

THE 1967 DECLARATION ON TERRITORIAL ASYLUM

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Article 14, paragraph 1, of the 1948 Universal Declaration on Human Rights proclaims the right of everyone, “to seek and to enjoy in other countries asylum from persecution”. Its final, equivocal wording – there is no reference to the right to be *granted* asylum – was a compromise between States which saw this form of protection as but one aspect of their territorial sovereignty, and those which urged that an individual entitlement to asylum be recognized, as well as the involvement or responsibility of the United Nations.

Following the adoption of the Universal Declaration, the issue of asylum remained very much alive, initially as the drafting of the human rights covenants got underway in the 1950s.

The topic “Right of Asylum” was already included in the provisional list for codification drawn up by the International Law Commission in 1949. At its first session that year a suggestion to include such a right in the draft Declaration on the Rights and Duties of States was discussed but rejected as being too complex to be answered in a single provision. (A/925, para. 23; A/CN.4/SR.16, paras. 67-110; A/CN.4/SR.20, paras. 95-111; and A/1316, para. 12). The question – as one of diplomatic asylum – also came up before the International Court of Justice during the same period; see *Asylum (Colombia v. Peru)*, Judgment, I.C.J. Reports 1950, p. 266, and *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 71.

In 1956, the Commission on Human Rights decided to place the question of the right of asylum on the agenda of its next meeting (E/2744, paras. 108-112; E/CN.4/738 and E/CN.4/SR.564), and in 1957 France proposed a declaration on the subject (E/CN.4/L.454 and Rev.1). It suggested that responsibility for granting asylum should lie “with the international community as represented by the United Nations”, and that entitlement should extend to “every person whose life, physical integrity or liberty is threatened, in violation of the principles of the Universal Declaration”.

The Sixth Committee and the International Law Commission

In a parallel development, the question of asylum was also discussed extensively in the Sixth Committee of the General Assembly in 1959, when it considered the work of the International Law Commission (A/4253 and A/C.6/SR.602-612). El Salvador proposed that the issue be included in the International Law Commission’s programme, but the Mexican representative, noting that asylum constituted an exception to the principle of a State’s sovereignty over its own territory, remarked that “[the] institution of asylum could operate only within a regional community possessing a fairly well-established common tradition. It seemed hardly likely that, so far as the world as a whole was concerned, States whose interests, legal philosophies and political systems were often conflicting would willingly accept the interference of other countries in their domestic affairs” (A/C.6/SR.608, para.17).

The general debate at the time was as much about diplomatic as about territorial asylum, and about the importance of the International Law Commission awaiting the outcome of the ongoing work of the Commission on Human Rights. Sir Gerald Fitzmaurice, then Chair of the International Law Commission, remarked that while the Commission would naturally accord much weight to any resolution of the General Assembly, other commitments and other topics would probably take precedence, and it was unlikely to take up the question before the Commission on Human Rights completed its own work (A/C.6/SR.610, paras. 37-39).

El Salvador's proposal was adopted by the Sixth Committee (63 votes for, 1 against, 12 abstentions) and submitted to the General Assembly. By resolution 1400 (XIV) of 21 November 1959 (56 votes for, 0 against, 11 abstentions), the General Assembly requested the International Law Commission "as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum."

Two years later, the General Assembly called again on the International Law Commission to work on codification of the right; it was duly included in the Commission's future work programme in 1962, although no start date was set (A/CN.4/128; A/5209, paras. 60 and 63). As noted below, the International Law Commission was never in fact to take up the topic.

Commission on Human Rights

The Commission on Human Rights meanwhile had reviewed the question of a declaration in 1958. The previous year, it had circulated a French draft for comments, receiving replies from twenty-three governments and one from the Office of the United Nations High Commissioner for Refugees. A revised draft was then also circulated, attracting further comments (E/3335, paras. 63-67). The Commission discussed the matter at its March 1960 session, with the revised French draft before it (E/3335, paras. 70ff), together with a proposed new article on the right of return submitted by Iraq (E/CN.4.L.518).

