

ASYLUM

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ABSTRACT

The word Asylum is latin and derives from the Greek word 'Asyilia' which means inviolable places. 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.

Asylum, understood as 'the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it'.¹, is a well-known institution in international law and its historical roots in state practice are well established. 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 and the content of that protection.

Clearly state has right to expel aliens generally, and a state has a right to grant asylum to aliens, but the question is whether an individual has right to asylum opposable to the state's right to expel. It is commonly understood that there no such right exist. Treaty obligations discussing "right to asylum" are understood in various ways, generally not to provide for a right to receive asylum but apply for it. However past few decades have shown a growth in conventions addressing asylum especially, but not limited to European context. With refugee flows being an inherently being an international concern with a need for durable solutions.

The paper will proceed broadly in various sections viewing the issue from different perspective. Paper will begin by examining "meaning of asylum then it will further proceed to types of asylum, right to asylum from the perspective of the state, reasons for asylum, forms of asylum cases dealing with political asylum, asylum in context of India. The paper will conclude that

¹Institute of International Law (5th Commission), 'Asylum in Public International Law', Resolutions Adopted at its Bath Session, Sept 1950, art 1.

the "right to asylum is helpful or not ". In essence states have right vis a vis other states to grant asylum to aliens and not have that act be viewed as hostile.

INTRODUCTION

According to Black's Law Dictionary "Asylum means a sanctuary or shelter. It's a Protection of usually political refugees from arrest by a foreign jurisdiction; a nation or embassy that affords such protection is termed as political Asylum.²

Each year, hundreds of thousands of people apply for asylum in Europe, North America, and Australia and many other countries. Some fear political persecution and genocide; some are escaping civil war or environmental catastrophe; others flee poverty, crime, or domestic violence.

The concept of asylum in international law involves three elements. Firstly, the State admits the individual seeking refuge to its territory or other places under its control. Secondly, the State is prepared to provide a long-lasting sanctuary, i.e. its more than mere temporary refuge. Thirdly, it involves a degree of active protection, i.e. the State authorities are taking appropriate steps to ensure actual protection of the particular individual. Hence, the granting of asylum is not an instantaneous act which terminates with the admission of an individual at a given moment, but continues as long as protection is provided.³

REASONS FOR ASYLUM

A state grants asylum to a person because of many reasons. Firstly it is granted to save a person from the jurisdiction of the local authorities. It is feared that he would not get fair trial, if extradited, because of the differences in the view as to his political or religious activities. Secondly a person may be granted asylum on extra- legal grounds or to say on humanitarian grounds. The international court of justice in Corfu Channel case⁴, state that 'asylum may be

²Black's Law Dictionary Ninth Edition Bryan A. Garner Editor in Chief

³Kaladharan Nayar, M. G., "The Right of Asylum in International Law: Its Status and Prospects"

⁴ICJ Reports (1949) p. 4.

granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population'⁵. The court stated that asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.⁶ Thus asylum is granted for preventing other human rights violations. Thirdly national security also plays an important role in granting asylum. The relationship would be strained if he is extradited.

Although a state may grant asylum after taking into consideration of any of the above factors, states adopt a cautious approach before doing so. Its implications on the existing relationship with the state of whose person asylum is granted is well studied because it normally affects the friendly relation of two states despite a clear provision in the Declaration on Territorial Asylum that grant of asylum shall not be considered as an unfriendly act. Asylum granted to Dalai Lama and others Tibetans by India resulted in more strained relationship between India and China is an example.

RIGHT TO ASYLUM

It is said that a person has a right to get asylum in other states. Universal Declaration of Human Rights under Article 14 lays down that 'everyone has right to seek and enjoy in other countries asylum from prosecution'. It may be however be noted that the Declaration simply recognises the right of asylum is probably nothing but the competence of every state to allow a prosecuted alien to enter and do remain on, its territory under its protection. Such fugitive alien enjoy the hospitality of the state which grants him asylum; but it might be necessary to place him under Surveillance or even to intern him at some place to make his entry subject to condition. For it is the duty of every state to prevent individuals living on its territory from endangering the safety of another state by organising hostile expeditions or by preparing common crime against its Head, members of its Government or its property⁷

In 1967, United Nations Declaration on Territorial Asylum was unanimously adopted by the General Assembly. Among its most important provisions, it called on Governments to refrain from measures such as rejection at the frontier of persons seeking asylum. Being a Declaration,

⁵*Ibid*, p. 282.

⁶*Ibid*. p. 294.

