

THE RIGHT OF ASYLUM
IN THE CONTEXT OF THE PROTECTION OF
HUMAN RIGHTS IN REGIONAL AND MUNICIPAL LAW¹

by P. Weis

1. The objective of universal protection of the human rights of all men

Just as the Universal Declaration of Human Rights proclaims the fundamental importance of the rights of all men, so the European Convention on Human Rights seeks to secure to everyone within the jurisdiction of the High Contracting Parties the rights and freedoms it contains. This objective of securing the general application of the protection of the Convention is followed in the Protocols to the Convention which add further rights to those already incorporated in it.

In view of this interest of the International Community both universally and regionally in the general protection of human rights, which is reflected in other regional instruments concerning human rights, a serious problem arises with regard to those persons who are in danger of coming within the protection of no such instrument. One particular group in respect of which this danger arises is that of persons seeking asylum. The need of such persons for the protection of their human rights is particularly acute and yet their protection depends on the goodwill of States which may or may not accept any obligations with regard to them. From earliest times, people have sought asylum from the violation of their human rights or in fear of their being disregarded. Until the protection of human rights is universally assured they are likely to continue to seek in other countries asylum from persecution which has been proclaimed as a human right in Article 14 of the Universal Declaration.

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As the right to life is the prerequisite for the enjoyment of every other human right, so the right of asylum is the prerequisite for the enjoyment of his basic rights by a refugee. The European Convention recognises the right to life as the first which it seeks to protect and in the same way a refugee first needs protection by the grant of asylum.

2. The development of the law on the right of asylum in international instruments

Traditional doctrine bases the right of asylum on the right of a State in its sovereignty to decide whom it shall admit to its territory. International law prohibits other States from interfering within its sovereign jurisdiction and, as a result, other States have been barred from challenging successfully the right of a State to harbour within its borders those persons to whom it wishes to give protection.

This traditional doctrine resulted in Article 14 of the Universal Declaration embodying only the right of everyone "to seek and to enjoy in other countries asylum from persecution." The UN Commission on Human Rights in their draft for this Article had included the right to be granted asylum but in the Third Committee of the General Assembly it was amended in order to remove any suggestion that the Article implied an obligation on any State to admit a person seeking asylum.

The chief international instrument relating to the protection of refugees, the Convention of 28 July 1951 relating to the Status of Refugees, to which all the Member States of the Council of Europe are party, was also drafted with the intention of having any effect on the regulation of the admission of persons seeking asylum from persecution. On the other hand it contained a strong provision giving effect to the principle of non-refoulement, i.e. that no State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The UN Commission on Human Rights' draft of a Declaration on the Right of Asylum at present before the Third Committee of the General Assembly develops this principle of non-refoulement by making it

explicitly referable to rejection at the frontier if this would result in compelling a person seeking asylum to return to or remain in a territory if there is well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

While it appears to be generally recognised that asylum is granted on humanitarian grounds (cf. I.C.J. 1950, page 282) and that States in granting asylum, act in fulfilment of their humanitarian duties (Institute of International Law, Bath, 1950 Vol. 2, page 389), a new trend in the doctrine on the law of asylum is appearing which seeks to base the right of asylum on the necessity for the protection of the human rights of the individual and further seeks to equate the right of asylum with a right of the individual to the protection of his human rights.

This trend was the basis of the draft of the UN Commission on Human Rights for Article 14 of the Universal Declaration before it was amended by the General Assembly. It was also the basis of an amendment proposed by France in the Third Committee to the Commission's draft which was itself largely the result of French initiatives. France by this amendment sought to add to the Declaration that everyone has the right to seek and be granted asylum, a provision that the United Nations in concert with States should be required to secure such asylum for those who seek it.

3. The right of asylum in municipal law

The strongest manner in which a right can be incorporated in the municipal law of a country is for it to be embodied in its Constitution. An ever-increasing number of Constitutions are declaring the respect for human rights and embodying in their provisions some assurances for the general protection of these rights. The number of Constitutions which mention specifically the right of asylum and of these, the number in which the right of asylum is defined as a right of the individual, is less great but is also increasing.

