PERUSAL OF INTERNATIONAL DIMENSION OF ASYLUM

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ABSTRACT

People who live in fear of being tortured or killed by their government often seek asylum, as do people who are persecuted for their religious or political beliefs. If someone is at risk of being persecuted in his own country, he may go abroad and ask for asylum in another country. In its literal sense granting of asylum means giving someone permission to remain in another country because of that risk of persecution. Asylum seekers are extremely marginalized and vulnerable people. They have ceased to be under the protection of the governments of their own countries, and are unable to return home because of fear of persecution to which they may be subjected. Various steps have been taken at international level to protect the rights of the asylum seekers, but still in many cases it has been found that many countries shows reluctance in granting of asylum. The doctrinal method is used in the article whereby the basic concept of asylum, its historical perspective, various attempts taken by UNO for granting rights to the asylum seekers and the present position of asylum seekers and problems faced by asylum seekers are dealt in detail.

KEY WORDS- Asylum, Persecution, Rights, State, UNO.
INTRODUCTION

Under International law the term Asylum is the protection granted by a state to a foreign citizen against his own state. The person for whom asylum is established has no legal right to demand it, and the sheltering state has no obligation to grant it. The word asylum is derived from the Greek word "asylon," which means freedom from seizure. Historically, asylum has been regarded as a place of refuge where one could be free from the reach of a pursuer. Another accepted view is that the word Asylum is a Latin word and it is derived from the Greek word 'Asylia' which means inviolable place. The legal dictionary defines Asylum as “Protection from arrest and extradition, given especially to political refugees by a nation or by an embassy or other agency that has diplomatic immunity”.

The term is referred to those cases where the territorial State declines to surrender a person to the requesting State, and provides shelter and protection in its own territory. Thus asylum involves two elements.

- Firstly, the shelter, which is more than a temporary refuge.
- Secondly, a degree of active protection on the part of the authorities in control of the territory of asylum.

These two elements distinguish asylum from that of immigration. A person enjoying asylum may be referred to as an asylee. Thus generally speaking the term “asylum” is used to designate the protection which a State grants to a foreign citizen against his own government.

People who live in fear of being tortured or killed by their government often seek asylum, as do people who are persecuted for their religious or political beliefs. If someone is at risk of being persecuted in his own country, then he may go abroad and ask for asylum in another country. Granting asylum means giving someone permission to remain in another country because of that risk of persecution. Asylum seekers are extremely marginalized and vulnerable people. They have ceased to be under the protection of the governments of their own countries, and are unable to return home through fear of persecution.

Asylum is not to be confused with refuge, although the terms are sometimes used inter-changeably. Refugee status or asylum may be granted to people who have been persecuted or fear they will be persecuted on account of race, religion, nationality, and/or membership in a particular social group or political opinion.

Asylum is different from refugee status, as the former constitutes the institution for protection while the latter refers to one of the categories of individuals, among others who benefit from such protection. "Asylum seeker" means a person who has applied for asylum under the 1951 Refugee Convention on the Status of Refugees on the ground that if he is returned to his country of origin he has a well-founded fear of persecution on account of race, religion, nationality, political belief or membership of a particular social group. He remains an asylum seeker for so long as his application or an appeal against refusal of his application is pending.

Refugee in this context means an asylum seeker whose application has been successful. In its broader context it means a person fleeing e.g. civil war or natural disaster but not necessarily fearing persecution as defined by the 1951 Refugee Convention. The recognition of the separate nature of asylum and refugee status has been confirmed by judicial decisions across different countries and internationally.

