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WHAT IS THE ASYLUM, FOCUS ON THE INTERNATIONAL CONFERENCE ON ASYLUM

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Abstract

States have been granting protection to individuals and groups fleeing persecution for centuries; however, the modern refugee regime is largely the product of the second half of the twentieth century. Like international human rights law, modern refugee law has its origins in the aftermath of World War II as well as the refugee crises of the interwar years that preceded it. Article 14(1) of the Universal Declaration of Human Rights (UDHR), which was adopted in 1948, guarantees the right to seek and enjoy asylum in other countries. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the “right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions.” American Convention on Human Rights, art. 22(7); African [Banjul] Charter on Human and Peoples’ Rights, art. 12(3).

The controlling international convention on refugee law is the 1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Optional Protocol relating to the Status of Refugees (1967 Optional Protocol). The 1951 Convention establishes the definition of a refugee as well as the principle of nonrefoulement and the rights afforded to that granted refugee status. Although the 1951 Convention definition remains the dominant definition, regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

The 1951 Convention does not define how state parties are to determine whether an individual meets the definition of a refugee. Instead, the establishment of asylum proceedings and refugee status determinations are left to each State party to develop. This has resulted in disparities among different States as governments craft asylum laws based on their different resources, national security concerns, and histories with forced migration movements. Despite differences at the national and regional levels, the overarching goal of the modern refugee regime is to provide

protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.

Introduction

“No one leaves home unless home is the mouth of a shark.”

— Warsan Shire

The quote by Warsan Shire depicts the harsh reality of how persecution or its fear drives millions to leave their homes and seek asylum. As per the United Nations, Human Rights Commission (UNHRC)'s 2018 data¹, 70.8 million people were forcibly displaced worldwide out of which 3.5 million were asylum-seekers.

Around 1 million asylum-seeking applications were filed in the first half of the year 2019². It is believed that the concept of asylum is as old as life on earth, and with developing years it has taken a structured meaning and implications.

This article describes the concept, types, needs, and other factors related to the concept of Asylum and Asylum-seekers.

Asylum in International Law

It is pertinent to first understand the term ‘Asylum’. It has been derived from a Greek word whose Latin counterpart is ‘Alyson’ and it means ‘freedom from seizure’. There is no specific definition of Asylum but it can be understood as legal protection granted to people who have fled their home countries due to warship, conflict, persecution, or fear of persecution. It is a possibility to remain in a country either permanently or for a temporary period. A person who seeks international asylum i.e., an asylum seeker is known as an ‘Asylee’.

The process is that an individual has to apply for asylum in a particular country, and while their application is pending, they are made to stay in a detention camp. Once, the applications are accepted i.e., their claims are accepted, then these people get the status of a refugee and the rights that come along with it.

¹ <https://www.unhcr.org/5d08d7ee7.pdf>

² <https://www.unhcr.org/en-us/statistics/unhcrstats/5e57d0c57/mid-year-trends-2019.html>

Kinds of asylum

There are two types of Asylums are as follows:

- A) Territorial Asylum; and
- B) Extra-territorial Asylum

A) Territorial Asylum:

Territorial Asylum is granted by a State on its Territory, it is called Territorial Asylum. The right to grant asylum by a State to a person on its territory flows from the fact that every state exercises territorial sovereignty over all persons, on its territory to anyone. The grant of territorial asylum, therefore, depends upon the discretion of a State which is not under a legal obligation to grant asylum to the fugitive, as no precise rules to grant of territorial asylum. General Assembly call upon the International Law Commission in 1959 to undertake the codification of the principles and rules of international law relating to right of asylum. On 14th December 1967 General Assembly adopted Declaration of Territorial Asylum through the adoption of resolution. The declaration consists of a Preamble and four Articles dealing with the principles relating to the grant of refusal of asylum. This Declaration provides that the right to seek and 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, war crimes and crimes against humanity. Article 4 of this Declaration provides that the State granting asylum shall not permit persons who have received asylum to engage in the activities contrary to the purpose and principles of the United Nations. From the above provisions of the declaration, it is clear that State does not have the absolute right to grant asylum. The grant of asylum is a part of which cannot be exercised in respect of international crimes including genocides.

Some examples of territorial Asylum –

- i) Dawood Ibrahim mafia Don is given asylum by Dubai Government.
- ii) Taslima Nasreen a Bangladeshi writer for her novel Lajja granted asylum by Sweden.
- iii) Tiger Menon, wanted in Bombay Bomb blast case, granted asylum by Pakistan.
- iv) Dalai Lama and his followers was granted asylum by government of India.

