

RIGHT TO ASYLUM: A RIGHT OF THE STATE OR THE INDIVIDUAL?**** GAURI THAMPLI. P¹ & ANAND NANDAKUMAR²****Introduction**

On 19th September 2016, the United Nations hosted a summit on Refugees and Migrants, the first ever to discuss the largest human displacement since World War II³. The leaders of nations of the world attended the summit to extend their corporation to the crisis that has 65 million people displaced around the world⁴. The end product of the summit was the ‘New York declaration for Refugees and Migrants’ through which the world leaders agreed to commit to solving the existing refugee crisis. In 2015, the total number of migrants crossed 244 million which is increasing at an even faster rate⁵. The displacement of such a large number of people shows the prevailing situation in the countries they’ve left and the damage associated with the uncertain future of millions including their resettlement and rehabilitation. The fundamental freedom the refugees and migrants are entitled to are the same even though they are governed by different legal frame works⁶. The UN charter applies to all irrespective of their language, race, colour, religion, sex, political opinion, place of birth, .etc⁷ and it guarantees the right to life, liberty and security of person⁸. Article 14 of the UN Charter exists for the protection of refugees and asylum seekers and thereby provides them with such a right :

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

(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 Nations⁹.*

It is the duty of the International community or rather the countries who’ve agreed to the various conventions, treaties and declarations to help the refugees and the displaced persons. It is not a political or economic matter, but a matter of human rights where the borders of the map, religion, war, and differences between individuals or countries’ policies are insignificant when it comes to the fact that lives of millions are at stake. As many as 1 million refugees crossed Europe in 2015, majority of them being from Syria followed by

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³ Summit for Refugees and Migrants, ADDRESSING LARGE MOVEMENTS OF REFUGEES AND MIGRANTS (September 19, 2016) <https://refugeesmigrants.un.org/summit> .

⁴ World Leaders Pledge To Improve Refugee Crisis Response In First-Ever U.N. Summit, THE HUFFINGTON POST (2017), http://www.huffingtonpost.com/entry/refugee-crisis-united-nations-summit_us_57d946e5e4b09d7a68809e83.

⁵ New York declaration for refugees and migrants A/71/L.1.

⁶ *Ibid* para 6.

⁷ UN Charter Article 2.

⁸ *Ibid* Article 3.

⁹ *Ibid* Article 14.

Afghanistan, Iraq, Kosovo, Albania¹⁰. Germany accommodated the maximum number of refugees while Hungary accommodated the highest number in proportion to its population¹¹. France, UK, Austria, Norway have also welcomed refugees to their country. This disproportionate burden of harboring refugees has led to conflicts within the European Union¹². The conflicted regions of Central African Republic, Nigeria, South Sudan as well as Burundi and Yemen have resulted in many fleeing these regions to find safety and security in Sub-Saharan Africa which hosts more than 26% of the refugee population¹³. Though many asylum seekers have accomplished the task of safe travel and found asylum, there are many applicants who've been rejected because the Countries were unwilling to take them in. There is influx of refugees to few countries causing the unequal distribution of the refugee population which has become burdensome for them. While a lot of resourceful countries are unwilling to welcome the refugees by having stricter regulations and policy framework.

The authors have structured the paper in such a manner that it starts off with finding an answer to the debate in question: whether the 'right to asylum' is a right to be exercised by the individual or is it the right of the State? The paper meanders through the various sources of international law, i.e. treaties, customs, general principles of international law and juristic opinion to find a conclusion to the question. Surprisingly, the law on the subject and the current practise are entirely different to each other. Hence, the paper looks into the factors that deny the true application of international law. The paper concludes with a note by the authors on the current crisis the world is facing and how the international practice does not support the cause.

How is to exercise the right?

Just how Grahl-Madsen, mentioned in as early as 1972, that the question of who has the right to asylum is worth pondering into. The debate as to whether the right is the right of the individual to claim or the territorial right of the sovereign to grant is still under question. The answer is to be brought out from international law itself. Since the international conventions on this matter do not give us a clear cut answer to the question and since customary international law is only codified in the treaties, we will have to look into the secondary sources for an answer.

¹⁰ Migrant crisis: Migration to Europe explained in seven charts, BBC NEWS (2017), <http://www.bbc.com/news/world-europe-34131911> .

¹¹ *Id.*

¹² *Id.*

¹³ UNHCR Africa, UNHCR (2017), <http://www.unhcr.org/africa.html> .

According to Grahl-Madsen 'it is significant that scholars in many countries are seriously exploring the question [of a 'right to asylum' for individuals] with the view to finding a suitable form of a binding international instrument guaranteeing the individual a right to be granted asylum'.¹⁴ He was also the first to mention 'right to asylum' as the right of the individual and not of the state. He also envisaged, in 1972, an international convention granting the right as a right to the individual and said that the various municipal laws and domestic constitutions pointed at its possibility.

