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Asylum Law in the European Union

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Asylum Law in the European Union

This book examines the rules governing the right to asylum in the European Union. Drawing on the 1951 United Nations Convention relating to the Status of Refugees (and the 1967 Protocol) and the case law of the European Court of Human Rights, Francesco Cherubini asks how asylum obligations under international law have been implemented in the European Union.

The book draws from international law, EU law and the case law of the European Court of Human Rights, and focuses on the prohibition of *refoulement*, the main obligation that EU law must confront. Cherubini explores the dual nature of this principle, examining both the obligation to provide a fair procedure that determines the conditions of risk in the country of origin or destination, and the obligation to respond to a possible removal.

Through this study the book sheds light on EU competence in asylum (also when regarding the different positions of Member States). The book will be of great use and interest to researchers and students of asylum and immigration law, EU law and public international law.

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Translation of the Italian revised version by Christine Stone.

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Introduction

According to an early but still well-regarded authority, while it is true that 'current international law is largely built upon the events that transformed Europe's political structure during the transition from the medieval to the modern world', equally,

> numerous principles, institutions and theories of international relations developed before that time or were passed down from the Greco-Roman world and continued without interruption even throughout the period concerned, although sooner or later they came under the influence, to a greater or lesser degree, of the new state of affairs.[1]

These include the practice of asylum, which has roots stretching far back in human history. The etymology of the word is the Ancient Greek particle *a-*, denoting absence, and the word *sýlon*, from *sýlán*, the verb used to indicate seizure by pirates.[2] An 'asylum' was thus a place secure from danger. The right of asylum subsequently developed chiefly as a concept of international law almost certainly because of the principles that governed its exercise. Indeed, only a body of rules that binds entities effectively exercising control over a given territory, as does international law, can contemplate an institution of this kind. This much is evident from even the briefest review of the history of asylum over the centuries.

According to one stream of legal theory,

> asylum was the word used in centuries past to denote certain places which were thought to possess the privilege of protecting from persecution anyone who took refuge there; right of asylum was the term given to the immunity or privilege enjoyed by those specific places or buildings.[3]

1 D. Anzilotti (1923: 2, trans. added).
2 M. Giriodi (1896: 778) and A. Quintano Ripollés (1951: 50).
3 M. Giriodi (1896: 777, trans. added). On this point see also C. Perris (1937: 767) and U. E. Paoli (1968: 1035). The latter mentions the temples of Athena Alea at Tegea, Poseidon on the island of Calauria, Athena Chalkioikos in Sparta, and Asclepius at Pergamum.

From the very outset, therefore, the right of asylum was determined *ratione loci* ('on account of the place'),[4] distinguishing itself in this way from other types of immunity, such as the '*asilía personale*' (personal asylum), also based on Greek law.[5] But this principle alone does not explain the inviolability of the places deputed to provide asylum: in the beginning, at least, the concept of asylum was

> tied to a religious or sacred quality, whereby the person or thing coming into contact with a sacred site somehow also enjoyed the protection that the deity bestowed on that place by taking up residence there.[6]

In other words, the right of asylum rested on the protection that divine authority afforded specific places and, conversely, on the fact that divine authority was itself outside human control. This is substantiated by the fact, according to authoritative sources, that these refuges offered sanctuary not only to individuals but also to their chattels.[7] Evidently, the institution of asylum owed much of its early fortune to the superstitions and taboos associated with violating places of refuge. This is amply illustrated in Greek literature, from which it would appear that violation of a place of asylum was regarded as an act of sacrilege against the deity residing there.[8] And indeed the gods had no hesitation in reacting

4 See M. Giriodi (1896: 778), E. Reale (1938: 481) and L. Bolesta-Koziebrodzki (1962: 32).

5 The term was coined, according to G. Crifò (1958: 191), by F. Woess to denote the immunity granted to individuals for a wide variety of reasons. Crifò further explains that this privilege was given to 'individuals belonging to categories that were highly respected by society: hence, athletes travelling from their homeland to the places where ritual games were held . . . ambassadors; foreigners who had rendered special service to the city, such as *proxeni*; heralds; workers engaged in projects of public usefulness' (trans. added).

6 G. Crifò (1958: 191, trans. added).

7 According to U. E. Paoli (1968: 1035), 'it was customary for people to leave valuables in sacred places and for cities to leave their riches there, and any man who took refuge in a temple or beside an altar or who had embraced the statue of a god became inviolable' (trans. added). The places of asylum apparently retained this privilege of 'extended' protection throughout the Middle Ages for, according to G. Vismara (1958: 199), 'the right of asylum fostered the development of markets, and even of villages and towns, in the areas around churches and monasteries' (trans. added).