B) Extra-territorial Asylum –

Active protection is given outside the territory not belonging to the state granting it. Thus, when Asylum is granted by a State at places outside its own territory. It is called extra-territorial

Asylum'. It usually describes those cases in which a State refuses to surrender a person demanding who is not upon its own physical territory but is upon one of its public ships lying in foreign territorial borders or upon its diplomatic premises within foreign territories. Thus, Asylum is given at legation, consular premises and warships are instances of extra-territorial asylum.

1. Diplomatic Asylum / Asylum in Legation:

Since granting extra-territorial Asylum or diplomatic Asylum involves a derogation from the sovereignty of the State, International law ordinarily does not recognize a right to grant asylum on the premises of legation. But asylum may be granted in the legation premises in the following exceptional cases.

- i) Individuals who are physically in danger from violence.
- ii) Where there is well-established and binding local custom.
- iii) When there is a special treaty between the territorial State and the state of Legation concern.
- iv) Asylum in consular premises -

2. The above principle also applies in the case of a Grant of asylum in consular premises.

3. Asylum on the premises of an international institution -

Though International Law does not recognize any rule regarding the grant of asylum in the premises of international institutions, however, temporary Asylum may be granted in case of danger of imminent violation.

4. Asylum in Warship -

There are conflicting views on to grant of asylum in warships, but it is argued that Asylum may be granted to political offenders.

As far as an asylum Warship is concerned, it may be granted on the ground of humanity, in cases of extreme danger to the individual seeking it. Thus, the right to grant asylum on Warship may be granted in the same way in the case of Legation and also subject to the operation of the same conditions.

5. Asylum in Merchant Vessels -

Since merchant vessels do not enjoy immunity from local jurisdiction, they are not competent to Grant asylum to local offenders. Thus, if a person after committing a crime on shore seeks asylum on board a foreign merchant ship he may be asserted by the local police, either before the ship leaves the port or when it comes into another port of the same State. There is, therefore a rule that asylum is not granted on merchant vessels. However, State may grant asylum if they conclude a treaty to this effect.

6. Asylum on the premises of international Institutions:

Whether a person taking refuge in the premises of an international institution or organization would be granted asylum is a question which cannot be given with certainty in the absence of any rule in this regard and also because of lack of practice. However, a right to grant temporary refuge in an extreme case of danger from a mob cannot be ruled out.

Thus, in Extra-territorial or diplomatic Asylum, Asylum can be granted in exceptional cases and it is necessary to establish a legal basis in each particular case.

Various declarations, conferences and conventions

It is worth noting that there has been a continuous conflict on the question of whether the right to asylum is a right of an individual or of the state.

There are a few declarations that provide the 'Right to Asylum' like the Universal Declaration of Human Rights (UDHR), the Vienna Declaration on Human Rights and Programme of Action and the Convention on Political Asylum which was concluded by the Seventh International Conference of American States in 1933.

- Article 14³ of the Universal Declaration of Human Rights provides the right to an individual to seek asylum in any country to protect them from persecution. Provided as per clause 2 of Article 14 that any individual who has a criminal record of anything which is not acceptable as per the principles of the United Nations, cannot seek asylum and in case of non-political reasons, the asylum can be denied. It is considered as the fundamental law.

³ https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf ⁴ <https://cms.emergency.unhcr.org/documents>

However, India is not a party to it.

□ Refugee convention⁴

Article 33(1) 1951 Refugee Convention prohibits the expulsion or return of refugees and asylumseekers if their life or freedom is in danger based on their race, religion, membership of a social group, political opinion, or nationality.

□ New York Declaration for Refugees and Migrants⁴

New York Declaration for Refugees and Migrants by the UN General Assembly in 2016 also reaffirms the 'right to seek asylum' and freedom of an individual to leave or return to their country.

□ Article 18⁵ of the Charter of Fundamental Rights of the European Union also provides that as per the rules of the Geneva Convention (28 July 1951) and 1967's protocol, the right to Asylum is guaranteed.

□ The Vienna Declaration and Programme of Action⁶ In 1993, the Vienna Declaration and Programme of Action also reaffirmed the right to seek and enjoy asylum in other countries and the right to return to their own country.

However, the articulation of the law of the right to asylum signifies that it is not the right of an individual, but rather is a right of the state to grant asylum. It depends on the discretion of the State whether it grants the asylum or not. The decision of the state must be respected by all the other states. States have to take into account their economic status before granting asylum as it is the duty of the state to ensure its economic stability.

