Access Denied?

– Human Rights Approaches to Compensate for the Absence of a Right to Be Granted Asylum

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Contents

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I. Introduction

The history of mankind can be told as a history of migration ever since our ancestors left the African continent to populate most parts of our planet. From a historical perspective, current migration flows cannot be regarded as a new phenomenon; rather they are an expression of constant human movement over thousands of years.[1] In more recent times, the 19th century has been regarded as the heyday of human migration,[2] in particular from Europe to the United States. The Convention relating to the Status of Refugees of 28 July 1951 (Geneva Refugee Convention, GRC)[3] was a response initially confined to the huge migration flows in Europe in the aftermath of

[1] Anthony J. Marsella and Erin Ring, 'Human migration and immigration: An overview', in Leonore Loeb Adler and Uwe P. Gielen (eds.), *Migration: Immigration and emigration in international perspective* (Westport: Praeger, 2003) 3-23, pp. 3-4.

[2] Marsella and Ring, 'Human migration and immigration: An overview', p. 5.

[3] UNTS Vol. 189, p. 137.

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the Second World War and the Nazi terror,[4] before its personal scope was extended by the New York Protocol relating to the Status of Refugees of 31 January 1967 to cover all refugees.[5] It is true that post-1945, migration has been curbed in particular by European States; and while the free flow of products and services in a global economy has been fostered and welcomed, the free movement of human beings faces more scepticism, even as an economic factor within the European Union and its internal market.[6]

Yet from 2015 onwards, the migratory pressure on European but also other States increased and the new wave of migration is not only being induced by economic reasons but based on a variety of causes, including violence, armed conflicts and even environmental threats.[7] In September 2019, the United Nations found that the global number of migrants had reached 272 million, with Asia (83,6 million) and Europe (82,3 million) hosting more than half of them, and established that migrants make up 3.5 % of the world population.[8] Estimates say that the number of migrants is likely to increase in the future so that the topic will remain on the agenda of domestic and international politics.

However, current migration is different from the previous movement of people. As revealed by archaeological discoveries, migration has also been a matter of concern

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[4] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), pp. 91-3.

[5] UNTS Vol. 606, p. 267.

[6] Jonathan Tomkin, 'Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union' (2011) 24 Immigration and Asylum Law and Policy in Europe 23-45, pp. 25, 28, 29, 35 et seqq.; Francesco de Cecco, 'Fundamental Freedoms, Fundamental Rights and the Scope of Free Movement Law' (2013) 14 German Law Journal 383-406, p. 405; Jef Huysmans, 'The European Union and the Securitization of Migration' (2000) 38 Journal of Common Market Studies 751–77. It is true that Art. 45 (1) EU-CFR as well as Art. 21 (1) TFEU provide for general freedom of movement of EU citizens and Art. 45 (1) TFEU provides for the free movement of workers; however, the general freedom of movement can be restricted more easily – as substantiated by secondary EU law – and the member States of the EU only reluctantly accepted the free movement of workers, cp. Stephan Hobe and Michael Lysander Fremuth, *Europarecht* (München: Vahlen, 2020), § 15 para. 37, § 17 paras. 10, 31-6. In reaction to the spread of the coronavirus SARS-CoV-2 after February 2020, many member States of the EU have closed their borders easily or enacted severe restrictions for entry while at the same time the importance of the free flow of goods has been constantly stressed.

[7] Etienne Piguet, 'Linking climate change, environmental degradation, and migration: a methodological overview' (2010) 1 Wiley Interdisciplinary Reviews: Climate Change 517-24, p. 518; for further reading see Jane Mc Adam, *Climate change, forced migration, and international law* (Oxford: Oxford University Press, 2012).

[8] Exact numbers and information can be found under https://www.un.org/en/sections/issues-depth/migration/index.html (last accessed 20 March 2020).

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in the past, but in the absence of established legal systems, conflicts induced by migration were often 'solved' by violence.[9] Today, migration has become a legal question based on the distinction between citizens and foreigners, as well as on the conception of territories and borders. Although even at the time of the Greek *poleis* and the Roman Empire, a distinction between citizens and foreigners existed, it was the emergence of the modern concept of statehood after the Peace of Westphalia in 1648 in particular that elevated migration from a predominantly societal to a legal issue. As a political model providing for order, the State was no longer identified with the ruler *in persona* but became defined by the rule over a specific territory demarcated by borders.[10] Accordingly, crossing a border became a concern of national law. As migration often concerns more than one State, public international law seems the adequate legal order to deal with upcoming questions. Moreover, public international law is still founded on the idea of territorial States[11] and governed by a geographical division of the world in spheres of jurisdiction, as well as the distinction between citizens and foreigners.[12]

With regard to human rights, however, public international law has partly transcended the concept of territorial States and the distinction between citizens and foreigners: human rights are the birth rights of *all* human beings irrespective of their location and their legal status – they claim to be universal.[13] Due to these specifics, the human rights dimension of migration is of utmost importance and significance.

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[9] Tom Higham/Katharina Douka/Rachel Wood, et al., 'The timing and spatiotemporal patterning of Neanderthal disappearance' (2014) 512 Nature 306-9; Phillip Walker, 'A Bioarchaeological Perspective on the History of Violence' (2001) 30 Annual Review of Anthropology 573-96, pp. 588-9. In his classic course at The Hague Academy in 1927, Varlez explained that the word 'migrate' was not utilized prior to the 12th century; in the past, when migration was ordered by a war lord or a king who wanted to conquer a territory, it was called an invasion, cp. Louis Varlez, 'Les Migrations Internationales et leur Réglementation' (1927) 20 Recueil des Cours 165-368, p. 172.

[10] Daud Hassan, 'Rise of Territorial State and the treaty of Westphalia' (2006) Yearbook of New Zealand Jurisprudence Special Issue 62-70, pp. 65-7; see Hans Morgenthau and Kenneth W. Thompson (eds.), *Politics among Nations: The Struggle for Power and Peace,* 6th edn. (New York: New York Knopf, 1985), p. 294 where he stated that 'the Treaty of Westphalia (...) made the territorial state the cornerstone of the modern state system'.

[11] In the case of international protection the continuing relevance of the nation State is proven by the fact that in case of internal flight alternatives the asylum-seeker might be rejected; see also Robert Jennings and Arthur Watts, *Oppenheim's International Law: Volume 1 Peace*, 9th edn. (Oxford: Oxford University Press, 2008), paras. 33-4, 169.

[12] Kay Hailbronner and Jana Gogolin, 'Aliens' (2013) *Max Planck Encyclopedia of International Law*, paras. 1-4; for the distinction in EU Law see also Daniel Thym, 'Citizens' and 'Foreigners' in EU Law: Migration Law and its Cosmopolitan Outlook' (2016) 22 European Law Journal 296-316.

[13] World Conference on Human Rights, 25. June 1993, Vienna Declaration and Programme of Action, para 32; Declaration of the high-level meeting of the GA on the rule of law at the national and

In the present article, the relationship between human rights and migration will be addressed, with a particular focus on the question of asylum. *Firstly*, the question shall be answered as to whether there is a human right to asylum (II.). *Secondly*, potential human rights substitutes to tackle the lack of a human right to asylum will be discussed (III.), before a conclusion is *finally* drawn that encompasses an outlook (IV.).

II. A Human Right (to Be Granted) Asylum?

As a 'right to asylum' is often invoked and discussed, first, the notion 'asylum' will be clarified before the existence of such a right in international, regional and domestic law is analysed.

1. The Notion of Asylum and the Distinction between Asylum and Migration

'Migration' is not a recognised term under general international law[14]; it denotes the process of human mobility and encompasses in particular persons leaving their home country or region to move to another country or region for different reasons.[15] In contrast to this more factual understanding of human movement, 'asylum' describes a *legal* status of protection which is granted by a State on its territory[16] to a person facing persecution, and which entails the enjoyment of specific rights.[17] These regularly include the right to lawfully enter and stay in that State's territory, to be protected from being expelled or extradited, and to be granted human rights, national treatment, and liberty.[18]

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international levels, UNGA Res. 67/1 of 24 September 2012, para 6: 'The universal nature of [all human rights and fundamental freedom] is beyond question'; Jack Donnelly, 'The relative universality of human rights' (2007) 29 Human Rights Quarterly 281-306, p. 283; Michael Lysander Fremuth, *Menschenrechte* (Berlin: Berliner Wissenschaftsverlag, 2019), pp. 26-31.

[14] Dieter Kugelmann, 'Migration' (2009) *Max Planck Encyclopedia of Public International Law*, para. 3.

[15] Kugelmann, 'Migration', para. 1; Aleksandr Dontsov and Olga Zotova, 'Reasons for Migration Decision Making and Migrants Security Notion' (2013) 86 Procedia - Social and Behavioral Sciences 76-81.

[16] 'Territorial asylum' has to be differentiated from the more controversial 'diplomatic asylum', see Kay Hailbronner and Jana Gogolin, 'Asylum, Territorial' (2013) *Max Planck Encyclopedia of International Law*, para. 2; ICJ, *Colombian-Peruvian asylum case*, Judgment, I.C.J. Reports 1950, pp. 266, 274-5 calling 'diplomatic asylum' an intervention into the sovereignty of the territorial State.

[17] Eleanor Drywood, 'Who's in and who's out? The court's emerging case law on the definition of a refugee' (2014) 51 Common Market Law Review 1093-1124.