At its Sixteenth Session in February-March 1960, the Commission took note of General Assembly resolution 1400 (XIV) requesting the International Law Commission to undertake codification of the right of asylum. It was generally agreed, however, that the Commission should continue its own work, which was concerned with the humanitarian aspects of asylum, as opposed to the essentially legal focus of the International Law Commission (E/3335, para. 73).

The question of whether the Declaration should relate only to territorial asylum or touch also on diplomatic asylum was raised, as also was its scope with regard to individuals and large numbers of people fleeing persecution (E/3335, para. 74). While the Declaration should not attempt to impose obligations on States, nevertheless it should mark a step forward from article 14 of the Universal Declaration on Human Rights.

Members agreed that the principle that all States should respect the grant of asylum by another State was sound. A specific role for the United Nations was queried, however, given the terms of article 2, paragraph 7, of the United Nations Charter (E/3335, paras. 94, 99-104). The wording of draft article 4 was also objected to, insofar as it would place other countries under an *obligation* to assist States facing difficulties in granting asylum; a less 'normative' formulation was proposed and accepted (E/3335, paras. 105, 107-8, 147).

It was understood that the principle of *non-refoulement* was the core of the Declaration, although with some reservations as to the text: “no one entitled under article 14 ... to seek and to enjoy asylum shall be subject to measures, such as expulsion, return or rejection at the frontier, which would result in compelling him to return to or remain in a territory where his life, physical integrity or liberty would be threatened on account of his race, religion, nationality, or membership of a particular social group or political opinion” (draft article 3 of the draft Declaration as submitted by the representative of France (E/CN.4/L.517)). Also, although the permissible exceptions to the principle were based on article 33, paragraph 2 of the 1951 Convention relating to the Status of Refugees, some members highlighted their ambiguity and lack of precision, while others were worried about a possible mass influx and the necessity to acknowledge other ‘compelling reasons’ as a basis for exceptions (E/3335, paras. 110, 113-14).

However, broad exceptions would defeat the purpose of the Declaration. After all, there was still no obligation to grant asylum and the restriction on sovereignty entailed by *non-refoulement* was very limited, and only about not sending the individual to a country in which their life or liberty would be endangered. The United Nations High Commissioner for Refugees, speaking at the invitation of the Chair, stressed the importance of the principle being stated unambiguously (E/3335, paras. 115-16).

A revised text on exceptions suggested “overriding reasons pertaining to national security or to the protection of its population” (E/3335, paras. 119, 123). Again, some members expressed concern at the vagueness of these terms, and their openness to ‘elastic interpretation’. After a somewhat confusing vote, draft article 3 was reopened, with the notion of “safeguarding of the population” now mentioned together with national security as grounds for exception. The Commission also retained a reference to the possibility of provisional asylum being granted wherever the exceptions were invoked (E/3335, paras. 126-33). Draft article 4 (those enjoying asylum should not engage in activities contrary to the purposes and principles of the United Nations) and draft article 5 (on the right of everyone to return to their country) were adopted with little debate, and the draft Declaration was submitted to the Economic and Social Council and to the Secretary-General for transmission to States for any further comment (E/3335, paras. 145-7).

The Council in turn sent the Commission’s draft to the General Assembly (Economic and Social Council resolution 772 (XXX) of 25 July 1960), but discussion in the Social, Humanitarian & Cultural Affairs Committee (Third Committee) of the General Assembly was deferred to the next session because of lack of time (General Assembly resolution 1571 (XV) of 18 December 1960). It was then further deferred to the seventeenth session (General Assembly resolution 1682 (XVI) of 18 December 1961; and A/C.3/SR.1125, paras. 31-51).

