

## CHAPTER 20 ASYLUM

### Definition :

The word asylum is Latin and derives from the Greek word 'Asylos' which means inviolable place. 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, shelter, which is more than a temporary refuge; and secondly, a degree of active protection on the part of the authorities in control of the territory of asylum.<sup>1</sup> These two elements distinguish asylum from that of immigration. Historically, the concept of asylum is very old and traditional, and is opposite to the notion of extradition. Where the traditional hospitality is not offered to an alien, the act is known as extradition.

### Law on Asylum :

Asylum is being practised by the States since a long time either because it is referred to in some extradition treaties or in municipal laws. Sometimes, it is also granted without any formal legal basis. However, the concept of asylum has still not acquired the necessary clarity. Practice of States is insufficient to constitute it that type of custom which International Law requires to call the practice as a customary International Law. This reason alone led to the International Law Commission to include the topic of asylum in its provisional list for codification. The Assembly in 1959 requested the Commission 'as soon as it considers advisable, to undertake the codification of the principles and rules of International Law relating to the right of asylum'. According in 1962, the Commission decided to include the topic of asylum in its programme, but without setting any date for the start of its consideration.<sup>2</sup> In the absence of any law, the topic at present is governed mainly on the basis of the State practice and judicial decisions.

### Basis of Asylum :

A State has a right to grant asylum to a person on the principle that it has a sovereign right to control over the individuals found on its territory. Thus, the right of territorial asylum has been conferred to a State on the basis of its sovereignty over the territory. This right is exclusive in the sense that other States are excluded to exercise the jurisdiction over the same territory. The Draft Convention on Territorial Asylum adopted by the General Assembly in 1974 has recognized under Article 1 that the grant of asylum is a sovereign right of a State. The territorial jurisdictional right extends, by application, to the embassies, legations, vessels, and aircrafts. The extra-territorial application of sovereignty implies the same exclusive control as does the principle of territoriality. However, the source of legal control of a State over its territory and at the places beyond its territory



(i.e., extra-territorial) differs. While the territorial asylum finds its basis in municipal law, the extra-territorial asylum is said to have its legal basis in International Law.

States have complete freedom to put restrictions on their territorial jurisdictional right by concluding treaties. Thus, if a State concludes treaties for extradition of a fugitive criminal, there arises a legal obligation on its part to surrender them. In such cases, the sovereign right to grant asylum to such persons cannot be exercised. Similarly, restrictions can also be imposed by the States on their sovereign right to grant asylum in respect of other inhuman and heinous crimes. However, the self-imposed limitation is a discretionary privilege of a State.

### 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 views 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 case,<sup>1</sup> stated that 'asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population.'<sup>2</sup> 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.'<sup>3</sup> Thirdly, national security also plays an important role in granting asylum. The offender who may be a rebel today may become the ruler in future date. In that case, 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 relations 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 other Tibetans by India resulted in more strained relationship with India and China is an example.

### Is Asylum a Right of a Person ?

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 'every one has a right to seek and enjoy in other countries asylum from persecution'. This right was expressed as a response to the concern for refugees and stateless persons after the World War II. Further, the General Assembly of the United Nations unanimously adopted a resolution in 1967 entitled a Declaration on Territorial Asylum<sup>4</sup> which states that 'no one shall be subjected to measures such as rejection at the frontier, expulsion, or compulsory return to any State where he may be subjected to persecution, i.e., the principle of non-refoulement in its wider sense, including persons seeking admission at the order.' The above provisions might give an



impression that a person has a right to get asylum in any State. But it is to be noted that both the documents have been adopted by the General Assembly by way of declarations, and as such they have no legal force. States are, under, in no way, legally bound to accept the above provisions. Moreover, Universal Declaration of Human Rights under Article 14 provides, for a right to 'seek and enjoy' asylum. But a person can 'seek and enjoy' asylum only when it is granted by a State. Further, if asylum is regarded as to that of a right of a person, it would mean that States have a corresponding duty to grant asylum. But, it is not true. States have no such duty to grant asylum to a person. It exercises complete discretion in this regard subject to certain commitments made by way of conclusion of extradition treaties. The Constitutions of a number of countries<sup>1</sup> expressly grant the right of asylum to persons persecuted for political reasons, but it cannot yet be said that such a right has become a 'general principle of law' recognized by civilized States and as such forming part of International Law.<sup>2</sup>

