

Right to Asylum for Refugees: With Reference to International Consensus on OpinioJuris and State Practices

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Abstract

The practice of offering haven to aliens escaping from the persecution they are suffering in a country has been widely accepted now and has become international tradition. The creation of united nation high commissioner refugees in the year 1951 by united nation general assembly is the corollary of the demolition of human rights which was the consequence of worldwar II. The 1951 convention is the foundation of international refugee law and its wide range acceptance as customary principle of international law.

While The ratification of treaty confers a right on a state and shows its interest in obliging to the same and the expression of willingness to be bound by the convention on the other hand the non ratification of the convention shows unwillingness to be obliged by the convention . A state has right to grant asylum to the aliens and to expel them from the same but here the question that arises is whether that the individual has right to claim for asylum and whether the principle of granting asylum is an international obligation or not. With rampant increase in the number of refugees this issue has become an international concern with the need of ultimate solution, states are anticipating this havoc situation and are formulating their own domestic laws to grant asylum to the individual who qualify the status of refugees these emerging trends in the state of granting asylum to refugees suggest an international consensus on opiniojuris and state practice to accept refugee hence grant asylum to them. This research would deal with the right of individual to be granted asylum and the analysis of same.

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Introduction

Perspicuously, a state has right to expel aliens and grant asylum to the aliens this right has been established in Asylum case but the question that is in frame is whether the individual has right to asylum as opposable to right of state to grant asylum, treaty that provides for right to asylum are anticipated differently generally not the right to receive asylum but to apply for it. With the large mass influx of refugees in various nations this particular issue has become the issue of international concern several European convention, American convention, African convention has been executed as the corollary of the same rampant influx. States are recognising the right of asylum to refugees as humanitarian right and are espousing same in their domestic law, nowadays states are comprehending asylum seeker as refugees, this emerging drift has suggested an international consensus on opiniojuris and custom practices that a refugee must receive asylum and expelling refugees from this right would be the violation of international obligation. Today even non signatory state protects the right of refugee and the same right has been inculcated in various international conventions such as universal declaration of human rights.

The aforementioned issue would be discussed in two sections the first section would consist of the right of refugees for asylum this section is further segregated in four parts the first part would be obligations arising out of conventional law, customary principle of non-refoulement, protection of refugees in non signatory states, state practice which commingles asylum seeker and refugees. Second section would deal with the analysis of the right of asylum to refugees. Further the conclusion is based on widespread practice of the same.

Research Objectives

Hypothesis

Right of refugees to be granted asylum once they get the refugee status identified.

Research Methodology

The methodology adopted for this research is doctrinal method this doctrinal method involves the analysis of various international statutes various municipal statutes and case law; existing secondary information accessed from various like books articles, journals, websites

Right to Asylum for Refugees

Although it is agreed that a state has the right to grant asylum to aliens irrespective of this right the right of individual cannot be excluded and cannot be endangered. It has also been argued that refugees are provided with procedural protection and with the right to be granted

asylum² for individuals requesting asylum once an individual claims that he has come in the latter state fearing the persecution in frontier state. The country in which the individual is claiming to be refugee cannot send them back to the country of persecution as this would be the violation of customary principle of non-refoulement and would be against international obligations. It has been argued that the right to seek and enjoy asylum is not the legal right but this right has been given in article 14 of universal declaration of human rights. Goodwin-gill does not accept this interpretation and negates this by saying that Articles 1 and 33 read together place a duty on States parties to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination. Access to asylum procedures is also debatably an implied right under the 1951 Convention (although such procedures are not necessary to accord refugee protection), and is an accepted part of State practice. It has been asserted that without appropriate asylum procedures, obligations of non-refoulement, including rejection at the frontier, could be infringed.³

Conventional Law Obliging States to Protect Refugees

Unambiguously there are certain international agreements providing explicitly the right of refugees to receive asylum besides this there are some agreements too which does not provide for the right to asylum for refugees as the explicit right and are silent on the same this right to asylum is not the legal right and is neither codified anywhere but is given in the universal declaration of human rights and in reference with the same human right European countries have drafted charter of fundamental rights in which the right to receive asylum or at least right to apply for asylum has been granted for individual qualifying the status of refugees with the due respect for the rules promulgated in Geneva convention in 1951 and in its protocol in 1967. The right to asylum on refugees has been specified as “The right to asylum shall be guaranteed in due respect with Geneva convention date 28 July 1951 and its protocol in 1967 relating to status of refugee and in accordance with constitution.”