The Third Committee

The Third Committee considered the draft Declaration in detail in 1962 (A/C.3/SR.1192-1202 and A/C.3/SR.1209). The United Nations High Commissioner for Refugees, Felix Schnyder, addressed the first meeting and emphasized that the Declaration would be of value “only to the extent that it expressed, for the guidance of States, positive principles reflecting such practice as would protect and promote the right to seek asylum” (A/C.3/SR.1192, paras. 2-3). He favoured a statement without qualifications, particularly as the Declaration would not be legally binding. The principle of non-return needed to be stated clearly and unambiguously, lest the draft be weakened and each exception appear more important than the principle itself. As in the Commission on Human Rights, so also

in the Third Committee, the exceptions were criticised for their vagueness (A/C.3/SR.1194, paras. 19, 29-30 and 35).

In the introductory debate, the French delegate stressed the humanitarian emphasis of the draft, which dealt with the ‘general right’ of asylum, entailed no legal commitments, and could thus be applied universally. Several States repeatedly declared that existing law and practice distinguished between the right of the individual to seek and enjoy asylum, and the prerogative or sovereign competence of the State to grant asylum (A/C.3/SR.1192, para. 15 and A/C.3/SR.1194, paras. 7 and 23). Others thought it necessary to define with precision the categories of those who might enjoy the right of asylum, and specifically to include a reference to persons struggling against colonialism; still others preferred to avoid “the pitfalls of enumeration” (A/C.3/SR.1192, para. 16; A/C.3/SR.1194, para. 24; and A/C.3/SR.1196, para. 18). The distinction between diplomatic and territorial asylum came up repeatedly, as did that between the “purely political” *asilado*, as understood in the practice of Latin American States, and the refugee (A/C.3/SR.1193, paras. 4, 7, 9 and 19). Many States considered that the Declaration should be styled as relating exclusively to territorial asylum (A/C.3/SR.1193, paras. 10 (Brazil) and 19 (Argentina); A/C.3/SR.1194, para. 8 (United Kingdom); and A/C.3/SR.1195, paras. 4 and 7 (Chile), and paras. 15-17 (Peru)).

The Third Committee then moved to consider the preamble and article 1 of the draft Declaration. There was considerable support for the principle, proposed for inclusion by Poland, that the State granting asylum was alone competent to define the grounds (A/C.3/SR.1195, para. 18; and A/C.3/SR.1196, para. 1). It was also widely agreed that the grant of asylum should be respected by other States, and was to be seen as “a peaceful and humanitarian act” (A/C.3/SR.1197, para. 15). The preamble was adopted at the 1198th Meeting (A/C.3/SR.1198, paras. 47-57), and the Committee then examined article 1. Delegates again emphasised that the ‘right’ in question was simply that of the individual to “seek” asylum (A/C.3/SR.1200, para. 15), and that the State remained competent to “evaluate” the grounds without having to explain its reasons (para. 31). Article 1 was adopted as amended at the 1201st Meeting (A/C.3/SR.1201, paras. 19-42). The remaining text of the draft Declaration was scheduled for consideration at the next session, and the General Assembly undertook “to devote as many meetings as necessary” to complete the issue (General Assembly resolution 1839 (XVII) of 19 December 1962). In fact, no further substantive discussions took place until 1966.

The Sixth Committee, once again

In 1965, the General Assembly decided to allocate the draft Declaration to the Sixth Committee, which had a much lighter agenda. The Committee established a working group to review various procedural questions, which in turn recommended that the Committee proceed with drafting articles 2-5 and review the preamble and article 1 as necessary (UNGAOR, 21st Session, 1966, Annexes, 4-5; and General Assembly resolution 2100 (XX) of 20 December 1965).

The Sixth Committee reviewed its mandate from the General Assembly (A/C.6/SR.919-923, 925-926, 953). Initial discussions went over much of the ground covered earlier in the Third Committee and the Commission on Human Rights. Among the issues still of concern were the scope of the draft Declaration, and whether it should also cover diplomatic asylum; the Chilean representative suggested not, and supported Uruguay’s proposal that the words “right of asylum” in the title be replaced by the words “territorial asylum” (A/C.6/SR.920, para. 2 and A/C.6/SR.921, para. 43(d)).

Many States were again keen to underline the “sovereign competence” or discretionary power of the State in granting asylum (A/C.6/SR.921, para. 35; A/C.6/SR.922, para. 33; and A/C.6/SR.923, paras. 6 and 32). Others emphasised the importance nonetheless of setting out “the political and humanitarian principles” by which the practice of States might be guided (A/C.6/SR.922, para. 26).