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1 Atle Grahl-Madsen, The Status Of Refugees In International Law 3 (1972)
3 I.A. Shearer, Starke’s International Law 323 (Butterworth, London, 11th edn. 1994).
HISTORICAL PERSPECTIVE

Asylum is an ancient institution, known and practised historically. However, the relevance of asylum as a legal institution goes well beyond its actual recognition in law and practice for centuries. What this recognition reflects is the normative character of asylum, which finds its roots in the most ancient bodies of norms for human conduct both in relation to individuals as well as to societies. Evidence of the normative character of asylum can be found in its nature as a religious command, a call for divine protection against human in/justice. All three monotheistic religions impose a duty of hospitality and protection to strangers, which constitutes the anthropological and historical background to the law and practice of asylum over time. Asylum therefore constitutes an ancient rule, together with the prohibitions to kill or to steal. In its primitive form, asylum was not concerned with the politically persecuted, but rather with the broader category of those in distress, who could be innocent or guilty.5

The Islamic practice of asylum finds its roots in the pre-Islamic traditions of protection and hospitality towards strangers. The religious law is preceded by a social code of conduct. The special consideration towards the guest and the foreigner constitutes a feature of generosity and spiritual excellence in pre-Islamic Arabia. The protection of the stranger in accordance with the rules of hospitality was a sacred command and is intimately linked to nomadic life and to the political organization of the Arabs. Protection was sought in the light of the hardship of life in the desert, as an exercise of alliance between tribes, or due to the need to flee from revenge (ataar). The rule of husn addyafa (welcoming the guest) constituted a duty of respect and hospitality to the stranger, which had to be offered also to enemies.

Thus, asylum constituted a duty imposed on every tribe towards anyone who requested it for whichever reason and its concession constituted a true pact of protection symbolized by sharing bread and salt.6 Islam draws from these sources. The Prophet himself became a refugee (al-mouhajir) in 622. And it is precisely this flight, the Hijrah, that marks the birth of Islam and glorifies the refugee in the Islamic tradition: ‘[T]hose who have believed and emigrated and fought in the cause of Allah and those who gave shelter and aided - it is they who are the believers, truly. For them is forgiveness and noble provision’.7 The institution of amân requires every Muslim to provide protection to every non-Muslim foreigner who fleeing persecution seeks asylum in an Islamic country: ‘And if any one of the polytheists seeks your protection, then grant him protection so that he may hear the words of Allah. Then deliver him to his place of safety’.8 The protection provided includes the right to be admitted into the territory where asylum is sought as well as the prohibition to return him to his country of origin (including by extradition). Islam thus conferred a legal and philosophical framework on asylum.

Judaism construed asylum as an institution exclusively for the protection of the innocent, whether Hebrews or foreigners, and for the slaves that belonged to the Jews.9 Asylum is cited on numerous occasions in the Old Testament; like the protection offered by the altar to those innocent of murder10; the case of Adonijah, who took refuge at the altar and was later pardoned, after having usurped the throne11 and the case of Joab, who had supported Adonijah, and also took refuge at the altar.

Long before the international regime for the protection of refugees was born in the twentieth century, asylum had been practiced for thousands of years, and was known in most ancient civilizations. The Kadesh Peace Treaty - concluded in the 13th century BC, between Ramses II and Hatusil III, king of the Hitittas, constitutes the first international treaty that we have evidence of and it contains protection

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5 María-Teresa Gil-Bazo, Asylum as a General Principle of International Law, International Journal of Refugee Law, Volume 27, Issue 1
7 Quran 8, 74.
8 Quran 9, 6.
9 Deuteronomy 23, 16–17
10 Exodus 21, 13
11 I Book of Kings 1, 50–53
clauses. In nine provisions, the treaty establishes that the exchange of population between the two sovereigns will only take place on condition that neither the individuals themselves nor their families be subject to punishment.