Initially European country rejected the inclusion of right to asylum in European law in the meeting held in Tampere but in year 2000 they promulgated the same. There are certain other conventions also which explicitly grants the right of asylum and binds the country these are American declaration on rights and duties of man, The organization of American states

²D. JOLY, HAVEN OR HELL? ASYLUM POLICIES AND REFUGEES IN EUROPE 1 (1996).

³ GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 202-203 (2d ed., 1996, reprint. 1998); C. D. de Jong, *The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later*, 10 INT'L J. REF. L. 688, 689 (1998); Alice Edwards, *Tampering with Refugee Protection: The Case of Australia*, 15 INT'L J. REF. L. 192, 197 (2003).

(OAS), American convention on human rights, African commission on human and people's rights(AFchpr)and the declaration on territorial asylum.

Despite all the shortcomings this has been proved by the inclusion of the right to asylum as individuals' that these rights to individual to have access to asylum provides for the rights supplementing to the rights of states and no state can afford to go against these convention as this would be the violation of international obligation.

Customary Principle of Non-Refoulement

Under International law if not anything a state is obliged to refrain from the principle of refoulement and to follow the principle of non- refoulement this principle states that “ It is a fundamental principle of international law that forbids a country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution based on "race, religion, nationality, membership of a particular social group or political opinion" Unlike political asylum, which applies to those who can prove a well-grounded fear of persecution based on certain category of persons, non-refoulement refers to the generic repatriation of people, including refugees into war zones and other disaster locales.”

This principle is the customary principle of international law and hence it binds every state signatory or non signatory to refugee convention in 1951. But the question is whether this principle is whether this obligation gives the individuals qualifying the status of refugee the right to asylum.

There are number of treaties providing the principle of non-refoulement for instance the fourth Geneva Convention, The refugee convention, OAS, Universal declaration of human rights and the Cartagena declaration which contains in them the obligation of non-refoulement and many refugee treaties are made on the basis of this customary principle which became customary principle because of the continuing violation of humanitarian law. It has also been said in the book expulsion of aliens by GiorgioGajathat an individual who qualifies the status of refugee cannot be sent back to the country in which his life is at threat as that would be violation of humanitarian law and would be the violation of human rights. This point proves that some authors are of view that the customary principle of non-refoulement now exist to check on the violation of humanitarian law and human rights law. This principle of customary international law has been evolved by the case law Soering versus United Kingdom.

Protection of Refugees in Non-Signatory State

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Up till now we have discussed about the obligations arising out of the customary principle and the conventional law now we will dive into the duties of those state towards refugees which are non signatory. Legally speaking the non signatory states are not bound to protect refugees but they are obliged under other conventions to bind by the same these conventions are;

1. The convention against torture and other cruel, inhuman or degrading treatment or punishment (article 3).
2. The fourth Geneva Convention 1949 (art 45 para 4).
3. Declaration on the protection of all person from the enforced disappearance (article 8).

International Covenant on Civil and Political Rights (Article 7) (ICCPR)

The convention on the rights of child which ensures the right all children is yet another great example of the protection humanitarian law through customary principle article 2 of this convention grants right to every children without exception article 6 of this convention ensures the child's inherent right to life and ensure child's development and survival article 13-15 provides for the right of expression to child and article 32-38 provides protection of child from all sort of abuse, trafficking, abduction, child labour, sexual abuse. Article 22 of CRC provides for the special protection of child refugees this is based on principle that 'what may be innocuous to one may be inhumane to other who is recovering from trauma.'

And last but not least article 14 of UDHR which says that 'everyone has the right to seek and enjoy asylum in other countries.'

State Practice which Commingles Refugees and Asylum Seeker

With the large influx of refugees and this issue becoming the issue of international concern many states are anticipating same in their own way and are supplementing refugee status with that of asylum seeker they are viewing asylum as the corollary of the individual who is identified as the refugee due to these state practices many countries like European countries have drafted this right in their charter of fundamental right and have given the right to individual to sought asylum these right although weak in sense obliges states to provide refugees seeking asylum to apply for it and to be granted the same in the case there is threat to their life and that there human rights are being jeopardized

The notion of asylum seeker and refugees are intermixed in many international instruments many municipal law these notions are so rampantly mixed that they sometimes are used as the synonyms. The qualification directive of European Union whose legal basis is treaty of Amsterdam obliges states to grant asylum to refugees as the policy of common asylum

system, this kind of commingling has been done in various convention and agreements of European union article 1 of Schengen agreement defines an asylum applicant as the applicant of any alien requesting refugee status recognition under refugee convention in combination with these European instrument there are international agreement that commingles the notion article 22 of convention on child rights says that a child seeking refugee status must receive full protection and humanitarian assistance . Many resolutions of united nation general assembly have many times mixed the notions of asylum seeker and refugees.⁴