⁷Oppenheim's International Law, Vol. 1, Edited by Sir Robert Jennings and Sir Arthur Watts, Ninth Edition Longman Group UK Ltd. and Mrs. Tomoko Hudson, 1992, p. 81

it lacked binding force, and it was considered necessary to strengthen the legal basis for granting asylum by means of a convention. With this aim in View the United Nations Conference of Plenipotentiaries on Territorial Asylum was held in Geneva from 10th January to 4th February, 1977. It recommended in its report that the General Assembly in 1977 consider reconvening a further session of the conference at the appropriate time. The draft text, which was before the conference prepared by the legal experts also intended to reinforce to some extent Article 14 of the 1948 Universal Declaration of Human Rights but makes no mention of any obligation by states to grant asylum. Thus although everyone has a right to seek asylum yet there is no corresponding duty of states to grant asylum. The only international legal right involved⁸ is that of the state of refuge itself to grant asylum.

FORMS OF ASYLUM

A state may grant asylum to a person in two ways. They are: territorial asylum and extra-territorial asylum.

(1) Territorial asylum:

When asylum is granted by a state in its own territory, it is called territorial asylum. On 28th march 1945, a convention on Territorial sovereignty was adopted at Caracas. Article 1 of the said convention provided " Every state has right in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable without, through the exercise of the right, giving rise to complaint by any other state". Beside this, Article 1 of the Declaration of Asylum as adopted by the United Nation Human Right Commission, provided : "Asylum granted by state in the exercise of its sovereignty, to persons entitled to invoke Article 14, of the Universal Declaration of Human Rights, shall be respected by all other states. Article 3 of the Declaration further provided, " No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights, should except for overriding reason of the population be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well founded fear of prosecution

⁸Starke's International Law, Eleventh Editon (1994), Edited by I.A Shearer, p. 324 *** C.S.E. (1993) Q. (c)

endangering his life, physical integrity or liberty in that territory...." Article 31, 32 and 33 of the Refugee Convention of 1951 have incorporated the above principle.

In its resolution of 14th December 1967 the General Assembly of the United Nations recommended that in practice the States should do the following:-

(a) When a person requests for asylum, his request should not be rejected or if he enters the territory of such state, he should not be expelled but when a large number of people request for asylum, it may be rejected on the basis of the national security of its own people.

(b) If any state feels difficulty in granting asylum, it should consider the appropriate measures with the feeling of international unity through the medium of individuals states or the United Nations.

(c) When states grants asylum to the fugitives, other states should respect it.

A State is free to grant asylum to the people of other states but this freedom can be restricted on regulations through treaties.

DRAFT CONVENTION IN TERRITORIAL ASYLUM

The above provisions although laid down the standard which a state is required to follow, they are, in no way legally binding on states. In order to give legal basis for granting asylum, efforts were made to formulate a Convention on the topic. The Draft Convention on Territorial Asylum was adopted by the General Assembly on December 10, 1974 but it again did not improve the position.⁹ Article 10 on Draft Convention recognized that the grant of asylum is a sovereign right of state, but state parties shall use their 'best endeavours' in a Humanitarian spirit to grant asylum in their territory. The General Assembly on December 9, 1975 adopted a resolution¹⁰ for the elaboration of a Draft Convention on Territorial Asylum wherein the Secretary General was requested to convene a conference of Plenipotentiaries on territorial asylum to consider and adopt a Convention on Territorial Asylum. Accordingly, a conference was held in Geneva¹¹

⁹General Assembly Resolution 3272 (XXIX), December 10, 1974

¹⁰General Assembly Resolution 3456 (XXX), December 9, 1975

¹¹U.N. Monthly chronicle, March 1977, p. 41.

from January 10, 1977 to February 4, 1977, but the representatives from the different countries could not succeed in reaching a consensus on the subject. Thus no convention has been formulated on the topic of territorial asylum.

EXTRA TERRITORIAL OR DIPLOMATIC ASYLUM

Extra territorial asylum is granted by the state outside its territory, e.g., its embassy or public vessel. This is about providing sanctuary to individuals in the premises of diplomatic missions. But less conventionally, sanctuary has been offered also in military facilities and on board military vessels and aircraft.¹² Extraterritorial or more commonly diplomatic asylum is problematic because, unlike in case of territorial asylum, the protected individual is still in the territory of his/her own country and therefore the protective State interferes with the sovereignty of another State.