**TYPES OF ASYLUM**

**TERRITORIAL ASYLUM**

Territorial asylum is the one granted by a state in its territory. Asylum is territorial where the State of refuge accords it to an individual upon its own territory. International Law gives every State an exclusive control over persons on its territory. They have this inherent right, as an attribute of their sovereignty, to grant asylum in their territory to all kinds of refugees, including the fugitive offenders, but they are not under a legal obligation to grant asylum to a fugitive. The Territorial Asylum has been further classified into:

(i) Political Asylum, for political defectors. (ii) Refugee Asylum, for those who fear persecution in their own country. (iii) General Asylum, for persons who have deserted their country to seek economic betterment but do not enjoy the status of immigration. In the absence of treaty obligations, a State is neither bound to admit aliens to its territory nor is it prevented from admitting them. It may choose to admit any one it pleases, it may exclude anyone it pleases or it may admit one on whatever terms and condition it pleases. This competence is a consequence of the territorial sovereignty of States. A State has even no obligation under customary International Law to extradite as has been already discussed that the rules of extradition have been developed through treaties and a large number of States has concluded such treaties.

**EXTRA-TERRITORIAL ASYLUM**

It is Asylum granted by a state not on its physical territory, but on its notional territory, like in a legation and consular premises and on warships is called the extra-territorial asylum. The extra territorial asylum can be further classified into: (i) Diplomatic Asylum (ii) Asylum in Premises of International Institutions (iii) Asylum in War Ships (iv) Asylum in Merchant Ships.

The granting of asylum in the legation premises is known as diplomatic asylum but it is an exceptional measure and controversial. In the Asylum case Columbia v. Peru the Court stated:

“In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matter which is exclusively with in the competence of that State. Such derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.”

Asylum in Premises of International Institutions is rarely found in practice. The Headquarters agreements of the United Nations and specialized agencies reveal no general right of international institutions to grant asylum or even refuge in their premises to offenders as against the territorial State, and does not even recognize a right of protection on humanitarian grounds.

As regard to Asylum in War Ships, the warships are treated as floating territory of the flag State and enjoy all immunities from the jurisdiction of the foreign State in whose port or waters they are

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16 ICJ Reports 266(1950)
found. They enjoy immunity under International Law and because of the similarly with the rule that diplomatic premises are inviolable, it has been claimed that there exists an analogue right of asylum on boarding such ships. The diplomatic practice has also, to a great extent, assimilated the position of warships with the status of diplomatic premises in this regard. It is a generally held view that an individual, who is not a member of the crew and take refuge on board of a vessel after committing a crime on shore, cannot be arrested by the local authorities and removed from the vessel if the commander of the ship refuses to hand him over. On the other hand there is another view that such an asylum should be granted only on humanitarian grounds if, the life of the individual seeking asylum is threatened. Asylum may also be granted to political offenders on war ships.

Asylum on Private vessels or merchant ships, in foreign territorial water do not enjoy that immunity from local jurisdiction as is enjoyed by public vessels, except with respect to acts which affect the vessel internal order and which do not disturb the peace of the port. Therefore, these vessels cannot accord asylum. Nor has any practice of State developed distinctly to invest in such vessels a right to do so. Consequently, local authorities have the right to arrest refugees in such vessels.

Neutral asylum is employed by states exercising neutrality during a war to offer asylum within its territory to troops of belligerent states, provided that the troops submit to internment for the duration of the war.

RIGHT TO ASYLUM UNDER INTERNATIONAL LAW

The right of a state to grant asylum is well established in international law. It follows from the principle that every sovereign state is deemed to have exclusive control over its territory and hence over persons present in its territory. One of the implications of this generally recognized rule is that every sovereign state has the right to grant or deny asylum to persons located within its boundaries. Traditionally in international law, the right of asylum has been viewed as the right of a state, rather than the right of an individual.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights.

The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, represents the first successful attempt to define the human rights which are entitled to protection by the Law of Nations. Article 14 (1) of the Universal Declaration of Human Rights as under: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. Sub clause 2 of Article 14 provides that this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

The Declaration on Territorial Asylum 1967

The Declaration on Territorial Asylum adopted by the UN General Assembly in 1967 affirms that the grant of asylum is a peaceful and humanitarian act, a normal exercise of state sovereignty, and that it shall be respected by all other states. Article 1 of the Declaration provides that:-

18 http://shodhganga.inflibnet.ac.in, accessed on 20/06/2016
20 Felice Morgenstern, The Right of Asylum, 1949 BRTr. Y.B. INT’L L. 327, 327
21 S. Prakash Sinha, An Anthropocentric View of Asylum in International Law, 10 COLUM. J. TRANSNATL L. 78, 88 (1971)
22 UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII), Article 1.
1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

2. The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.

Article 2 provides that where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State. The Declaration further provides that no person shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

Article 4 provides that States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.