A number of other international instruments and regional contexts also evidences commingling of both the notions Resolutions of the UN General Assembly have frequently commingled the notions of asylum and refugee status generally calling for states to not jeopardize the “institution of asylum” by not seeking ways to return “refugees”, appearing to assume that refugees necessarily apply for and receive asylum. Human rights treaty monitoring bodies also do not appear to make firm distinction between the status of asylum seeker and refugees. Mubanga-Chipoya, in its final report on right to everyone to leave any country, stated that the use of the term “asylum” includes the obligation of states to admit a person to the territory of a State, to allow the person to remain there, to refuse to expel, to refuse to extradite and not to prosecute, punish or otherwise restrict the person’s liberty. These are all rights accruing from refugee status.

Lastly, the commingling may be the correct interpretation of the Refugee Convention. The UNHCR assimilates the rights of refugee status to the grant of asylum. It often refers to refugees as “asylum-seekers”.⁶⁰ In addition, and very importantly, in an Annex to the Final Act of the Refugee Convention, the delegates to the convention that drafting the convention itself specifically observed that the receipt of refugees by states was an act of granting asylum. Therefore, the assimilation of refugee rights to asylum may be the correct interpretation of the Refugee Convention. Perhaps this usage reflects a growing global opinion juris that the formally distinct categories of refugee and asylum-seeker are converging and demand equivalent treatment, i.e. that individuals qualifying as refugees must be granted asylum. The only alternative reading of this statement is sloppy drafting, which is difficult to sustain on such a wide scale. It would appear that there is opinio juris confirming that refugees qualifying as such necessarily deserve asylum.

We should next examine the combined impact of all of these instruments. Considering the above American, African and European instruments that already provide for an individual

⁴ UN GA Res. 44/137 ¶ 3 (Dec. 15, 1989); UNGA Res. 48/116 ¶ 5 (Dec. 20, 1993).

right to receive asylum (or arguably provide for such a right), there are now a significant number of states from disparate regions of the world that are bound to grant asylum. However, the extent of the right to asylum is more limited. It would appear that there is a very good argument for a customary international law obligation to grant asylum, but that would only extend to those qualifying as refugees.

Analysis of the Right to Asylum for Refugees

After going through all the right given to individual to asylum and the state's right to grant asylum we can analyse through obligations arising out of conventional law that many states are there which are recognising the humanitarian rights and are including the right to asylum for refugees in municipal law although in the charter of fundamental rights it has been given in weak sense of right to apply for asylum yet these rights are widely recognised and are given preference over state's right to grant asylum. The customary principle of non-refoulement is yet again the corollary of the emerging issue of violation of humanitarian law, persecution, attacks this principle of non-refoulement came after the second world war in the document of united nation high commissioners for refugees as at that time life of many people were put to danger and human rights were jeopardized this principle became customary because of its wide range acceptance and due to rampant increase in violation of humanitarian law there are certain provisions in international instrument which provides for protection of refugees in non signatory countries these are called non signatory because they have not signed refugee convention in 1951 due to some problem in their domestic country this tells us that these rights are so crucial and are so quintessence to the protection of humanitarian law that these can not at all be endangered and are hence safeguarded in various documents, wide range acceptance of this customary principle has also resulted in the intermixing of two notions and hence this commingling tells us that the states are now realising the importance of asylum to refugee and are protecting humanity this is more of moral obligation than international obligation but inclusion of such moral obligation would give result to positive environment and healthy world and would ensure the protection of basic human rights.

Conclusion

We examined the rights of refugees and their right to asylum the language of many international instruments tell us that the right to asylum is supplementary to the individuals who are recognised as refugees various European instrument and international instrument are also of the same view, inclusion of right to asylum in many instruments tells us the

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opinionjuris established and the custom that is evolving. Today intermingling of the notion asylum seeker and refugees gives right to refugee to apply for asylum and this has been established in various case laws.

Initially, we examined whether the “right” to asylum should be understood as a state right to grant asylum. The language of many of the instruments examined in this paper appear to articulate a right for states, specifically, that states’ grant of asylum should be respected by other states and not interpreted as an unfriendly act. It seemed that this right to have the grant of asylum respected might be limited to situations of persecution or war, and it appeared that persecution in this context was similar or the same as persecution in the refugee context. Thus, at a minimum, the grant of asylum to refugees should be seen as a right of a state.