The second most secure manner for incorporating a right in municipal law is by means of an Act of the Legislature or some other formal statutory provision. The majority of Acts which refer to the right of asylum are those which regulate a country's extradition procedures. It is general for such Acts to restrict the surrender

of any person whose extradition is sought for a political offence. Aliens laws and regulations frequently limit in a similar way the expulsion of persons who would fear persecution in a territory to which their expulsion was intended. Aliens laws containing such provisions have only recently been enacted in several States, among them the German Federal Republic and the Netherlands.

A further possibility is the establishment of rights in municipal law by the incorporation of provisions contained in treaties. In those countries where the 1951 Refugee Convention has been incorporated into municipal law, the protection of the right of asylum is assured, although only to those already admitted to its enjoyment.

Extradition has also been the object of many treaties which have been incorporated in municipal law in this way and which have thereby given further protection to political offenders. The European Convention on Extradition of 30 December 1957 is one of the most important in this field. As well as promoting the uniformity of Extradition practice between Member States, it increases the protection of persons enjoying asylum by extending to the victims of political events the restriction on the extradition of political offenders and thereby excluding from the operation of the Convention any person whose extradition is sought " if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons " (Article 3(2)).

4. The right of asylum in the Constitutions of Member States

The French Constitution has the longest history of the formal Constitutions of the Member States of the Council of Europe containing a specific provision on the right of asylum. The Preamble to the Constitution of 4 October 1958 solemnly proclaims the attachment of the French People to the human rights and principles of national sovereignty as they were already defined in the Declaration on the Rights of Man of 1789 and completed by the Preamble to the Constitution of 27 October 1946, which states that anyone persecuted because of his activities in the cause of liberty shall be entitled

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to the right of asylum within the territories of the Republic. France has constantly been an initiator and a driving force for the protection of human rights and of those of persons fleeing from persecution in particular.

In its brevity and succinctness the German Constitutional provision on the right of asylum is perhaps the most general and far-reaching in effect. In Article 16(2) of the Basic Law of 8 May 1949, the second sentence in only four words states that the politically persecuted enjoy the right of asylum. Already a considerable body of judicial decisions has grown up interpreting this provision.

The new trend equating the right of asylum and the right of an individual to the protection of his human rights is best characterised by the Italian Constitution of 27 December 1947. In its Article 10, it states that the foreigner who is denied in his own country the effective exercise of the democratic freedoms guaranteed by the Italian Constitution has a right to asylum in the territory of the Republic in accordance with the provisions of law. This provision adopts for its yardstick to determine who shall receive asylum, the same protection that it grants to all persons within its jurisdiction demonstrating the faith which it has in the necessity to grant all persons universally the same standard and the same protection without discrimination.

No other Member State has a direct reference to asylum in their Constitution though references in various of their Constitutions are made to Extradition and Aliens Laws.

5. European State practice in the grant of asylum

Whether or not explicit provisions on asylum have been made in the Constitutions, Statute or Treaty law of Member States, their practice, which is itself a source of international law, has on the whole been fairly uniform, generous and virtually all-embracing in granting asylum both within the continent of Europe and from outside. Even when asylum is granted by the Executive as a matter of policy rather than under legal obligations, governments have frequently made firm statements that they would not deviate from this policy if this would leave the person seeking asylum to the mercy of his persecutors.

Typical of such statements is that made by the Home Secretary of the United Kingdom in the House of Commons on 21 March 1963: « The tradition of this country is that a person is granted political asylum if, in his own country, he appears to us to be in danger of life or liberty on political grounds, or on grounds of religion or race. »

In the same sense the Swiss Federal Council in its Report of 1 February 1957 on the principles to be observed in the practice of asylum in the case of increased international tension or of war stated the basis of its policy as follows: “ Le droit d’asile n’est pas une simple tradition de la Suisse. Il est un principe politique et une manifestation de la conception suisse de la liberté et de l’indépendance.”