8 A. Quintano Ripollés (1951: 50) and U. E. Paoli (1968: 1035). A. Bahramy (1938: 13) writes that 'à la suite de la profanation de l'autel des Euménides, par Megaclès, qui immola Cylon et ses compagnons, une peste désola Athènes. Une peste qui ne disparut qu'après que le peuple, sur le conseil de l'oracle de Delphes, eut fait une solennelle expiation du sacrilège de son Archonte. C'était pour la même raison qu'on égorgea Neoptalème, pour avoir égorgé Priam sur les autels d'Apollon. On raconte aussi qu'à la suite du massacre des Ilates, dans le temple de Ténare, il y eut un tremblement de terre qui désola Sparte. D'autre part on attribuait la terrible maladie de Sylla au fait d'avoir violé l'autel de Minerve pour mettre à mort Aristion'.

violently to such affronts.[9] The religious roots of asylum ran so deep that 'reflected' protection was extended without distinction to all human beings. It was only later, when the religious and sacred aspect lost some of its importance, that limits may have been imposed, so that convicted criminals could no longer be accorded asylum.[10]

The right of asylum also existed in Ancient Rome, although it was invoked with far greater circumspection than in Greece, mainly as a result of the Romans' very narrow concept of law and citizenship.[11] Places of refuge were fewer in number, and Tiberius is believed to have reduced them further.[12] This may be why a similar institution, at least as far as concerns its outcome, enjoyed greater fortune in the Rome of that time, namely *exilium* (exile), which gave any citizen who had received a capital sentence the option to avoid execution by choosing exile.[13] As in Rome, the right of asylum recognised by Hebrew law was also

9 When Ajax the Lesser dragged Cassandra from Athena's altar, the latter sought the help of the gods to exact revenge. Unfortunately, she struck not only Ajax, but all the Greeks returning from Troy. She then called on Poseidon: 'When they are sailing off home from Troy. And Zeus will send rain and vast hailstones and dark gusting blasts of wind. He says that he will give me the fire of his thunderbolt to strike the Achaeans and burn their ships with its flames. And you for your part must make the Aegean sea roar with huge waves and whirlpools and fill the hollow bay of Euboea with corpses so that for the future the Achaeans may learn to revere my sanctuaries and respect the other gods' (Euripides, *The Trojan Women and Other Plays*, Oxford, 2001, 78–84).

10 G. Crifò (1958: 193). This theory is disputed, however. According to U. E. Paoli (1968: 1035–6) 'it would appear, from the writings of the orator Lycurgus, that there was no requirement to recognise the right of asylum in the case of criminals convicted by a court. In all likelihood, though, this exception to the immunity of the refugee did not apply in temples that constituted an asylum in the full sense of the word' (trans. added).

11 E. Reale (1938: 482) notes that 'La conception que Rome avait de la loi et du citoyen ne pouvait pas se concilier avec le respect du droit d'asile'. See also A. Bahramy (1938: 17), L. Bolesta-Koziebrodzki (1962: 32) and U. E. Paoli (1968: 1036).

12 See M. Giriodi (1896: 778) and C. Perris (1937: 767).

13 According to G. Crifò (1958: 196), 'the prohibition – which a magistrate places on a citizen who chooses exile before being convicted – against the exercise of a faculty conferred and guaranteed by the law constitutes an *improbe factum* [wicked act]: this circumstance, and the possible intervention of the censorship, as a vehicle of public opinion, are sufficient to ensure that the individual's right to decide is respected, for by choosing exile that individual exercises a right, founded on the recognition of a socially and legally impelling interest in evading a capital sentence' (trans. added). G. Crifò (ibid.: 195–6) interpreted as a form of right of asylum the principle of the inviolability of the home. It should be noted that the concept of exile also existed in the Greek world. And not only in ancient times: in the Middle Ages – bearing out the text cited above – exile and asylum became almost interchangeable, so that if asylum were not granted – for example, because the bishop did not intercede successfully or because the asylum-seeker was accused of offences for which the privilege did not apply – the only option was to resort to exile. G. Vismara (1958: 198) confirms that 'if intercession was unsuccessful, the refugee could only avoid the feared conviction or violence by choosing voluntary exile' (trans. added). Furthermore (ibid.: 201), 'the institution was thus voided of content [the Author alludes to the practice of prior removal, whereby a

invoked less often than in Greece;[14] a person who had committed manslaughter was allowed to seek refuge in certain cities, although it would appear that this privilege was granted principally in order to prevent an unfair trial.[15] Perpetrators were not given shelter permanently, only as a precautionary measure. The trial would take place in the city of refuge, presided over by a group of elders. Defendants who were found innocent would be allowed to return to their home city; those found guilty would be driven from the sheltering city to suffer the vengeance of their victim's family.[16]