[18] Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5 Duke Journal of Comparative & International Law 1-33, p. 3; Alice Edwards, 'Human Rights, Refugees, and The Right To Enjoy Asylum' (2005) 17 International Journal of Refugee Law 293-330, pp. 302-4; on the

Historically, the notion of asylum derives from the ancient Greek word '*asylon*', which described a holy place where persons were free from seizure.[19] Tracing back to antiquity, a long-standing practice of political entities and religious institutions granting such protection to persons facing the risk of political and in particular religious persecution is recorded.[20] Furthermore, in these early times the institution of asylum was already addressed and accepted by scholars of public international law such as Hugo Grotius.[21] Today, granting asylum is regarded as an emanation of State sovereignty which has to be respected by other States and neither constitutes an unlawful interference nor an unfriendly act.[22]

The interest in being granted asylum can be the motivation behind migration in a broader sense. While migration might be based on the free choice of people and may arise for various reasons – including the quest for a better and more economically secure life –, asylum seekers feel forced to leave their country of origin for the legally recognised reason of persecution.[23] Thus, asylum is the reaction to specific causes behind migration. The distinction between migrants and asylum seekers is of great importance in domestic and international law,[24] in particular since no right to freedom of movement is recognised on the global scale.[25] While all human

consequence under EU Law see e.g. Judgment of the ECJ of 14 May 2019, *M and Others v Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17, EU:C:2019:403, para. 104 et seqq. See also Hailbronner and Gogolin, 'Asylum, Territorial', para. 4 stressing that asylum does not necessarily imply a right of residence or to remain; according to María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 International Journal of Refugee Law 3-28, p. 9 the right to reside is the distinct feature of asylum.

[19] Boed, 'The State of the Right of Asylum in International Law', p. 2; Maarten den Heijer, 'Art. 18 – Right to Asylum', in Steve Peers/Tamara Hervey/Jeff Kenner and Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 1st edn. (Oxford: Hart Publishing, 2014), para. 18.06.

[20] Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (London: Routledge, 2018), pp. 6-30; Hailbronner and Gogolin, 'Asylum, Territorial', paras. 6-10.

[21] Hugo Grotius, *De Jure Belli Ac Pacis* (Tübingen: Mohr, 1950) 2nd Book, Chap. 2, XVI; Chap. 21, III, V; 3rd Book, Chap. 20 XLI.

[22] ICJ, *Colombian-Peruvian asylum case*, Judgment, I.C.J. Reports 1950, pp. 266, 274 calling 'territorial asylum' (extradition) a normal exercise of territorial sovereignty; see also Art. 1 (1) UN Declaration on Territorial Asylum of 14 December 1967, UN Doc. A/RES/2312 (XXII).

[23] Christine Langenfeld, 'Asyl und Migration unter dem Grundgesetz' (2019) 38 Neue Zeitschrift für Verwaltungsrecht 677-84, p. 677.

[24] Kugelmann, 'Migration', paras. 23, 31-2, 45.

[25] Cp. Art. 12 (I) ICCPR, granting the right to liberty of movement only to persons which are lawfully within the territory of the respective State; Human Rights Committee, Communication no. 77/1980 (Samuel Lichtensztejn v. Uruguay), UN Doc. CCPR/C/18/D/77/1980, para. 8.3; EctHR, 13.11.2003,

beings have the right to leave any country, including their own,[26] only citizens enjoy the right to enter their home States.[27] Furthermore, the right to freedom of movement and the liberty to choose one's residence is confined to the territory where one is lawfully staying.[28] Accordingly, no one is entitled to freely decide to enter or take residence in other States. Asylum, however, might entail such a right to enter and stay, as well as to choose one's residence.

In current debates, a human right to asylum is frequently invoked, quite often without reference to differentiations between migration, international and subsidiary protection, and asylum in a strict sense. The first aspect to be addressed should therefore be the question of whether such a right actually exists. This requires a closer look at the different potential sources of human rights law.

2. Universal Declaration of Human Rights

On the international level, modern human rights development commenced with the landmark Universal Declaration of Human Rights (UDHR) as a resolution adopted by the United Nations General Assembly (UNGA) in 1948.[29] The UDHR mentions a right to asylum in Art. 14, para. 1 of which states:

> *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*

Quite often, Art. 14 UDHR is invoked as proof of the existence of a human right to asylum. However, a careful reading shows that under Art. 14, only the right to *seek* asylum and to *enjoy* it *once it has been granted* is protected. Accordingly, for the matter under consideration, the most important part of the norm seems to be that which is missing: there is no right to be *granted* asylum, as granting asylum is still regarded as a State's sovereign decision.[30] One might argue, though, that to 'enjoy

application no. 66485/01 (Napijalo v. Croatia), para. 68; further Eckhart Klein, 'Movement, Freedom of, International Protection' (2007) *Max Planck Encyclopedia of International Law,* paras. 2, 5.

[26] Cp. Art. 13 (2) UDRH; Art. 12 (2) ICCPR; Art. 2 (2) Protocol No. 4 ECHR.

[27] Cp. Art. 13 (2) UDHR; Art. 12 (4) ICCPR; Art. 3 (2) Protocol No. 4 ECHR

[28] Cp. Art. 12 (1) ICCPR; Art. 2 (1) Protocol No. 4 ECHR; see however Art. 13 (1) UDHR which is more broadly framed.

[29] UNGA, International Bill of Human Rights, UN Doc. A/RES/217(III) of 10 December 1048.

[30] See 1967 Declaration on Territorial Asylum, UN Doc. A/RES/2312 (XXII); Nihal Jayawickrama, 'The Right to Freedom of Movement', in Nihal Javawickrama (ed.), *The Judicial Application of Human Rights Law,* 2nd edn. (Cambridge: Cambridge University Press 2017) 448-89, p. 480; Colin Harvey, 'Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy', in Frances Nicholson and Patrick Twomey (eds.), *Current Issues in UK Asylum Law and Policy* (Dartmouth: Ashgate, 1998) 213-34, pp. 213, 221; Felice Morgenstern, 'The Right of

asylum' would logically encompass asylum to be granted, as well as that other human rights norms also use the phrase 'enjoy' to define a protected interest which is granted implicitly, e.g. to enjoy the right to property,[31] the cultural rights of minorities[32] or workers' rights.[33] However, the more narrow literal and systematic reading of the norm adopted here is supported by its drafting history.[34] A clause on asylum was first introduced by John Humphrey as the right of States to grant asylum to political refugees (Art. 34 draft).[35] A later draft added the perspective of persons concerned, stating that '*everyone has the right to escape persecution by seeking refuge on the territory of the State which would consent to grant him asylum*'.[36] The Human Rights Commission reinforced the proposals of the drafting committee and submitted a proposed wording according to which '*everyone shall have the right to seek and be granted asylum from persecution*' (Art. 11).[37] However, Chairperson of the UN Human Rights Commission Eleanor Roosevelt was already sceptical about a right *to be granted* asylum, doubting '*whether it was within the province of the United Nations to tell Member States that they must grant asylum.*'[38] Nevertheless, a majority in the drafting committee adhered to the broad definition of the right to asylum,[39] which afterwards met strong opposition from individual States. The proposal of Saudi Arabia to delete the phrase '*and be granted*'[40] found sufficient support. After a

Asylum' (1949) 26 British Yearbook of International Law 327-57, pp. 335-7; very critical with regard to a right to seek asylum without an assurance of receiving it Hersh Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 British Year Book of International Law 354-81, p. 373.

[31] Cp. Art. 1 (1) Protocol No. 1 ECHR.

[32] Cp. Art. 27 ICCPR.

[33] Cp. Art. 7 ICESCR.

[34] Hanna-Mari Kivistö, 'The Status of the Right to Political Asylum: A Rhetorical Analysis of German and United Nations Debates', in Kari Palonen/José María Rosales and Tapani Turkka (eds.), *The Politics of Dissensus: Parliament in Debate*, 1st edn. (Santander: Cantabria University Press, 2014) 449-74, pp. 452-9.

[35] UN Doc. E/CN.4/AC.1/3/Add.1, p. 281.

[36] UN Doc. E/CN.4/AC.1/W.2/Rev.2, p. 3.

[37] Commission on Human Rights: Report to the Economic and Social Council on the 2nd Session of the Commission, UN Doc. E/600 (SUPP), p. 16; UN Doc. E/CN.4/95, p. 7; UN Doc. E/CN.4/AC.1/20, p. 5.

[38] UN Doc. E/CN.4/AC.2/SR.5, p. 5.

[39] For an overview of the controversial discussions see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), pp. 75-9.

[40] UN Doc. A/C3/241, p. 1.

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controversial discussion,[41] the proposal of the United Kingdom[42] to replace the phrase '*and be granted*' by the phrase '*and to enjoy*' was accepted.

The text finally adopted, confining Art. 14 UDHR to the right to merely seek and enjoy asylum, resulted from the reluctance of States to accept an obligation to grant asylum under circumstances defined by international and not only domestic law. The States intended to preserve their sovereign autonomy to decide upon the question of granting asylum, the criteria to be applied, as well as the legal design of domestic asylum systems.

Accordingly, Art. 14 UDHR cannot be interpreted as including a right to be granted asylum.

3. Core International Human Rights Treaties

As a resolution of the UNGA, the UDHR in itself is not legally binding.[43] Irrespective of the question as to what degree the UDHR constitutes customary international law[44], it has inspired the further development of human rights and their transformation into binding international treaty law.

In particular, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been negotiated and ratified to implement and complement the rights envisaged in the UDHR. Together, these three documents are labelled the 'International Magna Carta of Human Rights'. Neither of these two treaties, however, even mentions asylum – and this silence is telling. Proposals have been made to include a comprehensive right to asylum but the international community of States was not even willing to introduce into the Covenants the narrow human right to seek and enjoy asylum.[45] The later negotiated and ratified core international human rights

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[41] Cp. UN Doc. A/C.3/SR 121, pp. 327-40; see also Morgenstern, 'The Right of Asylum', pp. 335-7; Morsink, 'The Universal Declaration of Human Rights: Origins, Drafting, and Intent', pp. 77-9.

[42] UN Doc. A/C.3/253, p. 1.

[43] Hilary Charlesworth, 'Universal Declaration of Human Rights (1948)' (2008) *Max Planck Encyclopedia of International Law*, para. 13.

[44] Hurst Hannum, 'Status of the Universal Declaration in Customary Law', in *Status of the Universal Declaration in National and International Law* (1995/1996) 25 Georgia Journal of International and Comparative Law 317-51.

[45] UN Doc. A/2929, Chap. VI, paras. 62, 65-9; Commission on Human Rights, Report to the Economic and Social Council on the eighth session of the Commission, UN Doc. E/CN.4/669, paras. 201-4; for the proposal of Yugoslavia see UN Doc. E/CN.4/573, p. 5; Boed, 'The State of the Right of Asylum in International Law', p. 10.