Weis, one of the drafters of the Refugee Convention, notes that '[i]n the Anglo-Saxon countries, the grant of asylum of a number of countries provide for right to asylum....Other countries have provisions in their aliens' legislation that either explicitly or *de facto*, as a result of the prohibition of *refoulement*, including rejection at the frontier, establish a right to asylum¹⁵...[which confers] upon the individual a subjective right to asylum.¹⁶ He went on to enlist 38 countries where right to asylum for individuals is recognized.

He also noted that 'our generation has witnessed an impressive development towards an internationally guaranteed right for the individual to be granted asylum' and stated that '[a]rticle 33 [of the Refugee Convention] creates an obligation to grant asylum to persons entitled to invoke it, provided that no third State is either obliged or willing to receive them.'¹⁷ Weis also mentioned that writers of international law (Grotius, Suarez and Wolff) conceived asylum 'as a duty of the State or a natural right of the individual...in pursuance of an international duty.'¹⁸ Weis mentions that during the negotiation on the 1967 UN Declaration on Territorial Asylum, the disagreement was that 'as [a] number of [States] considered that the right to asylum was a sovereign right of States [such as UK]. Others did not expressly subscribe to this view [such as Denmark], while yet others supported the opposite view of asylum as a right of the individual [such as Spain, Sweden and the Netherlands].'¹⁹

Having a liberal-democratic tradition, the constitutions of Angola, Benin, Bulgaria, Bolivia, Burundi, Brazil, Cape Verde, Chad, China, Colombia, Costa Rica, Cuba, Democratic Republic of Congo, the Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany,

¹⁴ A GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, (Sijthoff, 1966)

¹⁵ Weis, *The Development of Refugee Law: Transnational Legal Problems of Refugees*, 3 Michigan Yearbook of International Legal Studies, 27, 38 (1982)

¹⁶ Weis, *Territorial Asylum*, 6 Indian Journal of International Law 173, 180 (1966)

¹⁷ *Ibid* 42-43

¹⁸ *Ibid* 175

¹⁹ *Ibid* 180

Guatemala, Guinea-Conakry, Honduras, Hungary, Italy, Ivory Coast, Mali, Mozambique, Nicaragua, Paraguay, Peru, Portugal, Spain and Venezuela all recognize the right to asylum.

The German Administrative Court (*Bundesverwaltungsgericht*) on enquiring to CJEU to clarify whether the granting of asylum by application of the German Constitution to individuals excluded from refugee status, by article 1F of the Refugee Convention, was compatible with the obligations imposed by EU law, it was replied that ‘Member states may grant a right of asylum under their national law to a person who is excluded from refugee status...’.²⁰

Article 13 of the Cuban Constitution reads that “The Republic of Congo grants asylum to [individuals] persecuted because of their democratic ideals against imperialism, fascism, colonialism and neo-colonialism; against discrimination and racism; for national liberation; for the rights of workers, peasants, and students; because of their progressive political, scientific, artistic, and literary activities, because of socialism and peace. 1987 Nicaraguan Constitution reads that it ‘protects solely [individuals] persecuted for their fight in favour of democracy, peace, justice and human rights’.²¹ 1976 Portuguese Constitution ensures the right to asylum ‘to foreigners and stateless persons persecuted or seriously threatened with persecution as a result of their activities in favour of democracy, social and national freedom, peace among peoples, individual freedoms and rights.’²² 2010 Angola Constitution also ensured the right and mentions that ‘The right to asylum is guaranteed to every foreigner or stateless person persecuted for political reasons, especially those under serious threat or persecuted by reason of their activities in favour of democracy, national liberalisation, peace among peoples, freedom, and human rights, in accordance with the laws in force and international instruments.’²³ The 2010 amended Constitution of Cape Verde ensures ‘Foreigners and stateless persons persecuted for political reasons or under serious threat of persecution by virtue of their activities in favour of national liberalisation, democracy, or the respect of human rights, have the right to asylum in national territory.’²⁴ 1992 Constitution of Guinea-Conarky assures ‘Everyone persecuted by reason of his political, philosophical or religious opinions, his race, his ethnic membership, his intellectual, scientific, or cultural activities, [or] by reason of his defence of freedom has the right to

²⁰ Joined Cases C 57/09 and C 101/09 *Bundesrepublik Deutschland v B & D* [2010] ECR I-10979, ¶ 121

²¹ Constitution of Nicaragua; Article 42

²² Constitution of Portugal; Article 33(8)

²³ Constitution of Angola; Article 71(1)

