

## Extradition and Asylum

### Introduction

The liberty of a State to accord asylum to a person overlaps to a certain extent with its liberty to refuse extradition of that person at the request of some other State, an overlapping is best seen in the grant, commonly, of asylum to political offenders, who correspondingly are not as a rule extraditable. Asylum stops, as it were, where extradition begins, and this interdependence makes it important to consider the two subjects together. Thus, to understand the relationship between extradition and asylum it is essential to first deal with the concept of asylum in detail.

The term "Asylum" has no determined meaning and is applied in different contexts. Instruments of International Law allude to asylum, but do not define it or specify its meaning. European Community law applies the term in different senses. In the treaty of European Community signed in 1992, "Asylum" is closely linked to protection offered pursuant to the Refugee Convention, 1951 which would be too narrow a definition for present purposes.

In academic writing, the definition of asylum adopted by Institute du Droit International at its Bath Conference in 1950 is often applied:

*".....the terms "asile" designe [1] La protection [2] qu' un Etataccorde [3] sur son territoireoudans un autreendroit relevant de certains de ses organs a' [4] un individuquiestvenu la Chercher"* -" the term "asylum" means [1] the protection [2] offered by a State [3] on its territory or elsewhere to [4] an individual who came to seek it".

According to this definition, firstly the term "individual", (element-[4]) as the drafter of this definition undoubtedly tacitly intended, the term asylum applies only to protection offered to aliens. States owe protection to their nationals on account of that nationality; such protection hence needs no juridical category. Thus, "an individual" should be understood as a person not possessing the nationality of the State he requests protection from. Secondly, the term "protection" (element [1]), suggests some threat or danger from which the individual needs shelter. Hence, asylum concerns protection by a State from a danger that threatens the alien outside the State's jurisdiction. Thirdly, regarding territorial scope the definition intentionally covers both protection offered on the territory and protection offered at embassies and consulates. Fourthly, the definition restricts "asylum" to protection offered "by State" (element [2]), thus excluding protection by a church or other non-State actors.

Official accounts retain obeisance to the principle of asylum as having a long historical tradition in Britain. A home office memorandum of 1984 is an example of this:

The UK, like most other western European Countries, has a long tradition of granting refuge to those who have fled their own countries to escape political or religious persecution..... a historical account.....would need to back at least 16th century when the grant of asylum to those who fear persecution for their religious beliefs became common place. But it is worth noting that the first piece of modern immigration legislation – The Aliens Act, 1905, provided that anyone who sought asylum on political or religious grounds should be granted entry and should not be refused, leave to land even if he was likely to fall charge on public rates. In the same way today a valid claim for asylum overrides the normal requirement of immigration control that other immigrants must satisfy in order to enter or remain there.

Until the mid-1980s only refugees could invoke International Law to resist removal to a dangerous country of origin. The evolution in International Law since that time has been fast – paced and profound. This is most clearly under European Human Rights Law. No less an authority than House of Lords has declared that the right of non-return extends not only to refugees, but to any person at risk of torture or inhuman or degrading treatment or punishment, and at least where the risk is clear and extreme, applies also where any right of life, freedom from slavery, liberty and security of person, to protection against *ex post facto* criminality, the right to privacy and family life, and to freedom of thought, conscience or religion is threatened.

Another accepted view is that the word Asylum is a Latin word and it is derived from the Greek word ‘Asyilia’ 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.

1. Firstly, the shelter, which is more than a temporary refuge.
2. 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. The nature of the doctrine is well outlined by the Institute of International Law in the following terms:

“Asylum is the protection which 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”.

Embedded in this definition is the fundamental distinction between territorial asylum granted within the territorial jurisdiction of a State, and ex-territorial asylum granted in embassies, legations, consulates, warships and merchant vessels and, thus, within the territory of another country. Before going into details we will discuss the history of Asylum.

### **Historical Background of Asylum**

Historically the word extradition stands for the opposite notion of traditional hospitality offered to an alien and is, therefore “extra-tradition”. It is a process which derogates to the tradition of asylum. The practice of asylum preceded in origin to that of extradition and, therefore, extradition became an exception to asylum, both by reason of substance and as a consequence of their historical development. Asylum was the place where a State could not exercise its jurisdiction over any individual, granted there in or upon any individual, the inviolability of his person. This gave rise to legal connection between asylum and jurisdiction.