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treaties[46] do not contain a right to asylum either. Further proof of the States' unwillingness to accept a right to be granted asylum is offered by a systematic interpretation. As shown above (see II.1.), international human rights law provides for a right to emigration, i.e. to leave any country, including one's own, but not for a right to enter the territory of another State as a normative corollary. The fact that nationals cannot request asylum in their home States, and that the right to enter a specific State is confined to its citizens (see II.1.) confirms the absence of a right to be granted asylum.

In response to the failure to include an asylum clause in the international human rights treaties, attempts to create a universal convention on a right to asylum started in the early 1970s. Some States favoured a duty to grant asylum,[47] however, the UN Conference on Territorial Asylum ended without any result and due to divisions among States, the UNGA did not pursue this issue further.[48]

Accordingly, a literal, systematic, and historical interpretation shows clearly that international human rights law does not provide for a right to asylum.

4. Geneva Convention on Refugees

It is the Geneva Refugee Convention (GRC) that is intended to mitigate the situation of persons facing persecution, and which is serving as foundation for most of today's national asylum regimes.[49] Its definition of refugees (Art. 1 A (2)) is, however, a narrow one:[50] Refugees are persons that have left their countries of origin due to the

> '*well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion*' and who

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[46] See https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx. (last accessed 20 March 2020).

[47] Boed, 'The State of the Right of Asylum in International Law', p. 13.

[48] Hathaway, 'The Rights of Refugees under International Law', p. 112; Guy S. Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 363-5.

[49] Hailbronner and Gogolin, 'Asylum, Territorial', para. 3.

[50] Angelika Nußberger, 'Flüchtlingsschicksale zwischen Völkerrecht und Politik' (2016) 35 Neue Zeitschrift für Verwaltungsrecht 815-22, p. 817; Krista Daley and Ninette Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' (2000) 12 International Journal of Refugee Law 148–74; Alice Edwards, 'Age and gender dimensions in international refugee law' and Rodger Haines, 'Gender-Related Persecution', in Erika Feller/Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 46–80 and 319-50 respectively; UNHCR, Convention and Protocol relating to the Status of Refugees, Introductory Note (UNHCR, Geneva Switzerland, 2011) p. 3, available at http://www.unhcr.org/3b66c2aa10.html (last accessed 20 March 2020).

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> are '*unable or, owing to such fear, [...] unwilling to avail [themselves]of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence as a result of such events, [are]unable or, owing to such fear, [are]unwilling to return to it.*'

The GRC does recognise in its preamble that granting asylum may place unduly heavy burdens on the countries concerned, and – irrespective of proposals to insert an asylum clause – it does not oblige them to grant asylum.[51] The rights under the GRC, i.e. human rights combined with a graduated level of equal treatment to citizens/nationals (Art. 3-34 GRC), constitute rights *in* asylum not *to* asylum.[52] The Convention literally does not even grant a right to enter the territories of the parties to the Convention,[53] nor does it oblige the State parties to legitimize the presence of refugees or award them a specific legal status. It only prohibits imposing criminal sanctions on persons who have transgressed borders if they are able to present good cause for being in the country illegally (Art. 31). This provision might provide for a right to temporary admission for asylum seekers to access refugee procedures, without, however, rendering their presence lawful.[54] Even though national asylum systems might be based on the GRC, they frequently transcend the limited rights enshrined in the GRC.

5. New York Declaration for Refugees and Migrants as well as the Migration and Refugee Compacts

In September 2016, the Heads of State and Government and High Representatives acting as the UNGA addressed the large movements of refugees and migrants by

[51] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (2019), UN Doc. HCR/1P/4/ENG/REV. 4, para. 25; Christian Tomuschat, 'A Right to Asylum in Europe' (1992) 13 Human Rights Law Journal 257-65, p. 258; Boed, 'The State of the Right of Asylum in International Law', p. 11.

[52] Paul Weis, 'The Refugee Convention 1951: The Travaux Preparatoires analysed with a commentary by Dr. Paul Weis', available at https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html (last accessed 20 March 2020), p. 241; Dieter Kugelmann, 'Refugees' (2010) *Max Planck Encyclopedia of Public International Law*, para 14; Nußberger, 'Flüchtlingsschicksale zwischen Völkerrecht und Politik', pp. 816-7 indicating that protection under the GRC requires presence in the territory.

[53] Nußberger, 'Flüchtlingsschicksale zwischen Völkerrecht und Politik', p. 817; Stefanie Schmahl and Florian Jung, 'Die Genfer Flüchtlingskonvention: "Magna Carta" des Flüchtlingsrechts' (2018) 3 Neue Zeitschrift für Verwaltungsrecht-Extra 1-8, pp. 2, 8; Boed, 'The State of the Right of Asylum in International Law', pp. 17, 26.

[54] Goodwin-Gill and Mc Adam, 'The Refugee in International Law', p. 384.

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adopting the New York Declaration for Refugees and Migrants[55] as a political declaration preceding the adoption of the Compacts for migration and on refugees.[56] The New York Declaration differentiates between migrants, refugees, and asylum-seekers (cp. paras. 2, 3). Whenever it mentions 'asylum' in combination with subjective rights of individuals, the declaration is confined to the right to *seek* asylum (cp. paras. 27, 67, 70), which is, furthermore, separated from asylum as a respected institution (para. 67 first sentence) on the one hand and the principle of non-refoulement on the other hand (para. 67 second sentence). Accordingly, not even when facing a challenging situation, such as that concerning the global movement of people since 2015, have States been willing to go beyond Art. 14 (1) UDHR and accept the existence of a right to be granted asylum.

While the Global Compact for Safe, Orderly and Regular Migration[57] does not mention the notion 'asylum', the Global Compact on Refugees[58] reiterates that granting asylum might place unduly heavy burdens on certain countries (para. 2), but falls short – like the GRC – of claiming a right to asylum. In a footnote, it refers to the right to seek asylum under Art. 14 (1) UDHR as part of a general reference to human rights (para. 5, footnote 5), but apart from that, the Global Compact focuses on supporting asylum systems to become or remain '*in line with applicable international, regional and national instruments and laws*' (para. 62). Obviously, the aggravated situation regarding global migration after 2015 has not led the international community of States to reconsider a human right to asylum beyond the ambit of 1948 as reflected in Art. 14 (1) UDHR.

6. The Right to Asylum on the Regional and National Level

Even though this article is focused on international human rights law on the universal level, a brief glimpse into selected regional and national legal orders with regard to a right to asylum shall not be omitted.

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[55] UNGA, New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1 of 19 September 2016.

[56] Further information: UN, Global Compact on Refugees (2018), available at https://www.unhcr.org/5c658aed4 (last accessed 7 April 2020); and Global Compact for safe, orderly and regular migration, Intergovernmentally negotiated and agreed outcome (2018), available at https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/180713_Agreed-Outcome_Global-Compact-for-Migration.pdf (last accessed 20 March 2020).

[57] UNGA, UN Doc. A/RES/73/195 of 19 December 2018.

[58] UN, Global Compact on Refugees-Booklet, 2018, para 2, available at https://www.unhcr.org/5c658aed4 (last accessed 24 March 2020); affirmed by the resolution adopted by the UNGA on 17 December 2018, UN Doc. A/RES/73/151, para. 23.

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A) The European Level

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR)[59] constitutes the first binding regional human rights treaty which claims to be a constitutional order for Europe[60] and which has been inspired by the UDHR. However, not even the narrow right to asylum in the Declaration (see above II.2.) was enshrined in the ECHR and a proposal to include a comprehensive right to asylum in the Protocol No. 2 to the ECHR was defeated.[61] In accordance with this, the European Court of Human Rights (ECtHR) found in its settled case-law, that '[...] *neither the Convention nor its Protocols protect, as such, the right to political asylum.*'[62] The Court rather stresses that the parties to the Convention preserve their right and autonomy to decide upon admission to their territory, residence, and the removal of foreigners.[63]

In contrast, the Charter of Fundamental Rights of the European Union (EU-CFR)[64] in its Art. 18 contains a clause that is labelled 'right to asylum'. In the past, it has been discussed to what extent Art. 18 EU-CFR actually provides for subjective rights.[65] Meanwhile, the European Court of Justice (ECJ) has established that Art. 18 EU-CFR constitutes a fundamental right and not merely a principle.[66] However, the court has confined the material scope of Art. 18 EU-CFR to the principle of non-

[59] Council of Europe, ETS No. 005.

[60] The Court has pointed out the Convention's role as a 'constitutional instrument of European public order' in the field of human rights, cp. ECtHR, 30.6.2005, application no. 45036/98 (*Bosphorus v. Ireland*), para. 156.

[61] Cp. Council of Europe, Assembly, Legal Committee, Doc. 1329 and Recommendation 293 (1961); see also Council of Europe, Committee of Ministers, Declaration on Territorial Asylum of 18 November 1977, para. 2 merely reaffirming the right of the member States to grant asylum; see further den Heijer, 'Art. 18 – Right to Asylum', para. 18.09.

[62] Cp. ECtHR, 21 November 2019, application no. 47287/15 (*Ilias and Ahmed v. Hungary*), para. 213; 3 October 2017, application no. 8675/25 and 8697/15 (*N.D. and N.T. v. Spain*), para. 188; 28 February 2008, application no. 37201/06 (*Saadi v. Italy*), para. 126; 17 December 1996, application no. 25964/94 (*Ahmed v. Austria*), para. 38.

[63] E.g. ECtHR, 28.2.2008, application no. 37201/06 (*Saadi v. Italy*), para. 124.

[64] EU, OJ C 326, 26.10.2012, pp. 391-407.

[65] Cp. Salvatore Fabio Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23 European Law Journal 94–117, pp. 102-4; in favour of a subjective right: den Heijer, 'Art. 18 – Right to Asylum', para. 18.28.

[66] Judgment of the ECJ of 24 June 2015, *H. T. v Land Baden-Württemberg*, C-373/13, EU:C:2015:413, para. 65; Judgment of the ECJ of 19 June 2018, *Sadikou Gnandi v État belge*, C-181/16, EU:C:2018:465, para. 33.