It may be noted that the right to grant asylum vests in the State. It is exercised on the basis of the principle of territorial sovereignty. Although the Draft Convention on Territorial Asylum provides that the parties to the Convention shall use their 'best endeavours' in a 'humanitarian spirit' to grant asylum in their territory to a person eligible under the Draft Convention, it cannot be interpreted as that States have under any legal obligations to grant asylum to them.

### Forms of Asylum :

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

#### (I) Territorial Asylum :

When 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 own territory flows from the fact that every State exercises territorial sovereignty over all persons, on its territory, whether they are its subjects or aliens. A State has a right to admit or expel any person found in its territory. The grant of territorial asylum therefore depends upon the discretion of a State. States are not under a legal obligation to grant asylum to a fugitive.

The lack of generally accepted rules regarding the grant of territorial asylum led the General Assembly to call upon the International Law Commission in 1959 to undertake the codification of the principles and rules of International Law relating to the right of asylum. Pending the codification, the Assembly adopted a resolution on December 14, 1967, which is known as the Declaration on Territorial Asylum through the adoption of a resolution. The Declaration consists of a Preamble and four Articles, dealing with the principles relating to the grant or refusal of asylum and with the interest of the international community in the question of asylum. Article 1 of the Declaration provided that asylum granted by a State is to be respected by all other States. It also stated that the right to seek and enjoy asylum may not be invoked by any person with respect to

1. For instance, See the Preamble to the French Constitution of 1946 ; Article 10 of the Italian Constitution of 1947 ; Article 16 of the Constitution of the German Federal Republic of 1949.
2. Oppenheim, 'International Law', Vol. I, Ninth Edition (1992) p. 802.



whom there are serious reasons for considering that he has committed a crime against peace, a war crime or crimes against humanity. Article 2 stated that the situation of persons seeking or enjoying asylum is of concern to the international community. Article 3 provided that no person at the frontier, expulsion or compulsory return to any State, where he might be subjected to persecution. Exception to this principle may be made only for overriding reasons of national security or in order to safeguard the population, as in the case of mass influx of persons. Article 4 provided 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.

**Draft Convention on 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 the 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.<sup>1</sup> Article 10 of the 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 resolution<sup>2</sup> 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 Geneva<sup>3</sup> 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.

## (2) Extra-Territorial Asylum :

When asylum is granted by a State at places outside its own territory, it is called 'extra-territorial asylum'. McNair says that the term 'extra-territorial asylum' is usually described to those cases in which a State declines to surrender a person demanded who is not upon its own physical territory but is upon one of its public ships lying in foreign territorial waters or upon its diplomatic (or rarely consular) premises within foreign territory.<sup>4</sup> Thus, asylum given at legations, consular premises, and warships, are instances of extra-territorial asylum. They have been dealt separately.

### (a) Asylum in Legation :

When asylum is granted by a State within its embassy premises situated in foreign countries, it is known as asylum in legation or diplomatic asylum. Diplomatic asylum is based on the consideration that embassy premises are regarded to be outside the jurisdiction of the territorial State, and therefore it is inviolable. The Head of the mission may grant asylum to a person in the premises. Diplomatic asylum is not a general principle of International Law, and as such a State is not bound to give asylum in its embassies. Oppenheim has rightly stated that the procedure of granting diplomatic asylum in exceptional circumstances is of long-standing, but it