²⁴ Constitution of Cape Verde Article 39

asylum in the territory of the Republic.’²⁵ 2006 Constitution of Democratic Republic of Congo reads that [t]he Democratic Republic of Congo grants...asylum in its territory to foreigners sought or persecuted by reason of their opinion; beliefs; racial, tribal, ethnic, linguistic, membership or because of their activities in favour of democracy and the Rights of Man and Peoples, in accordance with the laws and regulations in force.²⁶ 1988 Brazilian Constitution also mentions that ‘the international relations of the Federal Republic of Brazil are ruled by the following principles...the granting of political asylum.’²⁷

The Costa Rican Supreme Court in a judgment²⁸ in 1998 held that “asylum is a legal principle of higher rank that...turns the State’s territory into an inviolable space for the protection of individuals of other countries when they are persecuted by reason of their political or ideological preferences or actions, a principle enshrined in Article 31 of the Constitution, and that as such it constitutes a fundamental right [of individual].” In Ecuador, the Constitutional Court terming the right to asylum as a human right stated that “insofar as [asylum] arises from the need to restore the fundamental human rights of individuals who have been forced to leave their countries of origin.”²⁹ Rejecting the provision for right to asylum of individual, the constitutional debate in Spain concluded the relevant provision³⁰ in their Constitution as “the law shall establish the terms under which nationals of other countries and stateless persons shall enjoy the right to asylum in Spain.” But even in Spain, if an individual meets the requirements according to the law, he has the right to claim asylum or else the action will be subject to judicial scrutiny. The Administrative Tribunal in Nantes (France) held that the nature of the constitutional right to asylum is that of a fundamental freedom, it follows that the refusal to issue a visa constituted ‘a serious and manifestly unlawful violation of a fundamental freedom with serious consequences for the asylum in question.’³¹

In the context of the European Union, asylum has been recognized as a (legally binding) general principle of the EU Law resulting from the constitutional traditions of its member states. In the words of Advocate General Maduro in the *Elgafaji* case: ‘[the]

²⁵ Constitution of Guinea-Conarky; Article 11

²⁶ Constitution of Democratic Republic of Congo; Article 33

²⁷ Constitution of Brazil; Article 4

²⁸ *Leiva Durán v Ministro de Relaciones Exteriores y Tribunal Penal del Primer Circuito Judicial de San José*, Costa Rica Supreme Court, decisión No 6441– 8, 4 Sept 1998.

²⁹ *Case No 0056-12-IM & 0003-12-IA Acumulados*, Ecuador Constitutional Court, Judgment No 002-14-SIN-CC, 14 Aug 2014, 38

³⁰ Constitution of Spain; Article 13(4)

³¹ TA, 16 Sept 2014, Case No. 1407765

fundamental right to asylum...follows from the general principle of Community law which, themselves, are the result of constitutional traditions to the Member States.³² Article 22(7) of the American Convention on Human Rights³³ recognizes 'the right to seek and be granted asylum'. The Inter-American Court of Human Rights in the case of *Pancheo Tineo* held that the interpretation that Article 22(7) on the right to asylum enshrines a right to individual, which imposes specific procedural obligations on states, including to give them access to asylum procedures.³⁴

Grahl-Madsen believed that constitutions around the world '[laid] down a more or less perfect right to asylum for individuals,³⁵ a view shared by Weis, who stated that constitutions around the world '[confer] upon the individual a subjective right to asylum.'³⁶

The above-mentioned constitutions in fact gives us a feeling that the general international law on the subject supports the contention that right to asylum is a right that can be claimed by the individual. But on the practical level, things are much different. It is to be noted that none of the permanent nations of the Security Council, except for France, have a constitutional provision assuring the right to asylum. Most of the States that do assure such a right belong to the third world or politically weaker powers who have no enforcement capabilities in the International sphere. This very same factor hinders the enforcement of right to asylum as a right of the individual.

Enforcement of International Refugee Law

The international law is founded on the basis of some universal principles. John Austin defined law, as the command of the sovereign. The principle of sovereignty which was earlier limited to a constitutional aspect has gained significance in the field of international law as well³⁷. Sovereignty, as a concept associated with International law has led to the existence of a peremptory norm to uphold Human rights by international community³⁸. The element of enforceability is what that differentiates international law from the national law³⁹. Unlike the national laws which allow the state to take legal action against

³² Case No. 465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, [2009] ECR I-921, ¶ 21; Opinion of Advocate General Maduro

³³ American Convention on Human Rights, Adopted 22 Nov 1969, entered into force 18 Jul 1978, 114 UNTS 123.

³⁴ *Caso Familia Pacheco Tineo v. Estado Plurinacional de Bolivia*, Inter-Am. Comm'n H.R. (2013)

³⁵ Grahl-Madsen, *Territorial Asylum*, Almquist & Wiksell International, (1980)

³⁶ P Weis, *Territorial Asylum*, 6 *Indian Journal of International Law* 173, 180 (1966)

³⁷ Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 *Emory Int'l Rev.* 321, 444 (1991)

³⁸ *Ibid* p393

³⁹ Jasper Doomen, *The Meaning of 'International Law'*, 4 *The Open Law Journal* 21-28 (2011).

any violation of law, the international law has political means rather than legal methods to invoke countries to adhere to it⁴⁰.