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refoulement (also enshrined in Art. 19 II EU-CFR)[67], which is in line with the wording of the provision referring to the GRC and thereby incorporating its narrow understanding of refugee protection. Even though the right to asylum under Art. 18 EU-CFR is linked to the status of refugees under the GRC, it is disputed whether the norm adds further content to the protection provided under the GRC.[68] In any case, there are strong arguments for holding that the norm grants an individual right of protection in accordance with the GRC.[69] Finally, EU secondary law compensates for potential lacunae on the level of EU primary law by way of detailed rights granted not only to refugees but also to persons eligible for subsidiary protection (Art. 20-35 Qualification directive[70]).

B) Other Regional Human Rights Systems

A right to asylum is also mentioned in other regional human rights instruments. Art. 22 (7) of the American Convention on Human Rights provides for the right to be granted asylum '*in accordance with the legislation of the State and international conventions*.' It was feared that the referral to domestic and international law could weaken the asylum clause.[71] However, the Inter-American Court of Human Rights, most recently in 2018 in a landmark advisory opinion,[72] has rejected such an understanding and adhered to an interpretation of this norm as an individual right not only in line with the GRC but also in line with the evolving development of international law to ensure protection '*in light of current conditions regarding the*

[67] Cp. ECJ 19 June 2018, *Sadikou Gnandi v État belge*, para. 53; cp. Hans-Michael Wolffgang, 'Art. 18 GRCh', in Carl Lenz and Klaus-Dieter Borchardt (eds.), *EU-Verträge: Kommentar*, 6th edn. (München: Beck, 2012), para. 3

[68] See on the one hand Hailbronner and Gogolin, 'Asylum, Territorial', para. 36; and on the other hand den Heijer, 'Art. 18 – Right to Asylum', paras. 18.06-7 stressing the autonomous meaning of the right to asylum and holding that it might serve as a vehicle to invoke other rights under the EU-CFR. However, the Austrian Constitutional Court has stated in its settled case law that Art. 18 EU-CFR does not go beyond the protection granted under the GRC, see Michael Holoubek, 'Die Kooperation der Verfassungsgerichte in Europa – aktuelle Rahmenbedingungen und Perspektiven: Landesbericht Österreich', XVIth Congress of the Conference of European Constitutional Courts, p. 4, available at https://www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB_Autriche_DE.pdf (last accessed 20 March 2020).

[69] Den Heijer, 'Art. 18 – Right to Asylum', paras. 18.37-41.

[70] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20 December 2001, pp. 9-26.

[71] Boed, 'The State of the Right of Asylum in International Law', pp. 11-2.

[72] IACrtHR, Advisory Opinion OC-25/18 of 30 May 2018, available at http://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf (last accessed 20 March 2020).

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need for international protection'.[73] This need could also derive from generalised violence, foreign aggression, massive human rights violations, and other situations not falling under the GRC.[74] The court finally deduced a positive obligation for States to allow entry to their territories and to enable access to the asylum or refugee determination procedure.[75]

In a comparable manner, Art. 12 (3) of the African Charter on Human and Peoples' Rights states: '*Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.*' However, there is, as yet, no jurisprudence in Africa comparable to the progressive approach adopted by the Inter-American Court. Therefore, scholars deplore referral to domestic law which in most countries does not exist, thereby contradicting the idea of an individual right to obtain asylum.[76] However, the duty of non-refoulement is also recognised in Africa.[77]

C) The National Level

An in-depth analysis of various national legal systems is beyond the scope of this article. It can be noted, however, that on a global scale relatively few national (constitutional) legal systems contain a right to be granted asylum.[78]

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[73] IACrtHR, Advisory Opinion OC-25/18, paras. 131-43.

[74] IACrtHR, Advisory Opinion OC-25/18, paras. 96, 129.

[75] IACrtHR, Advisory Opinion OC-25/18, para. 122.

[76] Statement by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the Occasion of the 2014 World Refugee Day Celebration, 20 June 2014 available at https://www.achpr.org/pressrelease/detail?id=215 (last accessed: 20 March 2020); see also Rachel Murray, 'Article 12: Freedom of Movement', in *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford: Oxford University Press 2019) 318-9, pp. 331-4.

[77] Art. II (3) Convention governing the Specific Aspects of Refugee Problems in Africa, 174, 10011 UNTS 14691; Hathaway, 'The Rights of Refugees under International Law', p. 118; regarding Art. 12 (3) of the Charter see Jamil Ddamulira Mujuzi, 'The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights' (2009) 9 African Human Rights Law Journal 160-82, p. 176; Murray, 'Article 12: Freedom of Movement', p. 333.

[78] Cp. Stephen Meili, 'The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?' (2018) 41 Fordham International Law Journal, 383-424, pp. 392 et seq.; see however den Heijer, 'Art. 18 – Right to Asylum', para. 18.22 listing several European constitutions providing for a right to asylum, though some of which, refer to statutory domestic law.

In Austria, for example, constitutional law does not provide for a specific right to asylum.[79] The ECHR is part of the Austrian constitutional order,[80] but – as shown above – it does not provide for such a right either (see II.6.A)). According to the jurisprudence of the Austrian Constitutional Court, fundamental rights under the EU-CFR have been equated with fundamental rights under the Austrian constitution ('*verfassungsgesetzlich gewährleistete Rechte*'), if they are comparable to existing rights under domestic law; thus, a violation of EU fundamental rights can be brought before the Constitutional Court.[81] Concerning the absence of a right to asylum in Austrian constitutional law, one might question whether Art. 18 EU-CFR can be equated with domestic fundamental rights under the condition of comparability. Yet, – as shown (see above II.6.A)) – the ECJ has interpreted and confined Art. 18 EU-CFR to contain only a subjective right to non-refoulement. As this fundamental principle is also part of the right to life and the prohibition of torture, both rights being well-established under Austrian constitutional law, it seems safe to assume that the narrow right to asylum according to Art. 18 EU-CFR is also a right guaranteed by the Austrian Constitution *(verfassungsgesetzlich gewährleistetes Recht)* if the Charter's scope of application is opened. In the end, and due to the narrow interpretation of Art. 18 EU-CFR, this adds little value to the general debate on a right to asylum under domestic law.

In contrast, the German Constitution ('*Grundgesetz*', GG) does provide for a fundamental right to asylum in Art. 16a GG.[82] The norm (as the former Art. 16 GG) was inserted into the Constitution in reaction to the Nazi tyranny and established an individual subjective right to be granted asylum in the case of individual political persecution even before the GRC had been adopted. This interpretation of Art. 16a GG is broadly in line with the understanding of the term 'refugee' under Art. 1 A (2) GRC. Even though the right to asylum under the German Constitution has for the

[79] Cp. Walter Berka/Christina Binder and Benjamin Kneihs, *Grundrechte* (Wien: Verlag Österreich, 2019), p. 298; Judith Putzer, 'Asylrecht und Schutz bei Abschiebung und Ausweisung', in Gregor Heißl (ed.), *Handbuch Menschenrechte*, 1st edn. (Wien: Facultas, 2009) 441-59, p. 441.

[80] Federal Law Gazette No. 59/1964, Art. 2; available at https://www.ris.bka.gv.at/Dokumente/BgblPdf/1958_210_0/1958_210_0.pdf (last accessed 20 March 2020).

[81] Austrian Constitutional Court, 14 March 2012, U 466/11 et al., selected judgements of the Austrian Constitutional Court can be accessed via https://www.vfgh.gv.at/rechtsprechung/Ausgewaehlte_Entscheidungen.en.html (last accessed 20 March 2020).

[82] For a brief introduction cp. Christian Bumke and Andreas Vosskuhle, *German Constitutional Law* (Oxford: Oxford University Press, 2019), pp. 302–11.

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most part been set aside by the protection granted under the GRC and EU Law,[83] its scope of protection might exceed the protection granted under the GRC and general public international law.[84] In particular, Art. 16a GG includes a genuine right to enter Germany and to reside there until the end of the asylum procedure.[85]

7. A Right to Asylum as Customary International Law or as a General Principle of Public International Law

Finally, it must be assessed whether a human right to asylum on the international level derives from other legal sources of public international law, i.e. from custom or from a general principle of law (cp. Art. 38 (1) ICJ-Statute).

Customary international law requires sufficient State practice which is underpinned by a corresponding conviction that the conduct is legally binding (*consuetudo et opinio iuris sive necessitatis*).[86] It has been held that the UDHR is an expression of customary international law, which would also cover the right to asylum under Art. 14.[87] Assuming this to be correct, this would, however, only cover the right to seek and enjoy asylum. Only few authors argue that the right to *receive* asylum – confined to refugees – is likewise already part of customary international law. They base this view on the increase in the number of conventions addressing asylum and on domestic law to show that a State practice associated with the necessary *opinio iuris* has emerged.[88] One might question the equation of international protection for refugees including non-refoulement and asylum (on the differences see below IV.). Irrespective of a deeper analysis of State practice, it is, however, more convincing to hold that the *opinio iuris* required for a general right to be *granted* asylum is absent.[89] *Opinio iuris* can be depicted by the conclusion of treaties, public statements, and

[83] Christine Langenfeld, 'Asyl und Migration unter dem Grundgesetz', pp. 678-9.

[84] German Constitutional Court, BVerfGE 56, p. 216 (235).

[85] German Constitutional Court, BVerfGE 56, p. 216 (238 et seqq.); 94, p. 49 (87, 105); Bumke and Vosskuhle, 'German Constitutional Law', p. 308 para. 1261.

[86] James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2019), pp. 21-8.

[87] On the discussion see Boed, 'The State of the Right of Asylum in International Law', p. 6.

[88] William Thomas Worster, 'The Contemporary International Law Status of the Right to Receive Asylum' (2014) 26 International Journal of Refugee Law 477-99, pp. 485-99.

[89] Cp. Drafting Documents for Art 14 (former Art 12) of the Universal Declaration of Human Rights, UN Doc. A/C.3/SR 121, pp. 327-40.