Broadly there are two sources of law which support the practice of asylum namely: Municipal law and International Law. Proponents of the right of asylum find support for the existence of that right in either one or the other legal basis, but seldom rely on both and all too often ignore their interrelationship. In municipal law, asylum may be found in Constitutional provisions, or legislative enactments, particularly immigration laws and regulations. It may even exist in practice without legislative authority. It is frequently mentioned in extradition treaties, either directly or indirectly, particularly in reference to the political offence exception. The competence of states to grant asylum on their territory may thus be seen as stemming directly from the principle of territorial sovereignty and the derivative notion of states having exclusive control over the individuals on its territory. While this principle is usually invoked in recognising the power of states to exclude aliens, its reverse implication is that states are also free to admit anyone they choose to admit.

It follows that the right to grant territorial asylum is subject only to extradition treaties and other overriding rules of international law.

United Nations Convention Relating to the Status of Refugees 1951

Within this context, the international legal regime for the protection of refugees was established in the early twentieth century, as the League of Nations received the mandate to find a solution to the refugee problem, that is, the problem posed by the presence of non-nationals in the territory of a state with no effective legal link to another state, as they do not enjoy or no longer enjoy the protection of the Government of their country of origin. The adoption of international treaties establishing the standard of treatment of refugees reflected the understanding that refugees were a special group of non-nationals that required a collective response by the international community. The international refugee regime expressed the recognition among states of their mutual obligations in relation to this category of forced migrants, defined not so much by the causes of their flight or their plight thereon, but rather by the lack of protection by the state of their nationality. The Refugee Convention does not enshrine a right of asylum or a right of residence. In fact, the enjoyment of most of its provisions is conditional on the immigration status of the refugee; some can only be enjoyed by refugees ‘lawfully present’ while others only by refugees ‘lawfully resident’. Its drafters were well aware that refugees could find themselves without a country of asylum and therefore the Conference that adopted the Convention recommended ‘that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement’. However, the protection that are accorded to the refugees

23 Article3.

under the Convention are also conferred on the asylum seeker in the receiving state for the very reason that the socio-legal status of both the refugees and asylum seeker are same.

The 1951 United Nations Convention Relating to the Status of Refugees has created a system for providing protection to people at risk of persecution in their own countries. Article 1 of the Convention as amended by the 1967 Protocol defines a refugee as:

"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The purpose of the Convention is to assure protection to refugees, as defined in the Convention, by ensuring that they are not returned to their country or sent to any other territory where they could face persecution. Article 33 puts forward what has become known as the principle of non-refoulement: ‘No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever 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 protection does not apply however to persons who represent a security threat to their host country. The Geneva Convention does not exclude removal of asylum-seekers to safe third countries. Asylum-seekers unlawfully present in a state can be required to seek protection in another country, but those lawfully present cannot be expelled from its territory.

This principle has become part of other international human rights treaties either explicitly (Convention against Torture, Article 3) or implicitly through the relevant jurisprudence (European Convention on Human Rights, Article 3 and International Covenant on Civil and Political Rights, Article 7) and, according to some scholars, also part of customary international law, making it universally binding. While in the Refugee Convention, the scope of the non-refoulement principle is limited to refugees, and exceptions to it (for reasons of national security) are permitted, these limitations do not exist in the other three treaties. States signatories of these international treaties are thus obliged not to return to their countries persons who may face torture or cruel, inhuman or degrading treatment or punishment. They are however not entitled to any other rights provided under the Refugee Convention since they are not refugees within its scope.