Nowadays, one cannot take seriously the argument that the premises of diplomatic mission form a part of the territory of the sending State, not the receiving State, and diplomatic asylum is still provided in the “territory” of the State granting asylum. The theory of extraterritoriality was formulated by Hugo Grotius in the 17 century in order to explain why diplomatic missions do not fall under the jurisdiction of the receiving State in a similar manner as everything else. According to a fundamental rule of international law, States may not exercise their jurisdiction outside their territory, i.e. ¹³abroad, and because diplomatic missions are also “abroad”, States must refrain from exercising their jurisdiction in the premises of diplomatic missions. However, the International Law Commission, while drafting of the Vienna Convention on Diplomatic Relations (1961), rejected the theory of extraterritoriality because it is based on a legal fiction and does not reflect factual reality or modern understanding of diplomatic relations.¹⁴

Therefore, people seeking shelter in diplomatic missions are still in the territory of receiving States and sending States are, as a result, interfering in their territorial sovereignty. This

¹²Morgenstern, F., “‘Extra-Territorial’ Asylum”, 25 British Yearbook of International Law (1948) 236–261, pp 253–255; see also Convention on Diplomatic Asylum, Caracas, 28.3.1954, entry into force 29.12.1954, 1438 UNTS 101, Article 1.

¹³Grotius, H., *The Rights of War and Peace* (3 vols, Liberty Fund, Indianapolis, 2005), II, XVIII, IV, 5.

¹⁴Yearbook of the International Law Commission (2 vols, New York: United Nations, 1957), vol I, p 4: “It was true that the theory of extraterritoriality had found favour for a time, not only in connexion with diplomatic privileges and immunities ... It was not, however, in accordance with modern thinking to base international law on a fiction. Moreover, the theory of extraterritoriality could give rise to confusion and anomalies

explains why States mostly reject the right to diplomatic asylum. The International Court of Justice has equally been cautious about diplomatic asylum due to its dangerous and offensive interference is the sovereignty of another State: 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 a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State.¹⁵ Considering how much importance States and international law have always accorded to sovereignty, such an intrusion into independence is acceptable only if it has a clear basis in international law.

LEGAL POSITION UNDER INTERNATIONAL LAW(Columbia v. Peru)¹⁶

Victor Raul Haya de la Torre was the leader of the Peruvian political movement American People's Revolutionary Alliance which was constantly in troubles with the government. When his movement revolted and lost a one day civil war on 3 October 1948, he sought refuge in the Columbian embassy. Columbia recognised Haya de la Torre as a political offender, but Peru refused to grant him safe passage to leave the country. To settle their dispute, the States turned to the International Court of Justice, giving the latter a great opportunity to clarify the position of international law on diplomatic asylum. The Court delivered a cautious judgment in Asylum case saying that (1) diplomatic asylum as a serious derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case and (2) when relying on customary international law, the protective State must prove that it has a right to grant diplomatic asylum and the territorial State has an obligation to respect diplomatic asylum.¹⁷

Overall, the Court was sceptical that diplomatic asylum is a generally recognised concept of international law. Indeed, when it comes to the treaties concerning diplomatic asylum, there are only regional, Latin and Central American instruments, but no global treaties. If the States from other regions of the world provide exceptionally sanctuary in their diplomatic missions,

¹⁵Asylum, supra nota 5, pp 274–275

¹⁶I.C.J. Reports (1950) p. 266

¹⁷*Ibid* p. 276

they use other justification than diplomatic asylum, e.g. humanitarian concerns. Also, contemporary diplomatic law does not include, intentionally, the right to grant diplomatic asylum. But one thing is certain – no State is known to claim or to admit a sanctuary for common criminals.¹⁸ Diplomatic asylum is clearly confined to political offenders who hope to escape persecution by those in power and who cannot expect a fair trial.

INDIAN VIEW ON DIPLOMATIC ASYLUM

India has made its position regarding the diplomatic asylum by issuing a circular on December 30, 1967, to all foreign Diplomatic missions in India wherein it was stated that the Government of India does not recognize the right of such missions to give asylum to any person or persons within their premises. In the statement, missions were requested that if they receive a request for asylum or temporary shelter, or refuge such request should not be granted. The above view was further clarified by the Indian Delegate Dr. Seyid Muhammad on November 3, 1975 in the sixth committee on the item concerning Diplomatic Asylum.¹⁹ He stated that the diplomatic asylum involves a derogation from the sovereignty of the territorial state and an intervention in matters which are exclusively within the competence of the state. He further stated that 'diplomatic mission are accorded privileges and immunities for functional reasons it clearly brought out in the Vienna Convention on Diplomatic Relations. This Conventions spell out clearly the functions of diplomatic agents. Any unilateral expansion of these functions by a diplomatic mission would be considered as an encroachment on its authority by an territorial state. State practice permits a diplomatic mission to give within its premises temporary refuge to a person who is in imminent danger of his life until cessation of such danger.