The Sixth Committee also spent considerable time on whether those entitled to invoke article 14, paragraph 1, of the Universal Declaration on Human Rights should be strengthened with a reference to include those struggling against colonialism (A/C.6/SR.923, para. 15). Some States objected that colonialism was a more or less spent force, and/or that it was inappropriate to single out a particular group of potential asylum seekers who, if liable to be persecuted for their participation in the struggle, would likely qualify anyway (A/C.6/SR.923, para. 36).

At the 922nd Meeting, Mexico proposed that the Committee appoint a working group with a balanced representation of the geographical groups and the various schools of thought, and that the group prepare a preliminary draft using the material and work done so far (A/C.6/SR.922, para. 7). The Committee duly adopted this proposal and the Chairman in turn appointed the members after consultation (A/C.6/SR.923, paras. 67-8; A/C.6/SR.925, paras. 14-17; and A/C.6/SR.926, paras. 1-2).

The Sixth Committee Working Group

The Working Group held fourteen meetings in the period 14 November to 6 December 1966. It agreed to change the title of the draft to show that it was limited to territorial asylum (A/6570, Annex). It further agreed that the word “should” was appropriate to the preambular recommendatory paragraph (“recommends that... States should base themselves... on the following principles”), but that the word “shall” “should be used in the relevant operative paragraphs which, while not of a binding character, would be strengthened in their humanitarian purposes and have more persuasive value...” (A/6570, Annex, para. 13).

The Working Group was unable to resolve the “against colonialism” question, and left it for further discussion in the Sixth Committee (A/6570, Annex, paras. 21-4). The second paragraph of draft article 2, which was directed at encouraging international support for any State finding it difficult to grant or continue asylum, also caused problems. Some feared that this might open the way to the infringement of sovereignty and to interference in internal affairs (A/6570, Annex, paras. 42-7). The Working Group nevertheless decided to retain the reference in amended form.

Article 3 on *non-refoulement* was considered the most important article, and the Working Group focused on the most appropriate way of formulating the principle, the grounds for exception, and possible alternatives (A/6570, Annex, para. 54). It agreed that the principle should refer not only to the State of flight, but also to any other State where the individual might be in danger of persecution (A/6570, Annex, para. 55). On exceptions, it agreed that national security should be mentioned, but there were differences as to whether ‘safeguarding the population’ should be included, either at all, or with or without qualification. Several representatives thought the term too wide, and suggested specific reference instead to a ‘mass influx’. The Working Group decided not to include other possible grounds for exception, such as ‘public order’, which was described as ‘both dangerously wide and vague’, as well as being subject to different meanings in common law and civil law countries (A/6570, Annex, para. 57). It agreed finally on a compromise text which would permit an exception to the principle “in order to safeguard the

population, as in the case of a mass influx of persons.” In the words of the Working Group, “[it] was felt that this phrase, while not unduly restricting the exception concerned, indicated that it was to be invoked only in matters of serious import” (A/6570, Annex, para. 56).

The Working Group next examined article 4, an initial draft of which provided that those enjoying asylum should not engage in activities contrary to the purposes and principles of the United Nations. The oddity of moving from provisions addressed to States to one addressed to individuals was remarked, and the text was reformulated in terms of the responsibility of the State (A/6570, paras. 63-72). It decided not to include a separate article on the right of return, which was already mentioned in the preamble.

The complete text agreed by the Working Group was presented with its report to the Sixth Committee at its 953rd Meeting on 9 December 1966. The Chairman of the Group emphasized that they had approached the task not to set forth legal norms, but rather to lay down “humanitarian principles” (A/6570, para. 40); to this end, the Declaration “should be of a broad and general nature and couched in simple terms”. It was thought that Governments might want some time to reflect on the text before its adoption, and the Sixth Committee duly recommended that the General Assembly take the necessary action with a view to “the final adoption of the Declaration” (A/6570, paras. 40ff, and General Assembly resolution 2203 (XXI) of 16 December 1966).

