting asylum remains of a discretional character. It is characteristic that under Art. 79(2) of the Constitution rights regulated in Art. 56 are explicitly excluded from the scope of constitutional complaint to the Constitutional Court. The discretional character of asylum is even more evident under the statutory regulation: asylum may be granted to an alien if he or she is in need of protection and cumulatively granting asylum is in the best interests of Poland. No character of the protection needed is specified. The discretional character of asylum is also confirmed in the case law of the administrative courts.

The institution of asylum in Polish law originates from legal traditions prior to Poland's accession to the 1951 Geneva Convention and the 1967 New York Protocol, and in the communist era it was highly ideologized. The formulation of Art. 56(1) of the 1997 Constitution has been elaborated alongside with the gradual introduction to the Polish legal order of other forms of legal protection of aliens under international refugee law and international human rights law. Although freed from its previous ideological ballast, asylum has proven to be of marginal practical importance. It has been applied in practice very rarely. Thus, Polish law is another example of a municipal legal order in which a constitutional right to asylum has become superfluous. One can claim that it is only the profound political reluctance towards constitutional amendments in Poland that allows for the preservation of the constitutional status of asylum.

CONCLUSIONS

Understandings of the concept of asylum remain complex and must be viewed in various, albeit interrelated, legal dimensions. Yet its international law status still remains of predominant importance. Undoubtedly, the human rights approach to asylum, perceiving the concept as the right of an individual to protection status, has been consistently gaining importance. It should be noted, however, that the individualistic approach to asylum should not be legally framed in opposition to the traditional approach, which defines asylum as a right of a state. Rather, both approaches should be perceived and interpreted as complementary.

Although the individualistic approach to asylum as a means of protection is crucial, it still remains to a large extent unclear. Firstly, one should recall that the right to seek and enjoy asylum is conceptually different from the right to be granted asylum. Notwithstanding the human rights limitations incumbent on states under the non-refoulement principle, the right to be granted asylum lacks a solid legal basis in binding international law. What's more, the legal status of the right to seek and enjoy asylum remains ambiguous and – as has been mentioned above – it seems problematic whether it has acquired the status of a customary legal norm. It has been argued however that the ambiguity in the legal status of the right to seek and enjoy asylum is in a way

compensated for by the firm legal status of the non-refoulement principle under both international refugee law and, even more importantly, under international human rights law. Although conceptually different from the concept of asylum, the non-refoulement principle offers individuals effective legal protection from persecution and other grave violations of human rights.

One should also note the importance of asylum as a constitutional right. While it seems disputable whether it is on the rise or in decline, any generalisations in this respect remain highly risky because of the different constitutional modalities in domestic legal orders, and a thorough analysis of the domestic legal contexts is always required. Importantly, it has been submitted above that the constitutional regulations on asylum should not be perceived as an alternative to refugee protection. On the contrary, they should be intrinsically linked with states' international law obligations aimed at the protection of individuals from persecution and other human rights violations.

Taking into account all that has been stated above, one can claim that modern legal approaches to the concept of asylum must constantly challenge the existing and noticeable legal ambiguity. And indeed, Janusz Symonides' remarks on the legal foundations of asylum referred to above still offer, due to their incisive character, a valuable point of reference for contemporary analyses.