1. General Assembly Resolution 3272 (XXIX), December 10, 1974.
2. General Assembly Resolution 3456 (XXX) December 9, 1975.
3. U.N. Monthly Chronicle, March 1977, p. 41.
4. McNair, 'Extradition and Extraterritorial Asylum', BYIL, Vol. 28 (1951) p. 172.



is a matter of dispute to what extent it forms part of general International Law.<sup>1</sup> In the Asylum case<sup>2</sup> The Court further stated that the practice of States in this regard is laden with.....so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definite qualification of the offence.<sup>3</sup> However, asylum may be granted to individuals in legation premises in the following cases: Firstly, as a temporary measure, to individuals physically in danger from mob or from the fear of the government. It implies that asylum is given to a person whose life has become unsecured. But it is granted as a temporary measure, i.e., asylum continues so long the element of fear exists. Secondly, it is granted by those States where there is a binding local custom in this regard,<sup>4</sup> and thirdly, when there is a treaty between the territorial State and the State which is represented by the legation concerned.

Thus, a State is not under an obligation to grant asylum to a person in its legation. In the absence of a treaty or custom, the embassy must surrender the person to the prosecuting government at its request.<sup>5</sup> If the surrender is refused, certain measures may be taken to induce it to do so.<sup>6</sup> Such measures include the surrounding of the embassy by the soldiers.<sup>7</sup> Criminals may even forcibly be taken out of the embassy. But these measures may be justifiable only if the case is an urgent one, and after the envoy has in vain been requested to surrender the criminal.<sup>8</sup> However, the grant of temporary asylum against the violent and disorderly action of irresponsible sections of the population is a legal right which, on grounds of humanity,<sup>9</sup> may be exercised irrespective of treaties. In such cases, the authorities of the territorial State are bound to grant protection to the foreign diplomatic missions granting shelter to a person. Oppenheim has rightly stated that with the possible exception of the most compelling considerations of humanity, there is no right to refuse to surrender to the

1. Oppenheim, op. cit., p. 1082.
2. ICJ Reports (1950) p. 274 Facts of the case are : Victor Raul Haya de la Torre a Peruvian national, was accused of having instigated a military rebellion. A warrant was issued for his arrest on a criminal charge. He fled to the Columbian Embassy where he was granted asylum by Columbia in 1949 in its Peruvian Embassey in Lima. Columbia sought and Peru refused to safe conduct to allow Haya de la Torre out of the country. Colombia brought this case against Peru, asking the Court to rule, *inter alia*, that : Colombia, as the State granting asylum, is competent to qualify the offence for the purpose of the said asylum. It argued for such a ruling on the basis of both treaty provisions and American International Law in general.
3. *Ibid.* p. 217.
4. Starke, op. cit., p. 327.
5. Oppenheim, op. cit., p. 1083.
6. *Ibid.*
7. *Ibid.*
8. *Ibid.*, p. 1084.
9. See Asylum case, op. cit., p. 187. Also see resolution adopted in 1950 by the Institute of International law at Bath. Article 3(2) of the Resolution lays down that 'asylum may be granted to every individual whose life, person or liberty are threatened by violence emanating from local authorities or against which local authorities are manifestly not in the position to offer protection, which they tolerate or to which they incite. (cited in Oppenheim, op. cit., p. 1084).



territorial State persons who have been granted asylum within diplomatic premises. However, the position is different where the right to grant asylum, and the duty by territorial State to respect it, are expressly recognized in a treaty.<sup>1</sup> Whether asylum has been granted on humanitarian ground is a question which should be decided by some impartial agency, judicial or other, and not by the territorial State unilaterally. It is desirable if the issue is decided peacefully through the diplomatic channel. Once asylum has been granted in the diplomatic mission, the Head of the Mission is required to inform the territorial State of this fact.

The grant of asylum in legation is a question which could not be settled in International Law mainly because the practice of States is not uniform. Political considerations, very often play a dominating role in granting asylum, or in surrendering the refugees. In order to clarify the issue, the General Assembly of the United Nations adopted a resolution<sup>2</sup> wherein it invited Member States to communicate their views to the Secretary-General on diplomatic asylum. The latter was requested to circulate a report containing an analysis of the subject. The Report prepared by the Secretary-General, was, of course, a reliable study and a step towards the development of the law in this field.