At its twenty-second session, in 1967, the Sixth Committee considered what was now known as the ‘Draft Declaration on Territorial Asylum’ (A/C.6/SR.983-984, 986 and 989). Representatives reiterated earlier points, emphasizing again the importance of bringing in those struggling against colonialism, underlining the sovereign competence of the State, but recognizing nevertheless that decisions on asylum should be taken in good faith and not arbitrarily. Overall, they accepted that the text was a compromise, ‘a well-balanced consensus’. The Committee concluded by unanimously recommending the draft to the General Assembly (A/6912, para. 1). Its report summarised the discussions, and noted also the view that, though the Declaration was not binding, “if it achieved its purpose of serving as a guide for State practice it might eventually, through the unification of such practice, lead to the establishment of new customary rules of international law, creating new obligations for States” (A/6912, para. 14). Others stressed that the Declaration should be seen as a “transitional step”, leading in the future to the adoption of binding rules in an international convention (A/6912, para. 16), and the resolution adopting the Declaration expressly called attention to the work of codification to be undertaken by the International Law Commission, pursuant to General Assembly resolution 1400 (XIV) of 2 November 1959.

After brief examination in plenary, the General Assembly unanimously adopted resolution 2312 (XXII), ‘Declaration on Territorial Asylum’, on 14 December 1967.

Later developments

The first draft of a convention on territorial asylum was in fact proposed, not by the International Law Commission, as General Assembly resolutions might have anticipated, but by a group of experts meeting in 1971 and 1972 under the auspices of the Carnegie Endowment for International Peace, in consultation with the United Nations High Commissioner for Refugees. The draft was discussed in the Third Committee in 1972, the High Commissioner consulted with governments, many of whom appeared to favour a convention, and the General Assembly decided that the text should be reviewed by a United Nations Group of Experts. The General Assembly then asked the Secretary-

General, in consultation with the High Commissioner, to convene a conference on territorial asylum in early 1977 (General Assembly resolution 3456 (XXX) of 9 December 1975). The conference is generally considered a failure at which little if anything was achieved; notwithstanding a recommendation from the conference at its final session, the Third Committee has since declined to submit any proposal for its reconvening.

The International Law Commission noted the holding of the first session of the United Nations Conference on Territorial Asylum when reporting to the General Assembly later that year. It concluded that the 'Right of Asylum', which had been first selected for codification in 1949 by the Commission and was then referred to it again by the General Assembly in 1959, "[does] not appear at present to require active consideration in the near future" by the Commission (A/32/10, para. 109, pp. 129-30). It is no longer in the Commission's work programme.

Significance and impact

It took nearly twenty years for the question of asylum to move from one General Assembly Declaration to another and now, a further forty-five years later, an international convention seems as remote as ever. The principles adopted unanimously in 1967 are thus still very much a part of the legal framework today, but with some significant refinements due to the subsequent practice of States and international organizations at the universal and regional level.

The institution of asylum continues to be an important feature in the relations between States, but the categories of those entitled to protection as a matter of general international law range beyond the defining notion of persecution. The exclusion from protection of the most serious 'international criminals' has also developed with the extension and consolidation of international criminal law, particularly through the work of the tribunals for the Former Yugoslavia and Rwanda, and now that of the International Criminal Court. The July 2012 judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* also highlights potential qualifications to the right of the State to grant asylum to individuals accused of serious human rights violations.

While it still remains for each State to 'evaluate' the grounds for the grant of asylum, today that discretionary competence is necessarily qualified, to a point, by increased recognition of the individual's protected rights and interests, on the one hand, and by the powerful normative weight of the principle of *non-refoulement*/non-return, on the other. That these rules have been strengthened through the practice of States is in no small way due to the fact that, as the Declaration reaffirmed, refugees remain a matter of international concern. Despite fears of interference in domestic matters, States have regularly acted individually, but also collaboratively and comprehensively with the Office of the United Nations High Commissioner for Refugees, to provide protection and solutions for refugees displaced throughout the world. International solidarity and co-operation still present challenges, however, as the number of protracted refugees situations demonstrates only too well.