Asylum was not always uniformly recognized or practised by societies through history, in fact the practice was uneven, at one time it was selectively applied, and at other it was considered as a privilege rather than right. Maximum examples of its application throughout the times are increasingly relied upon to give credence to the theory of Suaaz and Grotius that asylum is an inherent human right deriving from Natural Law. The practice originated in sanctuaries offered by the holy places in ancient times. The holy places, by virtue of their association with divinity, came to be regarded as inviolable by the pursuing mortals. These places, consequently, provided asylum to the pursued. The reverence for holy places was probably based either on the superstition that the wrath of the God would fall upon the violator, or on the respect which these places commanded as being the abode of God. Divinity thus protected the unfortunate member of the society from certain primitive and cruel form of punishment.

Thus ‘The Asylum’, the sacred place, was available even against the civil authorities of the countries, where the religious and civil authorities remained separate. However, in countries where the two were combined in one supreme authority, asylum was not available against the civil authorities.

A different thought prevailed in other ancient civilizations. In India for example, the Laws of Manu insisted upon the punishment of the crime. According to Manu, the punishment (the consequence) of the wrong (the act) is justice, which is, following the Hindu thought, a

necessary phenomenon. Therefore, it would be in the interest of the culprit to put himself to justice through punishment, rather than to escape from it. Accordingly the Laws of Manu would not approve Asylum. Furthermore, the king who did not punish a crime was regarded an accomplice to it, whereas the king who punished the crime was to achieve glory in this world and supreme happiness after his death. In such system, there would not be any place for asylum.

Similarly in Egypt evidence seems lacking to support a proposition that asylum was an institution recognized by law, although accounts are found of asylum in the temple of Osiris and Amon, where slaves would flee from the abuse of their lords. Generally speaking Egyptians followed the law rigidly and punished its violator. Among the Greeks, a number of temples offered asylum, although there might not have existed a general right to it. There was also a multiplicity of Gods, each Greek city being under the special protection of particular God. The sanctity of a certain God was most dominating in the city whose patron he was. A city tended to recognize the right of asylum not in any of its temples but in the temple of its patron God. Generally speaking the Greeks regarded asylum necessary to alleviate the rigors of the law. In Rome, the legend of its founding is that, soon as Romulus and Remus founded the city, they opened a place for fugitives in this temple and refused to deliver them because as they declared they were directed by an oracle of Apollo to protect the asylum from violation. Thus the first part begins with the establishment of the Roman Empire and lasts until consolidation. The aim was to establish a strong bellicose State and for that reason the city was opened for all the fleeing people. It can be stated that Roman asylum was based on the principle of practicality. Presumably it was the first asylum in Italy, except for the Greek colonies in Sicilia Magna. This view is supported by the fact that if the same kind of asylum had existed in other Italian cities, Rome would not have been that popular to attract so many people from other places, who, later, formed the class of 'aliens'. Thus it can be assumed that this institution was originally adopted from the Greeks because in Latin the Greek word 'asylum' was used and the havens were similar, for instance they considered the same Gods as refugees protectors. Thus it can be stated that Roman asylum institution was an important stage during the evolution of the right of asylum. Territorial asylum was limited by the consequent and regular application of extradition and the perpetrating country's criminal jurisdiction was supported by international agreements.

Thus the middle age asylum laws were incorporated by ecclesiastical norms. However, these cannot be considered as belonging to the domain of International Law because they were connected with crimes committed on the territory of the Church. Ecclesiastical asylum right

represented the Catholic Church's mercy and forgiveness to the secular world. In 323 AD, Constantine the Great, authorized Churches to exercise the right of asylum. With that power the Church got involved into criminal jurisdiction of the secular State, which often caused conflicts between them as the Church gained more and more power.

The Arab tradition of asylum is long in existence in the Arabian Peninsula. It was started by Prophet Mohammad who on entering Mecca after battling its residents, who opposed him, proclaimed two sites as sanctuaries. Thus throughout the early history of asylum a common concept ran through it, namely the relationship between the transcendental beliefs. Thus the reason why a sanctuary was not violated was that the pursuers would become subject to the vengeance of the divinity whose sanctuary had been violated, and also in some cases subject to temporal punishment.