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even implicitly by unambiguous behaviour such as general practice.[90] In the case of asylum, however, States constantly refrain from accepting treaty obligations on the international level and the most recent public statements concerning refugees do not go beyond the right to *seek* (or enjoy) asylum (see above II.2.-5.). Accordingly, there is no argument to justify the existence of custom.[91]

Furthermore, it has been argued that asylum and the right to asylum have achieved the status of general principles of law, examples of which can be deduced from political and religious practices going back to ancient times in addition to the constitutional norms of many States and domestic asylum laws in general.[92] Scepticism and reluctance[93] are, however, justified. General principles of law serve the function of providing a norm or standard when treaty or custom is non-existent or inapplicable, i.e. to avoid legal lacunae as a 'gap filler', as well as assisting in interpreting treaty law.[94] It is generally recognised that such general principles derive from the national legal systems (*foro domestico*)[95] and provide for more abstract and general rules, as well as conceptions.[96] As a source of international law, a general principle has to be 'recognized by civilized nations' and to be transposed to the international legal system, i.e. it must be capable of existing within the framework of international law and not lead to distortions.[97] Furthermore, even if one does not

[90] Cp. ICJ, *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 paras. 70-80; however, the ICJ has also adopted a stricter approach, cp. Crawford, 'Brownlie's Principles of Public International Law', pp. 23-5.

[91] Consenting Goodwin-Gill and Mc Adam, 'The Refugee in International Law', p. 371: 'insufficient State practice *or* opinio juris'; Boed, 'The State of the Right of Asylum in International Law', pp. 14-6.

[92] Gil-Bazo, 'Asylum as a General Principle of International Law', pp. 14-28.

[93] Cp. Marcelo Vázquez-Bermúdez, ILC Special Rapporteur, Second report on general principles of law, A/CN.4/741, p. 5; Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21 International Community Law Review 307–24; who both ask for strict criteria and warn not to easily assume that a general principle of law exists.

[94] Mahmoud Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 Michigan Journal of International Law 768-818, pp. 776-9.

[95] See Marcelo Vázquez-Bermúdez, ILC Special Rapporteur, Second report on general principles of law, A/CN.4/741, p. 5 et seqq., who also considers another type of general principles which have been formed within the international legal system, p. 36 et seqq.

[96] Allain Pellet and Daniel Müller in Andreas Zimmermann/Christian J. Tams/Karin Oellers-Frahm and Christian Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd edn. (Oxford: Oxford University Press, 2019) Art. 38 paras. 251–67.

[97] Marcelo Vázquez-Bermúdez, ILC Special Rapporteur, Second report on general principles of law, A/CN.4/741, p. 6–36; Allain Pellet and Daniel Müller in Andreas Zimmermann/Christian J.

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accept the idea of a formal hierarchy of the legal sources according to Art. 38 (1) ICJ-Statute, general principles of law are a subsidiary or additional source of international law, in particular, they must not be invoked to contravene treaty law.[98]

With regard to a right to asylum as a general principle of law, it has to be stressed that there is broad diversity among national legal systems and their understanding of asylum. Not all of the constitutions or domestic asylum laws invoked actually enshrine a right to asylum; some are confined to merely affirming the non-refoulement-principle. Thus, it seems doubtful whether a right to asylum in the broader sense (see above II.1.) has emerged as a principle which is 'common' to the community of nations. Furthermore, national guarantees do not necessarily mean that a right to asylum is likewise transposable to the international level. A right granted under domestic law does not necessarily lead to a corresponding right under international law. This is reflected by provisions in international treaties which explicitly refer to asylum in accordance with domestic law (see above II.6.B)). If the question of transposability is also linked to the interest of avoiding a *non liquet*,[99] general principles cannot be invoked to override existing treaty law. The absence of a human right to be granted asylum is, however, not an accidental omission but an intentional decision taken by States; accordingly, a *non liquet* does not exist in this regard. It is not totally rejected by doctrine that general principles might also prevail over treaty rules.[100] However, as the conclusion of a treaty is an expression of the sovereignty of States and as they remain the predominant lawmakers in international law, one should be very reluctant to accept a right to be granted asylum as a general principle to prevail over conflicting treaty law; such an assumption might, if at all, be confined to such principles that reflect a norm of peremptory character.[101] This can be assumed for the prohibition of torture and a corresponding obligation of non-refoulment, but not for a right to be granted asylum in a broader sense.

Tams/Karin Oellers-Frahm and Christian Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd edn. (Oxford: Oxford University Press, 2019) Art. 38 paras. 268–70.

[98] Cp. Allain Pellet and Daniel Müller in Andreas Zimmermann/Christian J. Tams/Karin Oellers-Frahm and Christian Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd edn. (Oxford: Oxford University Press, 2019) Art. 38 paras. 271–303.

[99] Allain Pellet and Daniel Müller in Andreas Zimmermann/Christian J. Tams/Karin Oellers-Frahm and Christian Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd edn. (Oxford: Oxford University Press, 2019) Art. 38 para. 268.

[100] Giorgio Gaja, 'General Principles of Law' (2013) *Max Planck Encyclopedia of International Law*, para. 21.

[101] On the debate cp. Bassiouni, 'A Functional Approach to "General Principles of International Law"', pp. 779-81.

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8. Concluding Remarks

In sum, it may be concluded that current *international* law does not provide for a human right to be granted asylum.[102] A right to asylum has been enshrined in domestic and regional law. The broad variety of existing regulations and State practice, however, precludes the assumption that a right to be granted asylum can be deduced from custom or from a general principle of law as additional sources of public international law.

III. Human Rights Substitutes for the Absence of a Human Right to Be Granted Asylum

As public international law does not provide for a human right to be granted asylum, the question of human rights substitutes for persons in need of protection must be addressed. In particular, two human rights aspects deserve deeper scrutiny: the principle of non-refoulement (1.) and the prohibition of the collective expulsion of aliens (2.).

1. The Non-Refoulement Principle

In a broad sense, the principle of non-refoulement prohibits returning someone to a place where this person might face persecution for specific reasons or a violation of some of his or her fundamental human rights.[103] It has its roots in refugee as well as in human rights law.

A) Non-Refoulement Under the Geneva Refugee Convention

This cardinal principle, which emerged in 1933,[104] is enshrined in Art. 33 (1) GRC, which states that:

> '*no Contracting State shall expel or return 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 norm lists the criteria necessary for refugee status and combines them with the protection of life, freedom, and equality as obligations owed by the host State. Thus,

[102] Boed, 'The State of the Right of Asylum in International Law', p. 14; see also the conclusion after Part 2 Chap. 7 drawn by Goodwin-Gill and Mc Adam, 'The Refugee in International Law', pp. 414-5.

[103] Kugelmann, 'Refugees', paras. 29-34; Hailbronner and Gogolin, 'Asylum, Territorial', para. 33.

[104] Art. 3 Convention Relating to the International Status of Refugees, LNTS, Vol. CLIX No. 3663.

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a human rights dimension is enshrined in Art. 33,[105] i.e. the duty to protect and not to 'lend a hand' in specific human rights violations committed abroad.[106]

However, non-refoulement under the GRC only applies to refugees in the context of Art. 1A (2), requiring individual persecution for *specific* reasons – which have, despite their originally narrow scope, been interpreted broadly.[107] Confined to refugees, the exclusion of persons who have committed international core crimes or serious political crimes or have acted against the purposes and principles of the United Nations from the scope of the GRC (Art. 1F) also applies to non-refoulement under the GRC. Furthermore, Art. 33 GRC does not apply to a person who constitutes a danger to the security of the receiving country or its community (Art. 33 (2) GRC). Accordingly, Art. 33 GRC provides for a (limited) protection of human rights.

B) Non-Refoulement Under International Human Rights Law

The principle of non-refoulement has a further human rights dimension.

It can be established as a human right itself, as it has been incorporated into Art. 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT)[108], which obliges States not to

> '*expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*.'

The more far-reaching Art. 19 (2) EU-CFR states 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*.'

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[105] European Union Agency for Fundamental Rights, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law* (European Union Agency for Fundamental Rights, 2016), pp. 13-4.

[106] Kugelmann, 'Refugees', paras. 30-1; the same rational is adopted by the ECtHR with regard to non-refoulement under the ECHR: see ECtHR, 28 February 2008, application no. 37201/06 (*Saadi v. Italy*), para. 126.

[107] Nußberger, 'Flüchtlingsschicksale zwischen Völkerrecht und Politik', p. 817

[108] UNTS 1465, p. 85.

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Unlike Art. 3 CAT,[109] Art. 19 (2) EU-CFR is not confined to torture in a narrow sense but also includes the death penalty, inhuman and degrading treatment, which has been substantiated by EU secondary law.[110]

In most cases, however, the prohibition of refoulement is not explicitly enshrined but deduced by way of interpretation of other human rights. As can be exemplified by the sophisticated jurisprudence of the ECtHR, in particular the right to life,[111] the prohibition of torture[112] and the protection from bodily harm,[113] this prohibition can be interpreted as also prohibiting a refugee's return to a specific country if such legal interests are endangered. The corresponding obligations under the ICCPR have been interpreted in a comparable manner.[114]

The human rights-based non-refoulement-principle is legally more far-reaching than that under the GRC, the limitations of which (see above lit. A)) have no equivalent in human rights law. Accordingly, the ECtHR has stressed that e.g. the absolute

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[109] 'In its case law, the Committee has expressly stated that the scope of Article 3 CAT is limited to torture and does not extend to cruel, inhuman or degrading treatment encompassed in Article 16. [...] Article 3 CAT applies to all forms of capital and corporal punishment that must be considered torture in the sense of Article 1 CAT.' cp. Manfred Nowak/Moritz Birk and Giuliana Monina, *The United Nations Convention against Torture: A Commentary*, 2nd. edn. (Oxford: Oxford University Press, 2019), paras. 115, 127; according to the Committee against Torture, cruel, inhuman or degrading treatment can, however, serve as an indication for the threat of torture, cp. General Comment No. 4 on Article 3 (CAT/C/CG/4) of 4 September 2018, para. 28.