Examples

Various countries have provided the right to asylum in their Constitutions to the people who have fled from persecution, for example- Constitution of France, Article 10 of the Italian Constitution, Article 31 of Yugoslavia Constitution, etc.

⁴ <https://www.unhcr.org/584689257.pdf>

⁵ https://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁶ <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>

Landmark cases of asylum

Assange v. The Swedish Prosecution Authority⁷

The recent case that has captured a lot of media attention is of Julian Assange. He is an Australian editor, publisher, and founder of WikiLeaks who was accused of a rape case and a molestation case by the Sweden government. The Sweden government had filed for the extradition of Assange and the UK Supreme Court had ordered for his extradition to Sweden in May 2012. In June 2012, he was granted asylum in England at the Embassy of Ecuador.

The reason was given that his human rights would be violated if he is sent to Sweden. In 2015 Sweden dropped the charges against Assange. In February 2012, the UN declared that he had been 'arbitrarily detained' by the Ecuador embassy. In May 2019 he was sentenced for 50 weeks jail for breaching bail conditions.

He has also been accused of committing a crime against the United States of America by releasing the confidential documents of the United States of America on his website named 'WikiLeaks'. The USA has been trying to extradite him to their country.

Colombia v. Peru 1950⁸

It is a landmark case that has described in detail the law on diplomatic asylum.

A national of Peru who was a political leader named Victor Raul Haya de la Torre, he was accused of instigating a military rebellion. He was granted asylum by the Colombian embassy at Lima. However, he was not allowed to leave the country. The dispute arose between Peru and Colombia and the matter was then referred to the International Court of Justice. The main question raised was regarding the right to grant diplomatic asylum.

The court carefully observed that:

- Diplomatic asylum is the derogation of territorial sovereignty and it should not be recognized unless in each case a legal basis is established.
- The state providing such a grant must prove that it has the right to grant diplomatic asylum and it should be respected by the territorial State.

⁷ [2011] EWHC 2849

⁸ Asylum Case (Colombia v. Peru), International Court of Justice (ICJ), 20 November 1950

The Court also observed that there is no international treaty related to Diplomatic Asylum, only Latin American and Central American countries have such rights. Diplomatic Asylum is defined as the asylum provided to people who are political offenders and fear that if they are prosecuted, they will have to face an unfair trial and therefore want to escape the persecution. The Court held that it is a settled fact that common criminals cannot be granted asylum. *A and Another v. Minister for Immigration & Ethnic Affairs*

In 1997, in the case of *A and Another v. Minister for Immigration & Ethnic Affairs*⁹ Chinese nationals asked for asylum in Australia and claimed that they fear prosecution because they are expecting a second child which might land them in trouble. The reason being that China has adopted the one-child policy and the fear arose that they would be subjected to sterilization as the community from which they belonged had only one child and whosoever surpassed the limitation was forced or coerced to undergo sterilization. The Court of Australia did not accept it to be a sufficient ground of persecution. Whereas, the US Congress has recognized that forced sterilization amounts to and is enough to be considered as a ground for persecution.

In India, there is no specific law related to asylum-seekers. They are categorized as 'foreigners' under various acts like Registration of Foreigners Act, 1939, Foreigners Order, 1948, Passport Act, 1920 and The Foreigners Act, 1946. India is not even a party to the Universal Declaration of Human Rights (UDHR). Still, India has provided asylum in certain cases, the main one being the asylum provided to Dalai Lama and his followers in 1955 despite being highly criticized by the China government. India had the power to do so by exercising its sovereign power.

Conclusion

Asylum is a very crucial part of international law. Now more than ever, when the middle-east countries are under turmoil, with increasing wars among countries, CAA-NRC debate in India, etc. It has become necessary to ensure the proper implementation of the right to grant asylum with prudence and forethought. There is still a need to remove the layer of obscurity over the Diplomatic Asylum concept. Various countries including India need to have a clear Asylum law

⁹ *A and Another v Minister for Immigration and Ethnic Affairs and Another*, [1997], Australia: High Court, 24 February 1997, available at: https://www.refworld.org/cases,AUS_HC,3ae6b7180.html [accessed 4 December 2022]

in their countries. As the principle that every country needs to abide by is the principle of humanity. The rights of asylum seekers have become more important. The cases worldwide are stressful and leading inhuman behaviour. The laws for the refugees are established under International law but the asylum seeker's law is not explicitly described under international law.

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