Even in the case of the mass influx of some 200,000 Hungarians in 1956 and 1957 asylum was not denied by neighbouring countries. Austria and Yugoslavia, the International Community as a whole and the Member States in particular collaborated to relieve the countries of first asylum most immediately affected. This collaboration of other States with those who shouldered the greatest burden resulted in the spontaneous acceptance by many States of large numbers of refugees without any condition or special requirement for their entry.

Whether Member States grant asylum as a matter of policy or as a matter of law, where their municipal law recognises an obligation to grant asylum, there is little difference in their practice, all recognising humanitarian duty which they fulfil in so doing.

6. The prerequisites for the protection of all asylum seekers

If the objective of States in accordance with the basic humanitarian character of asylum is to ensure the protection of the human rights of all individuals and particularly of persons seeking asylum, means must be found to ensure that they will always be able to find some territory in which they can enjoy asylum. In the first instance it is the individual States who provide this. In certain circumstances, however, it may become impossible for a particular State to provide the necessary protection in its territory for more than a minimal period of time. In this event it is essential that an alternative so-

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lution be sought and the assurance that a territory will be found for all persons seeking asylum can only be given by the International Community as a whole acting in concert.

In this matter national and international action are clearly interdependent. Uniform State practice whether as a matter of law or of policy facilitates the reaching of international agreement. Equally international agreement is bound to influence the favourable development of municipal law on the right of asylum. The readiness of individual States to grant asylum and strengthen the protection of those seeking asylum will be enhanced by the knowledge that other States will act in the same way. It therefore follows that States should consider the strengthening of the right of asylum both in their municipal law and on a regional basis.

The Council of Europe has for some time been engaged in such action on a regional level. In September 1963 and again in April 1964 the Committee of Ministers considered the report of the Committee of Experts on Recommendation 293 in which the Assembly proposed the inclusion of an article on the right of asylum in a protocol to the Convention on Human Rights. The Committee of Experts were of the opinion that an article as proposed by the Assembly or on the principle of non-refoulement should not be included in a protocol to the Convention but suggested the possibility of a separate Convention on asylum outside the framework of the Convention on Human Rights or of a recommendation to Member States by way of a resolution of the Committee of Ministers. The Committee of Experts was instructed to prepare a draft declaration on the right of asylum upon which a resolution or convention might be based in due course while awaiting the results of discussions on the matter in the UN General Assembly.

In Latin America and the Western Hemisphere as a whole the right of asylum has been the subject of many bilateral, multilateral and regional instruments. The Asian African Legal Consultative Committee has studied the Law of Extradition and is at present examining the right of asylum within the larger question of the rights of refugees. The Organisation of African Unity is at present considering a draft Convention relating to the Status of Refugees in Africa which it is hoped will include a provision on the right of asylum.

Conclusion

Without individual States and regional organisations taking the necessary initiatives, progress in the protection of asylum seekers is not likely to be achieved. Every opportunity should therefore be sought to enshrine the right of asylum in municipal law as securely as possible. As an example, a recent initiative of the Austrian Federal Chancellor for the revision of the "State Basic Law on the general rights of citizens" of 1867 may be mentioned which provides such an opportunity to consider the inclusion of the right of asylum in a new basic law.

The States Members of the Council of Europe are perhaps in the best position to reach agreement on a regional level on an instrument which could pave the way to the protection of human rights where necessary by the grant of asylum being assured by the community of States. The Member States are agreed on a uniformly generous policy; they have the necessary unity of purpose to seek agreement; the wide experience of the last decades has given them an incomparable experience of the problems involved.

Whenever States acting individually or within the framework of regional organisations create particular legal provisions and instruments for the protection of persons seeking asylum, they not only assure these rights within their own territory but beyond this reaffirm their faith in fundamental human rights and in the dignity and worth of the human person proclaimed in the Preamble to the Charter of the United Nations.

Paul WEIS

Ph. D. Dr. Jur.

Director Legal Division, United Nations
High Commissioner for Refugees