[110] Regulation No. 04/2013 of the European Parliament and of the Council; Art 5, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; Art 15 and 21 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (former Qualification Directive 2004/83/EC); cp. Judgment of the ECJ of 17 February 2009, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, C-465/07, EU:C:2009:94.

[111] Nuala Mole and Catherine Meredith, 'Asylum and the European Convention on Human Rights', no. 9 Human Rights Files (Strasbourg: Council of Europe, 2010), pp. 88-90; ECtHR, 8 November 2005, application no. 13284/04 (*Bader and Kanbor v. Sweden*), paras. 42-48.

[112] ECtHR, 7 July 1989, application no. 14038/88 (*Soering v. United Kingdom*), paras. 100-11; 17 December 1996, application no. 25964/94, (*Ahmed v. Austria*), paras. 39-47.

[113] Mole and Meredith, 'Asylum and the European Convention on Human Rights', pp. 100-2.

[114] For the right to life cp. Human Rights Committee, General Comment no. 36 on Article 6 (CCPR/C/GH/36) of 3 September 2019, paras. 30 et seq.; Mole and Meredith, 'Asylum and the European Convention on Human Rights', pp. 100-2; for the prohibition of torture cp. General Comment no. 20 on Article 7, adopted at the sixteenth session 1982, para. 9; for the right to personal security cp. General Comment no. 35 on Article 9 (CCPR//C/GC/35) of 16 December 2014, para. 57.

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character of the prohibition of torture allows no exception – not even in relation to a terrorist[115] or in times of heavy burdens deriving from a massive influx of migrants.[116]

Non-refoulement under Art. 3 or other human rights norms does not, however, provide a specific status or a right to a residence permit.[117] However, even without a legal title permitting a person to enter or stay in a certain territory, if this person may not be returned due to the non-refoulement-principle, he or she is *de facto* granted the right to remain within a foreign State's territory.

2. The Prohibition of the Collective Expulsion of Aliens

Another human rights provision that gained much relevance in the jurisprudence of the ECtHR with regard to migration in Europe is the prohibition of the collective expulsion of aliens. It is enshrined in Art. 19 (1) EU-CFR, as well as in Art. 4 Protocol No. 4 ECHR, which has not, however, been ratified by all State parties to the Convention.[118]

The ECtHR has defined the notion of expulsion as any measure of a State's competent authority that compels aliens to leave the country[119] against their will or that prevents them from reaching a country in cases in which they have previously been under the jurisdiction of that State, i.e. the removal of aliens to a third country carried out outside national territory.[120] An expulsion of a collective nature, i.e. measures directed against an alien solely for being part of a group, is prohibited. This means that non-nationals can be removed only after a reasonable and objective examination of each individual case in which he or she has been identified as well as

[115] ECtHR, 28 February 2008, application no. 37201/06 (*Saadi v. Italy*), paras. 124-7, 137-49; Fulvio Haefeli, 'Steuerung der Migrationsströme und Non-refoulement-Prinzip gemäß GFK und EMRK' (2020) 40 Zeitschrift für Ausländerrecht 25-33, pp. 27-8, who is sceptical about this jurisprudence.

[116] ECtHR, 23 February 2011, application no. 27765/09 (*Hirsi Jamaa and others v. Italy*), paras. 122-3.

[117] ECtHR, 15. September 2005, application no. 10154/04 (*Bonger v. The Netherlands*); 4 June 2013, application no. 68564/12 (*Naibzay v. The Netherlands*), paras. 22-30.

[118] In particular, Greece, Turkey and the United Kingdom – all countries which can easily be reached via the sea – have not ratified the protocol; cp. list of ratifications available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=ABpLQQcN (last accessed 20 March 2020).

[119] ECtHR, Decision of the Commission, 3 October 1975, application no. 7011/75 (*Becker v. Denmark*), para. 236; 23 February 2011, application no 27765/09 (*Hirsi Jamaa and others v. Italy*), para. 166.

[120] ECtHR, 23 February 2011, application no. 27765/09 (*Hirsi Jamaa and others v. Italy*), paras. 167-82.

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been given the chance to put forward arguments against this measure.[121] In particular, this ensures that asylum seekers or potential refugees' personal circumstances are examined and that they may bring forward reasons that justify their status as a refugee or their demand for protection.

A failure to meet these requirements by the domestic authorities will usually also violate the closely related right to an effective remedy to enforce the rights and freedoms of the Convention (Art. 13 ECHR).[122] In addition to the requirements under Art. 4 Protocol No. 4 to the ECHR, the ECtHR deduced from Art. 13 ECHR that to be effective, the remedy must have suspensive effect,[123] thus granting a temporary stay to migrants.

The prohibition of the collective expulsion of aliens does not depend on a title to enter a respective country and does not even require that a person actually falls under the definition of refugee or is finally granted asylum. The guarantee of not being collectively expelled, which is not limited by an explicit restriction clause,[124] rather serves to ensure that the requirements for the obligation to fulfil other refugee and human rights obligations are adequately assessed. The prohibition of the collective expulsion represents, so to speak, the door to facilitating an evaluation as to whether the doors of entry and residence have to be opened.

3. The Territorial Scope of the Migration-Related Human Rights Obligation

As migration is a phenomenon of human movement that often includes the crossing of borders, the territorial scope of application of the above-mentioned guarantees is obviously of specific importance. At the outset, it has to be stressed that States *de jure* are neither obliged to offer protection on a global scale,[125] nor are they generally obliged to issue humanitarian visas in their embassies.[126] The principle of non-

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[121] ECtHR, 23 February 2011, application no. 27765/09 (*Hirsi Jamaa and others v. Italy*), paras. 166, 177.

[122] ECtHR, 23 February 2011, application no. 27765/09 (*Hirsi Jamaa and others v. Italy*), paras. 197-207.

[123] ECtHR, 5 February 2002, application no. 51564/99 (*Čonka v. Belgium*), paras. 79-83; 23 February 2011, application no. 27765/09 (*Hirsi Jamaa and others v. Italy*), para. 199.

[124] See Christoph Grabenwarter, *European Convention on Human Rights Commentary* (London: Bloomsbury, 2013), P 4 Article 4 para. 4, who mentions that a restriction might be justified under the emergency clause of Article 15 ECHR.

[125] Cp. ECtHR, 13 February 2020, application no. 8675/15 and 8697/15 (*N.D. and N.T. v. Spain*), para. 221.

[126] As decided for EU law by the Judgment of the ECJ of 7 March 2017, *X and X v État belge*, C 638/16 PPU, EU:C:2017:173, holding that the EU-CFR is not applicable as EU secondary law does

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refoulement as well as the right not to be expelled collectively require a link to the jurisdiction of the State. Thus, States regularly demand that persons who invoke these rights have reached or are already within their territory.[127]

With regard to the protection offered by the GRC and the non-refoulement-principle, the United Nations High Commissioner for Refugees (UNHCR) has clearly stated that the prohibition of refoulement also covers 'pushbacks' at the border, i.e. situations in which a person at the border asks for protection but is still not within the territory of a State.[128] This 'softened' territorial requirement – States are bound by humanitarian obligations at their borders – is largely recognised by States[129] and in the literature,[130] even though it is not generally respected in practice[131] and not adopted by all courts.[132]

Generally, the ECtHR has stressed that jurisdiction in the sense of Art. 1 primarily means territorial jurisdiction, i.e. that usually persons within the territory of a State

not provide for humanitarian visas as the applicants in the main proceeding had argued. Cp. also ECtHR, 5 May 2020, application no. 3599/18 (*M. N. and others v. Belgium*), arguing against a "near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction".

[127] Goodwin-Gill and Mc Adam, 'The Refugee in International Law', pp. 206-8; dissenting Kugelmann, 'Refugees', para. 39: 'extraterritorial refoulement is subject to the same rules as any other refoulement'.

[128] E.g. UNHCR, Note on International Protection - Standing Committee 69th Meeting, 16 June 2017, EC/68/SC/CRP.12, paras. 22-4, which recognises the States' interest in border protection and management while at the same time stressing that asylum claims must be orderly processed.

[129] See Art. 3 (1) of the (non-binding) UN Declaration on Territorial Asylum of 14 December 1967, UN Doc. A/RES/2312 (XXII).

[130] See e.g. Júlia Iván, 'Where Do State Responsibilities Begin and End? Border Exclusions and State Responsibility', in Maria O'Sullivan and Dallal Stevens (eds.), *States, the Law and Access to Refugee Protection: Fortresses and Fairness*, 1st edn. (Oxford: Hart Publishing, 2017) 47-68, pp. 49-53; for an in-depth analysis see Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011), pp. 44-99 also discussing opposing views and State practice.

[131] A recent example is the pushbacks conducted by Greece at its border with Turkey starting at the end of February 2020 after Turkey 'opened' its borders and incited migrants to migrate to the European Union. Greece has declared that it will temporarily not accept asylum applications at all; cp. BBC News, 'Greece suspends asylum applications as migrants seek to leave Turkey', 1 March 2020, available at https://www.bbc.com/news/world-europe-51695468 (last accessed 20 March 2020).

[132] In particular the Supreme Court of the United States has rejected the extraterritorial application of the non-refoulement-principle, see SCOTUS, Sale v. Haitian Centers Council, 113 S Ct. 2549, 509 U.S. 155 (1993); for a follow-up on the remaining relevance of this decision, see Harold Hongju Koh, 'The Enduring Legacies of the Haitian Refugee Litigation' (2016/17) 61 New York Law School Law Review 31-66.

party to the Convention are protected by the said convention.[133] However, the Court has also essentially ruled out the permissibility of pushbacks at the border,[134] even on the High Seas after persons have reached a ship under the flag of a State party and hence fall under its jurisdiction.[135] That means that pushbacks can be unlawful even when conducted abroad. In a recent ruling, however, the Court has decided that a State might push back migrants who have crossed its borders illegally and using force,[136] or where a person does not make use of 'genuine and effective access to means of legal entry'.[137] At the same time, the ECtHR has underlined, that, for the latter justification to apply, the opportunity to file an application at the border must be provided;.[138] Thus, the ruling does not constitute a deviation from the general jurisprudence of the Court, but rather enables States to establish border management in accordance with their human rights obligations.