### Indian View on Diplomatic Asylum :

India has made its position clear regarding the diplomatic asylum by issuing a circular to all foreign diplomatic missions in India on December 30, 1967 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.<sup>3</sup> 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 that State. He further stated that 'diplomatic missions are accorded privileges and immunities for functional reasons as is clearly brought out in the Vienna Convention on Diplomatic Relations. This Convention spells 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 a territorial State. State practice, however, permits a diplomatic mission to give within its premises temporary refuge to a person who is in imminent danger of his life until the cessation of such danger. The practice of temporary refuge is clearly justified on grounds of humanitarian considerations. What is important is that this practice does not in any way involve withdrawal of the persons concerned from the jurisdiction of the territorial State. In fact, it helps the territorial State inasmuch as the refugee is returned to it after the cessation of the imminent danger to his life'. It is to be noted that the Indian view conforms with the rules of International Law regarding diplomatic asylum.<sup>4</sup>

(b) **Asylum in Consulates :** Rules regarding asylum in consulates are similar to that of asylum in legation premises.



**(c) Asylum in Warships**

Men of war and public vessels of foreign States, while in the ports or internal waters of another State, are exempted from the jurisdiction of the latter for certain purposes. They remain under the jurisdiction of the flag State. However, such vessels are bound to observe the ordinary laws of the port. As far as asylum in war-ship is concerned, it may be granted on grounds of humanity. In cases of extreme danger to the individual seeking it. Thus, right to grant asylum on war-ship may be granted in the same way as in the case of legation and also subject to the operation of the same conditions. The fugitive once on board, is perhaps immune from seizure by the territorial State, but mere refuge does not exonerate the ship's authority from the duty to deliver up the offender. → Shelter

**(d) Asylum in Merchant Vessels :**

Merchant vessels are not exempt from the local jurisdiction, and therefore, asylum cannot be granted to an offender. Thus, if a person after committing a crime on shore seeks asylum on board a foreign merchant ship he may be arrested 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.<sup>2</sup> However, States may grant asylum if they conclude a treaty to this effect. For instance, Central American Republics have contracted to bind themselves to respect the inviolability of the right of asylum aboard the merchant vessels of whatsoever nationality anchored in their waters. But it is binding only upon the signatories of the treaty.

**Asylum in 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 the lack of practice. However, a right to grant temporary refuge in an extreme case of danger from mob cannot be ruled out.<sup>3</sup>

**ASYLUM AND EXTRADITION :**

The concept of asylum is very old and is traditional in the sense that earlier States used to provide shelter to an alien who was found in its territory. But since the last quarter of the eighteenth century the above traditional system has undergone a change for those persons who were accused of or convicted for a crime. Such persons were surrendered to the State to which they belong. Thus, in those cases where long-standing tradition was not followed was called ex-tradition. Thus, the institutions of extradition and asylum are contrary to each other. If a person is surrendered by the territorial State to the requesting State, that is called extradition. And if he is not surrendered, but given shelter and protection by the territorial State, that is referred to asylum. Thus, those persons who are not extradited are called to have been given asylum. It implies that asylum is normally granted to political offenders as well as to religious and military offenders because they as a general rule of International Law are not extradited. However, where a person has been convicted of a crime or alleged to have committed a crime, he is extradited. This has led Starke to state that asylum stops where extradition begins.<sup>4</sup> AAA

1. Starke, op. cit., p. 203.

2. O'Connell, 'International Law' Vol. II, p. 814.

3. Starke, op. cit., 328.



### Asylum and 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 criticized by China on the ground that India by granting asylum has interfered in its internal affairs, India was 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 refuge in the American Embassy in India, it was granted to him temporarily. On protest, he was surrendered to the Indian authorities.

---