The right of asylum only enjoyed something of a revival with the establishment of Christianity, which restored the Greek practice, albeit with important variations. As in Ancient Greece, the principle of asylum according to the Christian Church was based on the existence of places which for religious reasons were outside the control of the community; thus, the respect owed to the person taking refuge in that place essentially flowed from the deference due to the authority that had taken up residence there. The Greek concept of asylum, however, lacked certain elements that were only introduced with Christianity; these included the principles of charity and penitence, which underpinned the right of asylum.[17]

person seeking refuge was first removed from the altars, only to be allowed to return if not convicted of offences barred from asylum]; . . . Hence, criminals avoided seeking refuge in sacred places, preferring exile and banditry to the danger of falling into the hands of justice' (trans. added). On the broader subject of exile see G. Crifò (1966: 712 ff.).

14 A. Bahramy (1938: 15) notes that 'Les juifs, peuple religieux par excellence, restaient complètement étrangers à cette loi [asylum], c'est seulement lorsqu'ils s'établirent en terre promise, qu'ils ont admis à titre exceptionnel le droit d'asile dans certaines villes, pour les auteurs d'homicide involontaire'. For a contrasting view, see E. Reale (1938: 478), who maintains that the principle of asylum was 'largement pratiqué' among the Jews. According to the Book of Exodus (21, 12–14), 'whoever strikes a man so that he dies shall be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint for you a place to which he may flee. But if a man wilfully attacks another to kill him by cunning, you shall take him from my altar, that he may die'.

15 M. Giriodi (1896: 778) and L. Bolesta-Koziebrodzki (1962: 31). The six cities were, according to A. Bahramy (1938: 15), 'Kedès, Sichem, Hébron, Golan, Ramoth et Béser'. This opinion is shared by E. Reale (1938: 479).

16 C. H. Toy (1902: 256) notes that persons who avenged manslaughter in any of the cities of refuge would themselves become guilty of murder.

17 G. Vismara (1958: 198). A famous episode in the life of John Chrysostom provides an example: one Eutropius, chamberlain and chief minister of the fourth-century emperor Arcadius, attempted to persuade the latter to abolish the right to seek asylum in churches but fell into disgrace for undeservedly insulting the empress Eudoxia and was consigned to the vengeance of the people, who hated him because of his cruelty. A. Butler, *The Lives of the Fathers, Martyrs and Other Principal Saints*, vol. I, London, 1857, p. 126, narrates that 'Eutropius found himself in a moment forsaken by all the herds of his admirers and flatterers, without one single friend, and fled for protection to the church, and to those very altars whose immunities he had infringed and violated. The whole city was in an uproar against him; the army called aloud for his death, and a troop of soldiers surrounded the church with naked swords in their hands, and fire in

Moreover, the Christian form of asylum emphasised an aspect given little consideration by the Greeks: the belief that there existed an authority able to afford real protection to specific places. The events surrounding the development of the Christian concept of asylum, and the systematic clashes between Church and State on the extension of this right, are emblematic.[18] Eventually, the Christian practice of asylum fell into disuse as the Church's temporal power waned and nation states began to form.[19] Even before then, in the anonymous treatise *Dei delitti e delle pene*, published in 1764 by the Leghorn printer Coltellini, it had been remarked that

> Impunity and asylum differ only in degree, and since the certainty of punishment makes more of an impression than its harshness, asylums invite men to commit crimes more than punishments deter them from them.[20]

The practice of asylum was abolished under the Savoy kings by the Siccardi laws of 1850, and may well have been eliminated before then in other parts of the Italian peninsula.[21]

Once the religious right of asylum no longer existed,[22] the practice was reinstated by many nation states,[23] which stripped it of its roots and replaced them

their eyes'. John Chrysostom interceded in favour of Eutropius with one of the speeches that earned him the name Golden Mouth, asking them 'how they could beg of God the pardon of their own sins if they did not pardon a man who then, by repentance, was perhaps a saint in the eyes of God' (ibid.: 127).