International law addresses human rights as the right entitled to every human being in the world. As the preamble of Universal Declaration of Human Rights (UDHR) states, “... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”⁴¹ In the past few decades the international community is facing a conflict between the rights of the refugees and asylum seekers who’ve fled the countries of conflict, and the rights of the nations to maintain their national security. Refugee crisis is not a problem of the present as the world has seen some of the largest human movements from the 740 BC Israelites movement in Canaan to the,1685 Edict of Fontainebleau in France, 1783 Muhacirs from Ottoman Empire, and the significant World War I & II⁴². While analyzing the international obligation of states towards refugees and asylum seekers, the refugee convention and protocol, as well as the International human rights instruments including Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) are important⁴³. The difference in the status of ‘refugees’ and ‘asylum seekers’ arises here as refugees receive special protection due to the existence of the Refugee Convention and Refugee Protocol while the asylum seekers rights have been enshrined in the human rights law⁴⁴. Growing terrorism, fear of national security and difficulty in accommodating the refugees has forced the nations of the world to resort to interpreting the right to asylum in their own ways. A January 27th 2017 decree of the United States government prohibited the entry of all refugees to US for 120 days, and the entry of Syrian refugees indefinitely⁴⁵. It also suspended the issuance of visas to 7 majorly muslim countries, including Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen⁴⁶. US has an international legal obligation to

⁴⁰ *Ibid.*

⁴¹ UN General Assembly. (1948).

⁴² Mona Chalabi, What happened to history’s refugees?, THE GUARDIAN (2017), <https://www.theguardian.com/news/datablog/interactive/2013/jul/25/what-happened-history-refugees#Israelites>.

⁴³ Bobana Ugarkovic, *A Comparative Study of Social and Economic Rights of Asylum Seekers and Refugees in the United States and the United Kingdom*, 32 Ga. J. Int’l & Comp. L. 539, 580 (2004).

⁴⁴ *Id.*

⁴⁵ Trump’s travel ban: All you need to know about US President’s immigration order, HINDUSTAN TIMES (2017), <http://www.hindustantimes.com/world-news/trump-s-travel-ban-all-you-need-to-know-about-us-president-s-immigration-order/story-AGMcAlnXVexcovK6ooXgtL.html>.

⁴⁶ *Id.*

comply with the Refugee convention 1951⁴⁷. US had modified its domestic laws by introducing the Refugee Act 1890 in order to bring the law in compliance with the Refugee Convention and Protocol⁴⁸. The immigration ban was in clear violation of all International laws to which US is a signatory to. Such an immigration ban would also violate Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which prohibits refoulement⁴⁹. Even after violating many important International Refugee Laws, US did continue with the ban. This raises a question of the enforcement of International Law. A powerful country like US which is in a position to handle and curb the refugee crisis is violating the International law, and questioning the right of asylum seekers. Since International law doesn't have any legal enforcement mechanism, the extent to which a body could politically pressurize the government of a powerful country is very limited. The current decentralization has shifted the focus to regional human rights law, which allows the countries to influence and define human rights on their own⁵⁰. This is in favour of rich and the powerful countries and sooner or later the less powerful countries will disappear from the international human rights discourse⁵¹. The countries interpreting these laws to suit them, will dictate the international law – 'how it ought to be' in alliance with their domestic laws.

Conclusion

All the countries who are agreeing to such International legislations have a legal obligation or duty towards upholding such laws. Asylum is defined as a place where one is safe and secure⁵². The millions of asylum seekers are the ones' who escape adverse circumstances and situations and expect to live in a country where they can have a peaceful life. The idea of having international human rights is to consider all human beings as one and thereby lead to betterment of their lives. If the act of countries is such that it questions the enforcement of the International Laws, it'd lead to violation of rights of billions. Such gaps in law must be filled by the nations so as to uphold the idea of a global community that embraces peace and justice.

⁴⁷ Does Donald Trump's immigration ban breach international law?, Newsweek (2017), <http://europe.newsweek.com/donald-trump-muslim-ban-refugee-ban-international-law-549980?rm=eu>.

⁴⁸ Misha Seay, *Better Late than Never: A Critique of the United States' Asylum Filing Deadline from International and Comparative Law Perspectives*, 34 *Hastings Int'l & Comp. L. Rev.* 407, 434 (2011).

⁴⁹ *Id.*

⁵⁰ Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement*, 35 *Cal. W. Int'l L.J.* 275, 302 (2005).

⁵¹ *Id.*

⁵² Websters New world Dictionary 88th ed.