4. Concluding Remarks

The absence of a human right to be granted asylum can be explained by the interest of most States in defending their sovereignty and – as an emanation thereof – the right to establish their own immigration policies. The ECtHR has explicitly recognised this right, while stressing at the same time that having recourse to practices which are not compatible with obligations under the Convention cannot be justified.[139] This finding can be generalised: while enjoying the right to establish their own immigration policies, i.e. to decide upon the entry, residence and legal status of foreigners, States remain bound by international refugee and human rights law. These

[133] ECtHR, 7 July 1989, application no. 14038/88 (*Soering v. United Kingdom*), para 86; 12 December 2001, application no. 52207/99 (*Banković and Others v. Belgium and Others*), para. 59; 8 July 2004, application no. 48787/99 (*Ilaşcu and Others v. Moldova and Russia*), para 312; 29 January 2019, application no. 36925/07 (*Güzelyurtlu and Others v. Cyprus and Turkey*), para. 178; 13 February 2020, application no. 8675/15 and 8697/15 (*N.D. and N.T. v. Spain*), para. 103.

[134] In ECtHR, 23 February 2012, application no. 27765/09 (*Hirsi Jamaa and Others v. Italy*), para. 180 the Court held that preventing migrants from reaching the national border or pushing them back to a third State constitutes an exercise of jurisdiction within the meaning of Art. 1 ECHR.

[135] ECtHR, 23 February 2012, application no. 27765/09 (*Hirsi Jamaa and Others v. Italy*), paras. 166-82.

[136] ECtHR, 13 February 2020, application no. 8675/15 and 8697/15 (*N.D. and N.T. v. Spain*), paras. 164-232.

[137] ECtHR, 13 February 2020, application no. 8675/15 and application no. 8697/15 (*N.D. and N.T. v. Spain*), paras. 198, 201.

[138] ECtHR, 13 February 2020, application no. 8675/15 and application no. 8697/15 (*N.D. and N.T. v. Spain*), paras. 198, 201.

[139] ECtHR, 23 February 2012, application no. 27765/09 (*Hirsi Jamaa and Others v. Italy*), para. 179; 21 November 2019, application no. 47287/15 (*Ilias and Ahmed v. Hungary*), para. 213.

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bodies of law contain obligations which constitute the framework in which the sovereign policies of States can be realised and, as shown above, from which important limitations for the States' sovereign policies can be derived even in the absence of a right to be granted asylum. As human rights guarantees are neither confined to refugees nor provide for a general exception with regard to persons who constitute a danger to the security of the receiving country or its community (cp. Art. 33 (2) GRC) – rather in the case in which an absolute right is invoked no infringement whatsoever can be justified – the protection they provide is even broader than under the GRC.[140]

IV. Conclusion and Outlook

On the international level, neither the human rights discussed above nor other human rights from which asylum-seekers and migrants in general might benefit[141] contain the right to be granted asylum or to enter and legally reside within a territory. Rather, they guarantee that the rights to *seek* and to *enjoy* asylum, to ask for protection as a refugee and not to be subjected to unlawful refoulement or to collective expulsion, do not become illusionary.

In practice, however, the level of protection guaranteed by these rights and their combination might come close to a right to be granted asylum and can substitute for its absence to a great extent (*de facto* asylum).[142] Correspondingly, it has for example been held that the ECtHR has become the highest European court in refugee matters without the Convention knowing a human right to political asylum.[143]

The most relevant difference is that a right to be granted asylum would constitute a positive obligation, while the human rights mentioned ought to be better understood as negative obligations. Even though a State is not obliged to allow a person to enter its territory without being granted asylum, it is nevertheless not permitted to entirely close its borders and to prevent people from seeking international protection; nor is a State permitted to terminate the presence of a person if he or she is facing persecution or a violation of specific human rights in the envisaged receiving country.

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[140] ECtHR, 28 February 2008, application no. 37201/06 (*Saadi v. Italy*), para. 138 with regard to Art. 3 ECHR.

[141] The expulsion of foreigners in general might e.g. contravene the right to private and family life under Art. 8 I ECHR, cp. ECtHR, 17 April 2003, application no. 52853/99 (*Yilmaz v. Germany*), paras. 36-49.

[142] Hailbronner and Gogolin, 'Asylum, Territorial', para. 33; Boed, 'The State of the Right of Asylum in International Law', p. 16.

[143] Nußberger, 'Flüchtlingsschicksale zwischen Völkerrecht und Politik', p. 820.

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This means that a person might be allowed to stay within a country for a long time irrespective of the formal illegality of his or her continuing presence. However, under non-refoulement, a person has no free right to choose the country of protection or to be granted a legal title of residence. Rather, a State might send an asylum seeker to a country where he or she is not at risk of being persecuted or becoming subject to unlawful refoulement to a third country.[144] During a person's residence without recognised legal status, the number of their rights and their scope might be more limited compared to (recognised) refugees and persons who have been granted asylum. However, the most fundamental rights, founded upon an understanding of human dignity, will also apply to illegal residents as human rights apply to all human beings.[145]

In summary, even the absence of a human right to be granted asylum does not necessarily mean 'access denied' – it is the circumstances that matter in each individual case and that can provide a level of protection under international refugee or human rights law which comes close to granting asylum status.

There is, finally, another human rights dimension behind the entire issue of migration and asylum, i.e. the assumption that better protection of human rights might diminish the incentives for people to migrate or eliminate the reasons behind them seeking international protection in another State. Political persecution is based on the denial of individual human rights (e.g. the right to life and equality, religious freedom, freedom of expression) while subsidiary protection might particularly be granted in cases of systematic violations of human rights (as they often occur, e.g., in cases of an armed conflict). Moreover, eventually, realising the right to work, to water and an adequate standard of living around the globe would prevent people from feeling forced to go elsewhere to find a better life for economic reasons.

In other words: To respect, protect and fulfil the *existing* human rights would serve as the best substitute for a right to be granted asylum as this would render asylum irrelevant in the long run.

Admittedly, the current challenges deriving from flight and migration might not have been on the radar when the GRC or the human rights treaties were drafted and the international community of States might struggle with the fulfilment of obligations entered into in the past and which have changed due to a progressive interpretation of the human rights clauses. What is necessary to avoid an overload of specific States

[144] ECtHR, 21 November 2019, application no. 47287/15 (*Ilias and Ahmed v. Hungary*), paras. 128-64; Boed, 'The State of the Right of Asylum in International Law', p. 17.

[145] On the interplay between human rights and refugee law discussed under the right to enjoy asylum see Edwards, 'Human Rights, Refugees, and The Right To Enjoy Asylum', pp. 297-330.

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and communities is to realise that flight and migration are international concerns, requiring an international response – as attempted by the Compacts on Refugees and Migration – as well as international solidarity and, finally, the protection of human rights worldwide.

The current global situation – characterised by widespread violence, armed conflicts, trade wars, climate change, and the spread of the coronavirus – might give little reason to remain optimistic. Nevertheless, as Fridtjof Nansen, the first Refugee High Commissioner of the League of Nations, already declared in his Nobel Lecture:

'No future, however, can be built on despair, distrust, hatred, and envy.'

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V. Bibliography

Mahmoud Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 Michigan Journal of International Law 768-818

BBC News, 'Greece suspends asylum applications as migrants seek to leave Turkey', 1 March 2020, available at https://www.bbc.com/news/world-europe-51695468

Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (London: Routledge, 2018)

Walter Berka/Christina Binder and Benjamin Kneihs, *Grundrechte* (Wien: Verlag Österreich, 2019)

Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5 Duke Journal of Comparative & International Law 1-33

Christian Bumke and Andreas Vosskuhle, *German Constitutional Law* (Oxford: Oxford University Press, 2019)

Hilary Charlesworth, 'Universal Declaration of Human Rights (1948)' (2008) *Max Planck Encyclopedia of International Law*

Commission on Human Rights, Report to the Economic and Social Council on the eighth session of the Commission, UN Doc. E/CN.4/669

Commission on Human Rights: Report to the Economic and Social Council on the 2nd Session of the Commission, UN Doc. E/600 (SUPP)

Committee against Torture, General Comment No. 4 on Article 3 (CAT/C/CG/4) of 4 September 2018

Council of Europe, Assembly, Legal Committee, Doc. 1329 and Recommendation 293 (1961)

James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2019)

Krista Daley and Ninette Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' (2000) 12 International Journal of Refugee Law 148–74

Francesco de Cecco, 'Fundamental Freedoms, Fundamental Rights and the Scope of Free Movement Law' (2013) 14 German Law Journal 383-406

Declaration of the high-level meeting of the GA on the rule of law at the national and international levels, UNGA Res. 67/1 of 24 September 2012

Maarten den Heijer, 'Art. 18 – Right to Asylum', in Steve Peers/Tamara Hervey/Jeff Kenner and Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 1st edn. (Oxford: Hart Publishing, 2014)

Jack Donnelly, 'The relative universality of human rights' (2007) 29 Human Rights Quarterly 281-306

Aleksandr Dontsov and Olga Zotova, 'Reasons for Migration Decision Making and Migrants Security Notion' (2013) 86 Procedia - Social and Behavioral Sciences 76-81

Drafting Documents for Art 14 (former Art 12) of the Universal Declaration of Human Rights, UN Doc. A/C.3/SR 121

Eleanor Drywood, 'Who's in and who's out? The court's emerging case law on the definition of a refugee' (2014) 51 Common Market Law Review 1093-124

Alice Edwards, 'Age and gender dimensions in international refugee law' and Rodger Haines, 'Gender-Related Persecution', in Erika Feller/Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 46–80 and 319-50

Alice Edwards, 'Human Rights, Refugees, and The Right To Enjoy Asylum' (2005) 17 International Journal of Refugee Law 293-330

European Union Agency for Fundamental Rights, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law* (European Union Agency for Fundamental Rights, 2016)

Michael Lysander Fremuth, *Menschenrechte: Grundlagen und Dokumente* (Berlin/Wien: Berliner Wissenschaftsverlag/Verlag Österreich, 2019)

Giorgio Gaja, 'General Principles of Law' (2013) *Max Planck Encyclopedia of International Law*

Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011)

María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 International Journal of Refugee Law 3-28

Guy S. Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007)

Christoph Grabenwarter, *European Convention on Human Rights Commentary* (London: Bloomsbury, 2013)

Hugo Grotius, *De Jure Belli Ac Pacis* (Tübingen: Mohr, 1950) 2nd Book, Chap. 2, XVI; Chap. 21, III, V; 3rd Book, Chap. 20 XLI)

Fulvio Haefeli, 'Steuerung der Migrationsströme und Non-refoulement-Prinzip gemäß GFK und EMRK' (2020) 40 Zeitschrift für Ausländerrecht 25-33

Kay Hailbronner and Jana Gogolin, 'Aliens' (2013) *Max Planck Encyclopedia of International Law*, paras. 1-4

Kay Hailbronner and Jana Gogolin, 'Asylum, Territorial' (2013) *Max Planck Encyclopedia of International Law*

Hurst Hannum, 'Status of the Universal Declaration in Customary Law', in *Status of the Universal Declaration in National and International Law* (1995/1996) 25 Georgia Journal of International and Comparative Law 317-51

Colin Harvey, 'Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy', in Frances Nicholson and Patrick Twomey (eds.), *Current Issues in UK Asylum Law and Policy* (Dartmouth: Ashgate, 1998) 213-34

Daud Hassan, 'Rise of Territorial State and the treaty of Westphalia' (2006) Yearbook of New Zealand Jurisprudence Special Issue 62-70

James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005)

Tom Higham/Katharina Douka/Rachel Wood, et al., 'The timing and spatiotemporal patterning of Neanderthal disappearance' (2014) 512 Nature 306-9

Stephan Hobe and Michael Lysander Fremuth, *Europarecht* (München: Vahlen, 2020) §15, §17

Michael Holoubek, 'Die Kooperation der Verfassungsgerichte in Europa – aktuelle Rahmenbedingungen und Perspektiven: Landesbericht Österreich', XVIth Congress of the Conference of European Constitutional Courts, p. 4, available at https://www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB_Autriche_DE.pdf

Human Rights Committee, Communication no. 77/1980 (Samuel Lichtensztejn v. Uruguay), UN Doc. CCPR/C/18/D/77/1980

Human Rights Committee, General Comment no. 20 on Article 7, adopted at the Forty-fourth sixteenth session 1992, (HRI/GEN/1/Rev.9 (Vol. I)) of 10 March 1992

Human Rights Committee, General Comment no. 35 on Article 9 (CCPR//C/GC/35) of 16 December 2014

Human Rights Committee, General Comment no. 36 on Article 6 (CCPR/C/GH/36) of 3 September 2019

Jef Huysmans, 'The European Union and the Securitization of Migration' (2000) 38 Journal of Common Market Studies 751–77

Júlia Iván, 'Where Do State Responsibilities Begin and End? Border Exclusions and State Responsibility', in Maria O'Sullivan and Dallal Stevens (eds.), *States, the Law and Access to Refugee Protection: Fortresses and Fairness*, 1st edn. (Oxford: Hart Publishing, 2017) 47-68

Nihal Jayawickrama, 'The Right to Freedom of Movement', in Nihal Javawickrama (ed.), *The Judicial Application of Human Rights Law,* 2nd edn. (Cambridge: Cambridge University Press 2017) 448-89

Robert Jennings and Arthur Watts, *Oppenheim's International Law: Volume 1 Peace*, 9th edn. (Oxford: Oxford University Press, 2008)

Hanna-Mari Kivistö, 'The Status of the Right to Political Asylum: A Rhetorical Analysis of German and United Nations Debates', in Kari Palonen/José María Rosales and Tapani Turkka (eds.), *The Politics of Dissensus: Parliament in Debate*, 1st edn. (Santander: Cantabria University Press, 2014) 449-74

Eckhart Klein, 'Movement, Freedom of, International Protection' (2007) *Max Planck Encyclopedia of International Law*

Harold Hongju Koh, 'The Enduring Legacies of the Haitian Refugee Litigation' (2016/17) 61 New York Law School Law Review 31-66

Dieter Kugelmann, 'Migration' (2009) *Max Planck Encyclopedia of Public International Law*

Dieter Kugelmann, 'Refugees' (2010) *Max Planck Encyclopedia of Public International Law*

Christine Langenfeld, 'Asyl und Migration unter dem Grundgesetz' (2019) 38 Neue Zeitschrift für Verwaltungsrecht 677-84

Hersh Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 British Year Book of International Law 354-81

Anthony J. Marsella and Erin Ring, 'Human migration and immigration: An overview', in Leonore Loeb Adler and Uwe P. Gielen (eds.), *Migration: Immigration and emigration in international perspective* (Westport: Praeger, 2003) 3-23

Jane Mc Adam, *Climate change, forced migration, and international law* (Oxford: Oxford University Press, 2012)

Stephen Meili, 'The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?' (2018) 41 Fordham International Law Journal, 383-424

Nuala Mole and Catherine Meredith, 'Asylum and the European Convention on Human Rights', no. 9 Human Rights Files (Strasbourg: Council of Europe, 2010)

Felice Morgenstern, 'The Right of Asylum' (1949) 26 British Yearbook of International Law 327-57

Hans Morgenthau and Kenneth W. Thompson (eds.), *Politics among Nations: The Struggle for Power and Peace,* 6th edn. (New York: New York Knopf, 1985)

Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999)

Jamil Ddamulira Mujuzi, 'The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights' (2009) 9 African Human Rights Law Journal 160-82

Rachel Murray, 'Article 12: Freedom of Movement', in *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford: Oxford University Press 2019) 318-9

Salvatore Fabio Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23 European Law Journal 94–117

Manfred Nowak/Moritz Birk and Giuliana Monina, *The United Nations Convention against Torture: A Commentary*, 2nd. edn. (Oxford: Oxford University Press, 2019)

Angelika Nußberger, 'Flüchtlingsschicksale zwischen Völkerrecht und Politik' (2016) 35 Neue Zeitschrift für Verwaltungsrecht 815-22

Allain Pellet and Daniel Müller in Andreas Zimmermann/Christian J. Tams/Karin Oellers-Frahm and Christian Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd edn. (Oxford: Oxford University Press, 2019) Art. 38 paras. 251-67

Etienne Piguet, 'Linking climate change, environmental degradation, and migration: a methodological overview' (2010) 1 Wiley Interdisciplinary Reviews: Climate Change 517-24

Judith Putzer, 'Asylrecht und Schutz bei Abschiebung und Ausweisung', in Gregor Heißl (ed.), *Handbuch Menschenrechte*, 1st edn. (Wien: Facultas, 2009) 441-59

Stefanie Schmahl and Florian Jung, 'Die Genfer Flüchtlingskonvention: "Magna Carta" des Flüchtlingsrechts' (2018) 3 Neue Zeitschrift für Verwaltungsrecht-Extra 1-8

Statement by the UN Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the Occasion of the 2014 World Refugee Day Celebration, 20 June 2014 available at https://www.achpr.org/pressrelease/detail?id=215

Daniel Thym, 'Citizens' and 'Foreigners' in EU Law: Migration Law and its Cosmopolitan Outlook' (2016) 22 European Law Journal 296-316

Jonathan Tomkin, 'Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union' (2011) 24 Immigration and Asylum Law and Policy in Europe 23-45

Christian Tomuschat, 'A Right to Asylum in Europe' (1992) 13 Human Rights Law Journal 257-65

UN Doc. A/2929

UN Doc. A/C.3/253

UN Doc. A/C3/241

UN Doc. E/CN.4/573

UN Doc. E/CN.4/95

UN Doc. E/CN.4/AC.1/20

UN Doc. E/CN.4/AC.1/3/Add.1

UN Doc. E/CN.4/AC.1/W.2/Rev.2

UN Doc. E/CN.4/AC.2/SR.5

UN Global Compact for safe, orderly and regular migration, Intergovernmentally negotiated and agreed outcome (2018), available at https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/180713_Agreed-Outcome_Global-Compact-for-Migration.pdf

UN, Global Compact on Refugees-Booklet (2018), available at https://www.unhcr.org/5c658aed4

UNGA, International Bill of Human Rights, UN Doc. A/RES/217(III) of 10 December 1048

UNGA, New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1 of 19 September 2016

UNGA, UN Doc. A/RES/73/151, of 17 December 2018

UNGA, UN Doc. A/RES/73/195 of 19 December 2018

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (2019), UN Doc. HCR/1P/4/ENG/REV. 4

UNHCR, Convention and Protocol relating to the Status of Refugees, Introductory Note (UNHCR, Geneva Switzerland, 2011) p. 3, available at http://www.unhcr.org/3b66c2aa10.html

UNHCR, Note on International Protection - Standing Committee 69th Meeting, 16 June 2017, EC/68/SC/CRP.12

United Nations, *Migration* available at: https://www.un.org/en/sections/issues-depth/migration/index.html

Louis Varlez, 'Les Migrations Internationales et leur Réglementation' (1927) 20 Recueil des Cours 165-368

Marcelo Vázquez-Bermúdez, ILC Special Rapporteur, Second report on general principles of law, UN Doc. A/CN.4/741, p. 5

Phillip Walker, 'A Bioarchaeological Perspective on the History of Violence' (2001) 30 Annual Review of Anthropology 573-96

Paul Weis, 'The Refugee Convention 1951: The Travaux Preparatoires analysed with a commentary by Dr. Paul Weis', available at https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html

Hans-Michael Wolffgang, 'Art. 18 GRCh', in Carl Lenz and Klaus-Dieter Borchardt (eds.), *EU-Verträge: Kommentar*, 6th edn. (München: Beck, 2012)

Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21 International Community Law Review 307–24

World Conference on Human Rights, 25. June 1993, Vienna Declaration and Programme of Action

William Thomas Worster, 'The Contemporary International Law Status of the Right to Receive Asylum' (2014) 26 International Journal of Refugee Law 477-99

University of Vienna Law Review, Vol. 4 No 1 (2020), pp. 79-115, https://doi.org/10.25365/vlr-2020-4-1-79.