18 According to G. Vismara (1958: 201), 'it was thus that conflict arose between the Church, which ordinarily claimed jurisdiction in matters of asylum, particularly for passing judgment on excepted cases, and secular doctrine, which instead claimed sole right to determine whether the requirements of the canonical definition of the right of asylum had been met, and by this means sought to impose a restrictive interpretation on the canonical rule in order increasingly to circumscribe the right of asylum' (trans. added).

19 G. Vismara (1958: 200) wrote: 'in the meantime experts in civil law sought to establish a broad interpretation of excepted cases and, starting from the same canonical rule that had allowed some of these cases in order to overcome serious difficulties, now excluded from the right of asylum all persons accused of the worst crimes, wrongdoers who had eluded justice, blasphemers, those guilty of sacrilege, non-Christians. The exception was greater than the rule; the principle of canon law whereby no one should be excluded from the sanctuary of asylum was being replaced by the opposite principle, that asylum could only be granted in specific cases' (trans. added). See also E. Reale (1938: 490), L. Bolesta-Koziebrodzki (1962: 34) and P. G. Caron (1966: 1038).

20 C. Beccaria, *'On Crimes and Punishments' and Other Writings*, Cambridge, 1995, p. 92.

21 In 1827 A. Manzoni, *The Betrothed*, vol. I, New York, 1845, p. 67, wrote: 'The scene had taken place near a Capuchin convent, an asylum *in those days*, as every one knows, impenetrable to bailiffs, and all that complication of persons and things which went by the name of justice' (emphasis added).

22 It is still invoked today in very rare circumstances: see F. Lenzerini (2009: 21).

23 In reality, some forms of non-religious asylum vaguely resembling the modern institution existed before the birth of nation states. See F. Lenzerini (2009: 21 ff.).

with an ideological framework. The French Constitution of 1793 (Article 120) states that the French nation 'donne asile aux étrangers bannis de leur patrie pour la cause de la liberté. Il le refuse aux tyrans'. This pronouncement was echoed in the constitutions of the States founded on liberal principles.[24] Conversely, in the ideology that inspired the Socialist countries asylum was interpreted as a form of workers' protection.[25] This is clearly set out in Article 129 of the 1936 Soviet Constitution: 'The USSR affords the right of asylum to foreign citizens persecuted for defending the interests of the working people, or for their scientific activities, or for their struggle for the national liberation'.

Legal theory introduced a number of distinctions within the new concept of asylum, differentiating between asylum granted in the territory of the host country (territorial asylum) and asylum granted outside it (extraterritorial asylum) and, within the latter category, according to whether this was in an embassy (diplomatic asylum) or on a ship, or at the seat of an international organisation and so on. These distinctions aside, the granting of asylum remained nonetheless firmly linked to political considerations, to the point where it depended entirely on the discretion of the host country. According to an authoritative text of 1968,

> the expression 'right of asylum' denotes two entirely separate things in international law. On the one hand, it indicates the right of nations to give hospitality in their territory – or in equivalent locations – to individuals persecuted by other nations and to offer them protection; on the other hand, it indicates the right of nations to give hospitality in their legations or embassies in other countries to persons persecuted or wanted in the territory of the States in which that embassy or legation is located.[26]

A few years earlier the history of asylum had taken a completely new direction when human rights were codified in international law, principally as a result of the

24 As E. Reale (1938: 542–3) rightly points out, 'avant que la Révolution française proclame le droit à l'insurrection en donnant une base morale et juridique aux actes dirigés contre le gouvernement, celui qui est banni de sa patrie ou a été obligé de la quitter pour des raisons politiques, commence à être considéré comme inviolable'.

25 On this point see, among the preparatory papers for the Twelfth Meeting of the International Association of Penal Law (AIDP) in Freiburg, 1–3 September 1977, the articles by G. Antoniu (1978: 577–8), V. P. Choupilov (1978: 616–7), M. Cieslak and W. Michalski (1978: 569 ff.) and D. Mikhaïlov (1978: 458–9).