By the 16th century ideas on the reform of criminal justice appeared and by the 17th century, religious wars and unremitting religious feuds abated, particularly after the Treaty of Westphalia (1648). By the 18th century, penal reform and concern for world order started to emerge and this development brought about new limitations on the law and practice of asylum. Among these were:

1. Place should not confer absolute immunity to all types of fugitives because
2. States have duty to prosecute common criminals, *aut dedere aut judicare*.
3. States have a reciprocal duty to each other in furtherance of developing world order.

On the other hand the presence of asylum and refugee rights is sometimes considered as an achievement of the modern International Law. Indeed, it has gained more importance since the beginning of the 20<sup>th</sup> century and has become a core issue of the modern democracies. Since, the second half of the 20<sup>th</sup> century international refugee law, asylum rights and the system of extradition has made great strides. Through the bilateral and multilateral agreements conducted under the guidance of United Nations, an efficient and complex system has been built. The recent development is strongly connected with the evolution of human rights, which gained importance since Second World War.

The national and international characteristics can be clearly distinguished. The national character was distinctive until 17<sup>th</sup> century, when national legal orders and criminal procedure were dubious and could not provide efficient guarantees and remedies in case of failure. The main purpose behind this right was to provide help to the accused against encroachment until the criminal procedure started with its legal guarantees for a fair and just trial. The asylum rights with international characteristics, operating between States, had mainly political and humanitarian reasons. The legal institution had been considered as a common field for both

criminal and International Law until 19<sup>th</sup> century, when refugees due to the European revolutions and fights for independence and the improved transport facilities, fled to the other countries. By that time the question of competency finally seemed to be settled and the International Law approach was accepted.

Thus there is no clear demarcation line in history to indicate the shift from predominant practice of religious and ecclesiastic asylum to what became political asylum. The change was gradual and it came about with the decline of ecclesiastic temporal power and the emergence of political doctrine of government and State and their relationship to the individual, which occurred during the 17<sup>th</sup> and 18<sup>th</sup> century. Thus the asylum was now not based on fear of Gods but on territorial sovereignty of States that could exist only among independent sovereignties.

### **Rationale for Asylum**

Religious asylum declined with the emergence of the non-ecclesiastic State, in most of European countries after the separation of Church from the State and as the divine rights of the kings were now denied and this particularly occurred after reformation. This led to the development of the asylum as is existing now days, i.e. a form of immunity from foreign legal processes granted by the State of refuge to an alien subject to its jurisdiction. The application of this type of asylum was within the territorial jurisdiction of a State rather than within the walls of a temple or Church.

The concept of asylum remains one of personal immunity from the authoritative processes of a decision maker other than that of the jurisdictional authority under whose power the alien falls.

On this basis the asylum can be categorized into:

a) Territorial Asylum; b) Extra Territorial Asylum

M. Cherif Bassiouni explains these two terms as follows:

(1) Territorial Asylum: Denying another authoritative process the ability to exercise jurisdiction over an individual through extradition or other modes of rendition of the person sought but who was granted asylum and

(2) Extraterritorial Asylum: Granting asylum in an embassy or on a vessel.

### **Types of Asylum**

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, i.e., for political defectors.
- (ii) Refugee Asylum i.e., for those who fear persecution in their own country.
- (iii) General Asylum i.e., 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.

### **Extra-Territorial Asylum**

Asylum granted by a State not on its physical territory, but on its notional territory, like in legation and consular premises in the physical territory of another State, and on warships, is called the extra territorial asylum. Such kind of asylum finds its basis in:

- (i) The Principles of Extra Territoriality; (ii) The Diplomatic Privileges; (iii) Custom; (iv) Usage; (v) Treaty or (vi) Regional International Law

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

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. This also applies where an asylum seeker may have been involved in criminal conduct, be it in his or her country of origin or in third country. Should it exceptionally be deemed necessary to contact the authorities of that country, in case additional information which can only be obtained from these authorities is required to determine the extradition request or aspects of the asylum application which are related to an extradition request, there should be no disclosure of the fact that the individual has applied for asylum.