ASYLUM IN INDIA

India in the year 1955 gave territorial asylum to Dalai Lama and his followers who were oppressed from the repressive policies of China. Although their asylum was criticised by China on the ground that India by granting asylum has interfered in its internal affairs, India was

¹⁸See Ronning, C. N., *Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations* (The Hague: Martinus Nijhoff, 1965), p 8 as an authoritative source on earlier state practice, especially in Latin America.

¹⁹For the full of the Statement See IJI, Vol, p. 534.

competent enough to do so because of the principle of territorial sovereignty. The grant of territorial asylum should not be considered as an unfriendly act by China. India does not recognize the grant of extra- territorial asylum. It is clear from the circular issued to all the diplomatic missions in India on December 30, 1967 and also from the statement of Indian delegate Dr. Seyid Muhammad on November 3, 1975 in the Sixth Committee on the item concerning Diplomatic Asylum. However, it gave diplomatic asylum to late King Tribhuvan of Nepal when he sought asylum at the height of the Rana revolt against him. When the Soviet defector Aziz Ouloug- Zade took in the American Embassy in India, it was granted to him temporarily. On protest, he was surrendered to the Indian authorities.

ANAYSIS OF THE QUARREL OVER JULIEN ASSANGE

Over summer 2012, tensions accumulated in the relations between Ecuador and the United Kingdom, and almost lead to a diplomatic disaster. But this is not a dispute between just two States, it may well be seen as a clash between ideologies and two fronts, i.e. between States which recognise or reject the right to grant diplomatic asylum. The centre piece of this quarrel is Julian Assange, an Australian best known as the founder, spokesman and editor-in-chief of WikiLeaks.

Since November 2010, Assange is wanted by the Swedish authorities in relation to a rape and sexual assault investigation. Because he was living in the United Kingdom when the European Arrest Warrant was issued, they applied for the extraction of Assange to Sweden.²⁰ He decided to fight against the extradition, but his steps were unsuccessful on all levels. Finally, on 14 June 2012, Assange had exhausted all remedies available in the United Kingdom, but the decision to extradite him to Sweden remained in force.²¹ He was given 14 days to appeal to the European Court of Human Rights, but he decided to pursue an unusual alternative. On 19 June, Assange entered the Ecuadorian embassy where he asked for the protection of the Ecuadorian government. The latter informed, on the same day, the British government that it was considering Assange's request.²² On 16 August, Ecuador informed the world that they have

²⁰See, for example, *Judicial Authority in Sweden v Julian Paul Assange*, City of Westminster Magistrates' Court, 24.2.2011, (29.9.2012) for background information and charges brought against Julian Assange.

²¹*Assange v The Swedish Prosecution Authority*, [2012] UKSC 22.

²²*Extradition proceedings against Julian Assange*, Foreign and Commonwealth Office, 3.9.2012, (29.9.2012)

decided to grant Assange diplomatic asylum and provided a detailed explanation why sanctuary was given.²³ To sum the arguments, Ecuador found that Assange faced a situation

CONCLUSION

Although diplomatic asylum has been around for centuries and different States have granted diplomatic asylum to the individuals seeking refuge from the local authorities, its legality remains dubious and debatable. At the present moment, it is safe to conclude that diplomatic asylum has developed into a recognised concept (Latin and Central America), where the State granting asylum has the unilateral and definitive competence to determine whether the individual is accused of a common crime or political offence. The territorial States are basically forced to recognise the decision to grant diplomatic asylum, but may ask that the individual in question leaves the country. But elsewhere in the world, the concept of diplomatic asylum is rejected as a legal right – under general international law, diplomatic asylum is regarded as a matter of humanitarian practice. States are prepared to provide and, more likely, to accept the sanctuary in diplomatic missions if it is provided for the purpose of saving life or preventing injury in the face of an imminent threat. Even then the States involved negotiate and try to find an amicable solution without severing irreparably their relations. Bizarrely, the fact that the receiving State rejects the concept of diplomatic asylum makes little difference because the premises of diplomatic missions are protected by unconditional inviolability against any forceful action proposed for arresting the refugee. In the case of Julian Assange, it is not obvious that the sanctuary is necessary for the purpose of saving life or preventing injury in the face of an imminent threat. It is rather a classic example of diplomatic asylum where the protective State wishes, for whatever reason, to extend its protection to a person accused of a political offence. But once again, this does not give the United Kingdom the right to forcefully enter the Ecuadorian embassy in order to arrest Assange. What next? Because the States involved have opposite understandings and legally binding obligations about diplomatic asylum, it is difficult, if not impossible, to find a legal solution. The stalemate is likely to end with negotiations.

²³Statement of the Government of the Republic of Ecuador on the Asylum Request of Julian Assange, Ecuadorian Ministry of Foreign Affairs, Trade and Integration, 16.8.2012, (29.9.2012).