26 A. Migliazza (1968: 1039, trans. added). See also G. Balladore Pallieri (1938: 523 ff.). H. Cabral de Moncada (1945: 57) also notes that 'Em direito internacional, direito de asilo significa portanto, em sentido subjetivo, o direito de qualquer Estado, em relação a outro Estado, de conceder a qualquer indivíduo perseguido pelas autoridades dêste último qualquer espécie de asilo de direito internacional'. The only distinction recognised by legal theory related to the internal or external nature of the asylum, that is, whether it was granted in the territory of the State (political asylum) or in one of its missions abroad (diplomatic asylum). Other authors, such as L. Alcindor (1929: 33), added the further category of asylum 'à bord des navires'.

work of the United Nations (UN) and several regional organisations such as the Council of Europe. It is to these that we owe two instruments which more than any other have shaped the development of the institution of asylum; they are the 1951 Geneva Convention Relating to the Status of Refugees (and its Protocol of 1967) and the European Convention on Human Rights of 1950, Article 3 (and others) of which was used by the European Court of Human Rights to extend the application of the principle of *non-refoulement* beyond the limits of the Geneva Convention. Before this last development, the right of asylum was inseparable from the authority that ruled over the places of refuge (deities, Church or State), so that it was merely a consequence of the 'sovereignty' exercised over them and the respect owed to it. A very different and much more revolutionary concept of asylum has gained currency since then, as an institution mainly destined for the protection of individual human rights. Unsurprisingly, the idea (still debated by legal theorists) has taken root that alongside the traditional concept of right of asylum – still vested in States but largely fallen into disuse – an *individual right of asylum* has developed, linked to the protection of fundamental rights.

This book discusses this individual right of asylum, particularly as it relates to the European Union (EU). From the signing of the Treaty of Maastricht the EU has been heedful of an issue that has gained increasing importance in international law, even though as an organisation it is not concerned with all the forms of asylum described so far, only the narrower version based on considerations of a humanitarian nature. In other words, the body of laws governing the EU deals only with the 'new' types of asylum and is in no way concerned with the traditional concept of political asylum in its various strands of territorial, diplomatic and other. As to terminology, therefore, this first meaning of asylum is the one I use here. However, within the *genus* it may be useful to distinguish two *species* that differ according to whether the conditions of access to protection are laid down in the Geneva Convention (in which case the term is 'refuge') or in the case law of the European Court of Human Rights (in which case the term, adopted only recently, is 'subsidiary protection'). In practice, as many official documents of the EU use the term 'asylum' as a synonym of 'refuge', the distinction will be made only where necessary.

1 The Geneva Convention of 1951 and its Protocol of 1967

1.1 Definition of refugee

The first international treaty regulating the right of asylum is the 1951 Geneva Convention Relating to the Status of Refugees (the Refugee Convention), together with its Protocol of 1967.[1] The articles of the treaty, which have been given an authoritative, though not binding, interpretation by the Office of the United Nations High Commissioner for Refugees (UNHCR), were drawn up essentially in order to supply a definition of persons in need of protection and to provide them with a system of support ranging from the prohibition on *refoulement* to the right to work.[2] The beneficiaries of the Refugee Convention are listed in Article 1A(2), which defines as refugee someone who

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the

1 Convention Relating to the Status of Refugees (adopted Geneva 28 July 1951 and entered into force 22 April 1954), 189 UNTS 147 ff. To date there are 145 parties to the Convention, including the United Kingdom, which ratified it on 11 March 1954. Protocol Relating to the Status of Refugees (adopted New York 31 January 1967 and entered into force 4 October 1967), 606 UNTS 267 ff.; 146 states signed, including the United Kingdom, which ratified it on 4 September 1968. Only very few of the States parties to the Convention failed to ratify the Protocol, and vice versa; respectively, they were Madagascar and Saint Kitts and Nevis, and Cape Verde, the United States and Venezuela. As will be explained later, this has major consequences only where the States are parties to the Convention alone.

2 The Office of the High Commissioner was founded as a subsidiary organ of the United Nations General Assembly (UNGA) under Article 22 of the Charter, UNGA Resolution 319 (IV), December 1949, A/RES/319(IV)[A–B]. Broadly speaking, it took over the functions of the former International Refugee Organization (IRO), the Constitution of which was adopted by UNGA Resolution 62, 15 December 1946, A/RES/62(I)[I–II]. The organisation was originally intended to operate only until 31 December 1953; however, its mandate was renewed every five years (see UNGA Resolution 727, 3 October 1953, A/RES/727(VIII); Resolution 1165, 26 November 1957, A/RES/1165(XII); Resolution 1783, 7 December 1962, A/RES/1783(XVII);