This commentary is placed in the context of comparative constitutional law. It attempts to show, in the same line of argumentation as Prof. Lenzerini’s paper, the distinctive ratio and functions of the constitutional asylum, vis-à-vis its protection under international law.

1. THE INTERNATIONAL PROTECTION OF ASYLUM

The control of frontiers has been always a core issue for the determination of sovereignty and citizenship, both in the sense of the manifestation of “external sovereignty” vis-à-vis other States, and in the inward sense of protecting national identity. Hence, despite the increasing influence of human rights discourse and the transnationalization of values, there is not an international or constitutional norm recognizing the right of foreigners to enter the territory of another State apart from their own. ¹ Neither the European Convention on Human Rights (ECHR) nor the European Social Charter secure an alien’s right to enter, reside or settle in a European State. Article 18(4) of the Social Charter provides migrant workers with the right to engage in remunerated employment in the territory of other Contracting Parties, subject to restrictions based on cogent economic and social reasons. However, the Appendix states that this right is not to be confused with a right of entry into the national territory and applies only to those foreigners who are already lawfully therein.

Nevertheless, the refusal of entry or deportation may constitute interference with other rights, such as the right to respect for family life (Article 8, paragraph 1, of the ECHR), or even degrading treatment (in the sense of the Article 3 of the ECHR) if there is strong evidence that the foreigner will be transferred to a State where he/she will be subjected to such treatment.² Moreover, a State is not allowed to implement


² See 35 East African Asians (Citizens of the United Kingdom and Colonies) v. the United Kingdom, Application No. 4626/70, Judgment of 6 March 1978; X. v. the United Kingdom,
an immigration policy of a racist nature since “discrimination based on race could amount to degrading treatment”.\(^3\)

With regard to asylum, the Universal Declaration of Human Rights contains Article 14, according to which “everyone has the right to seek and enjoy in other countries asylum from persecution”. Moreover, according to Article 1(A)(2) of the 1951 Geneva Convention relating to the Status of Refugees (Geneva Convention), any foreigner outside the country of his nationality who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is, theoretically, ipso facto entitled to the recognition of refugee status. However, in practice the decision to grant asylum remains largely on the discretion of public authorities,\(^4\) as a State prerogative and an act of sovereignty. An attempt by the Federal Republic of Germany to define a full subjective right of asylum under public international law failed, probably for fear it might interfere with sovereign rights to control immigration.\(^5\)

Hence, according to the European Court of Human Rights, “the right to political asylum is not contained in either the Convention or its Protocols”.\(^6\) However, a number of decisions of the Court protect facets of rights or freedoms of asylum seekers. The Court has stipulated, for instance, that “a national law which authorizes deprivation of liberty – especially in respect of a foreign asylum-seeker – must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness”.\(^7\)

Hence,

“They in cases of deprivation of liberty (of asylum seekers), it is particularly important to respect the principle of legal security […] [and] the

\(^3\) See *East African Asians v. the United Kingdom*, Application No. 4403/70, Collection of Decision 36, p. 92.

\(^4\) According to a comparative analysis of 19 European countries’ legal-institutional frames of asylum, there are four major models of institutional frames in decision-making on asylum granting and detention: (i) one characterized by the dominance of border and police authorities, whose decisions are monitored by inter-governmental organizations and non-governmental organizations; (ii) one characterized by limited police authority supplemented with courts of law with full decision-making authority; (iii) one characterized by police authority with asylum boards functioning as appeal authorities; and (iv) one characterized by the dominance of central authorities. See *Sicakkan, Political Asylum beyond Citizenship Concerns*, New York, 2008; *Ibid.*, “Political Asylum and the Multi-Level, Plural Forms of Sovereignty in Europe”, Eurosphere Working Papers Series, No. 7, 2008, available at: <http://www.eurosphere.uib.no/knowledge-base/wpdocs/Eurosphere_Working_Paper_7_Sicakkan.pdf>.