Obligations under the Convention fall squarely onto the receiving state, and come into effect after the asylum seeker has entered its territory and made a claim for refugee status. The most basic principle, or core obligation, of signatory states is that of 'non-refoulement', i.e. not sending someone back to a situation where there they might face persecution. Another important obligation (and source of increasing tension with the rise of people smuggling) is not to penalise asylum seekers for entering a signatory country 'illegally'.

The problem with the Convention can be summarised in simpler terms, of what it doesn't include. It doesn't confer any right of assistance on refugees/Asylum Seekers unless and until they reach a signatory country. It confers no right of assistance on the 'internally displaced' at all. It imposes no obligation on governments not to persecute their citizens, or to guarantee their safe return. It imposes no mechanism for preventing mass outflows, for burden sharing between states, for ensuring speedy assistance for those most in need, or for maximising the effectiveness of international resources. And

25 Article 33(2).
26 Article 32
27 Article 33 states that 'No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where this life or freedom would be threatened on account of his race, nationality, political opinion or membership of a particular social group'.
28 Article 31 states that 'The Contracting State shall not impose penalties, on account of their illegal entry or presence, on refugees...provided they present themselves without delay to the authorities'.

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it takes no account of the capacity of receiving states. The problem with reforming the international refugee regime is in what the Convention does provide: a system for providing protection to people at risk of persecution in their own countries. No matter how lost they may become amongst mass claims and backlogs, there are few countries willing to risk turning such people away.

CONCLUSION

The grant of asylum in legation premises is a question which is difficult to be settled under International Law, mainly for the reason that the practice of the States is not uniform. Political considerations often play a dominating role in granting asylum or in surrendering refugees. A grant of asylum by one state in the territory of another state is subject to the sovereignty of the latter state. This will not pose problems as long as the territorial state does not object to the grant, or in situations where persons fear maltreatment from non-state actors or for other reasons falling beyond the scope of local laws. If the person seeking refuge is fleeing from the authorities of the territorial state however, granting asylum is likely to infringe upon the sovereignty of that state. States do not have to tolerate such incursions on their territories.

The position in International Law is that asylum is still a right of States rather than of the individual, except for the principle of non-refoulment, which has become part of International Law. It entails a duty to grant at least temporary asylum if refusal of admission would compel the asylum seeker to remain in, or to return to, a territory where he might be subjected to persecution. The option of granting refuge in diplomatic premises is a distinct form of extra territorial asylum. If granted in opposition to demands of the territorial state, it remains problematic from a legal point of view, but its practical feasibility is much enhanced by the inviolability of diplomatic premises. It could well be argued that it is the system of diplomatic immunity and in-violability, rather than a legal right to grant diplomatic asylum, which has made the practice of diplomatic asylum a perpetuating phenomenon.

The UNHCR and other asylum seeker supporters, while acknowledging that there are problems with the operation of the Convention, are concerned that opening it up to review could lead to restriction, rather than expansion, of refugee rights. They argue that avenues for legal migration should be opened up to insulate the Convention from migration pressures, and that governments should work with the UNHCR to supplement, not supplant the Convention, in response to the changed refugee context. Other commentators argue that proposing expanded obligations for governments on top of a Convention-based asylum system that is already if not 'broke' then loudly creaking, is fruitless as such proposals are politically impossible.

Therefore, it can be concluded that all the member states to various International Conventions relating to the rights of the asylum seekers, must in first place, respect all the provisions of the Conventions in the sense of giving them practical implementation. For this the member states should be obliged to insert the provisions of the International Conventions in their Municipal Laws. Throughout the asylum procedure, the confidentiality of all aspects of asylum claim should be respected. As a general rule, no information regarding an asylum application or the fact that such an application has been made, should be shared with the country of origin or any other country. The receiving state should not make any discrimination against the asylum seekers on any ground whatsoever merely for the very reason that they are someone not of their origin. The combined common effort of all the nations to accept and embrace the Asylum Seekers in their territorial jurisdiction as a human being entitled to a dignified life can effectively help in ensuring the safety and security of the deprived/suppressed persons throughout the world.