

Fondation Philippe Wiener – Maurice Anspach
Chaire W. J. Ganshof van der Meersch

Principles of International Refugee Law

3. Asylum

Guy S. Goodwin-Gill
Senior Research Fellow, All Souls College, Oxford
Professor of International Refugee Law, University of Oxford
Barrister, Blackstone Chambers, London

Universal Declaration of Human Rights

The first draft – 1947

- John Humphrey
 - Article 34
 - Every State shall have the right to grant asylum to political refugees
- Drafting Committee
 - Everyone has the right to escape persecution on grounds of political or other beliefs or on grounds of racial prejudice by taking refuge on the territory of any State willing to grant him asylum.

Universal Declaration of Human Rights

Asylum – final text

- Article 14(1)
 - Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- Article 14(2)
 - This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Universal Declaration of Human Rights

Asylum

- Article 14(1)
 - **Everyone** has the **right to seek and to enjoy** in other countries asylum from persecution.

Universal Declaration of Human Rights

Asylum – alternatives

■ France

- Everyone has the right to seek *and be granted*, in other countries, asylum from persecution

Universal Declaration of Human Rights

Article 14 critiqued

■ Hersch Lauterpacht

- ‘... artificial to the point of flippancy...’

■ Otto Kimminich

- ‘Das Recht, Asyl zu suchen, bedeutet nichts anderes als das Recht, sich auf die Flucht zu begeben.’

The right to asylum

To be a convention right?

- ‘One of the fundamental rights of the human being...’
- ‘The natural corollary’ of other human rights

The right to asylum

Possible scope

■ Chile, Uruguay, Yugoslavia

- ‘any person accused of political offences, and in particular... any person accused or persecuted on account of his participation in the struggle for national independence or political freedom or on account of his activities for the achievement of the purposes and principles proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights’

The right to asylum

Possible scope

■ USSR

- ‘all persons persecuted for their activities in defence of democratic interests, for their scientific work or for their participation in the struggle for national liberation’

■ Other States

- ‘there was no fundamental right of the individual to be granted asylum but only a right of the State to extend its protection...’

1967 UN Declaration on Territorial Asylum

■ Article 1

1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.
2. The right to seek and enjoy asylum may not be invoked... serious reasons... crime against peace, war crime, crime against humanity...
3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.

Later developments

■ 1977 UN Conference on Territorial Asylum (failed)

- ▶ from:
 - Contracting States, ‘acting in an international and humanitarian spirit, *shall use [their] best endeavours to grant asylum* in [their] territory...’
- ▶ to:
 - Contracting States, ‘shall endeavour... to grant asylum...’

Regional Instruments

1969 OAU Convention on Refugee Problems in Africa

Article II: Asylum

1. Member States of the OAU **shall use their best endeavours** consistent with their respective legislations **to receive refugees** and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.

Regional Instruments

1969 OAU Convention on Refugee Problems in Africa

Article II: Asylum (cont'd)

...

4. Where a Member State finds **difficulty in continuing to grant asylum** to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take **appropriate measures to lighten the burden of the Member State granting asylum**.

5. **Where a refugee has not received the right to reside in any country of asylum**, he may be granted **temporary residence** in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

Regional Instruments

2004 EU Qualification Directive

Article 13: Granting of refugee status

Member States **shall grant refugee status** to a third country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.

Regional Instruments

■ Article 8, 2001 EU Temporary Protection Directive

- ▶ 1. The Member States shall adopt the necessary measures to provide persons enjoying temporary protection with residence permits for the entire duration of the protection...

■ Article 18, EU Charter of Fundamental Rights

- ▶ The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Human rights-based protection

Asylum and Regional Human Rights Treaties

1950 European Convention on Human Rights

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Asylum and Regional Human Rights Treaties

1969 American Convention on Human Rights

Article 22

...

7. Every person has **the right to seek and be granted asylum** in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

Asylum and Regional Human Rights Treaties

1981 African Charter on Human and People's Rights

Article 12

...

3. Every individual shall have **the right, when persecuted, to seek and obtain asylum** in other countries in accordance with the law of those countries and international conventions.

Asylum in customary international law

Asylum and general international law

- *Corfu Channel Case*, [1949] ICJ Reports 4
 - ‘... elementary considerations of humanity, even more exacting in peace than in war...’
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136
 - ‘... ‘obligations which are essentially of an *erga omnes* character’
- *Application of the International Convention for the Elimination of All Forms of Racial Discrimination (Provisional Measures)*, [2008] ICJ Reports 353
 - the ‘irreparable’ prejudice that could result from violation of ‘the right to security of the person and protection by the State against violence or bodily harm...’