Since 1967, the principle of *non-refoulement*/non-return has also consolidated itself in the practice of States in pursuance of their treaty obligations and the requirements of customary international law. Again, regional developments have played an important role. Within two years of the adoption of the Declaration, the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa adopted the language of articles 1-3 of the Declaration for its own statement of obligations

on asylum and *non-refoulement* (1969 OAU Convention, article 2). Similarly, the 1981 African Charter on Human and Peoples' Rights recognizes "the right, when persecuted, to seek and obtain asylum in other countries..." (article 12, paragraph 3), while both instruments follow the lead of article 4 of the Declaration in prohibiting refugees from engaging in "subversive activities" (1969 OAU Convention, article 3; and 1981 African Charter, article 23, paragraph 2).

The 1969 American Convention on Human Rights likewise recognizes the right of the individual "to seek and be granted asylum in a foreign territory" (article 22, paragraph 7), and not to be returned "to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions" (article 22, paragraph 8). The 1984 Cartagena Declaration on Refugees reconfirms the basic principles of the 1967 Declaration, describing the principle of *non-refoulement* as "a corner-stone of international protection of refugees."

In Europe, the terms of the Declaration were soon reflected in the decisions and recommendations of the Council of Europe Parliamentary Assembly and the Committee of Ministers. The principle of non-return was developed in the jurisprudence of the European Court of Human Rights, and, in 2000, the European Union's Charter of Fundamental Rights provided expressly that "the right to asylum shall be guaranteed", and that no one may be removed to a State where he or she faces a serious risk of the death penalty, torture or other inhuman or degrading treatment or punishment (articles 18 and 19).

This central principle of *non-refoulement*/non-return figures specifically in a number of human rights instruments, applying respectively in regard to the prohibition of torture (1984 Convention against Torture, article 3) and enforced disappearance (2006 Convention for the Protection of All Persons from Enforced Disappearance, article 16); and it too has been developed in the practice of the Human Rights Committee (interpreting and applying articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights), and the Committee against Torture.

Nevertheless, limited references apart, a certain disjuncture still remains, as a matter of general international law, between the individual seeking asylum and the grant of asylum. Although neither the 1967 Declaration nor any other international instrument defines 'asylum', it can be considered as the grant to a non-citizen of lasting protection in the territory of a State, the opportunity to make a life and a living, and the possibility to enjoy fundamental human rights and freedoms. The Declaration certainly moved the debate forward, and the individual's standing in international law has also strengthened; States, however, appear no less anxious to retain their sovereign competence on the ultimate asylum decision.

Ironically, this position continues to be maintained, even as States recognize their obligations of *non-refoulement* and/or non-return. Between these obligations and the pillar of asylum itself, the individual in flight, in search of a solution and unable to return to his or her country can often fall into legal limbo – protected against a certain risk of harm, but unable, as a matter of law, effectively to enjoy even the minimum conditions for a meaningful life.

'Territorial asylum' is still about the protection accorded by a State to an individual who comes to seek it, as the Institute of International Law noted in 1950. In the gap that remains to be bridged, it may be those "elementary considerations of humanity" and basic rights of the human person, many of which are the subject of obligations *erga*

omnes and referred to by the International Court of Justice on several occasions, that provide the source for a solution.

Related Materials

A. Legal Instruments

African (Banjul) Charter on Human and Peoples' Rights

American Convention on Human Rights, United Nations, *Treaty Series*, vol. 1144, p. 123.

Cartagena Declaration on Refugees

Charter of Fundamental Rights of the European Union

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series*, vol. 1465, p. 85.

Convention Governing the Specific Aspects of Refugee Problems in Africa

Convention relating to the Status of Refugees, United Nations, *Treaty Series*, vol. 189, p. 137.

Draft Declaration on Rights and Duties of States

International Convention for the Protection of All Persons from Enforced Disappearance

International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171.

Universal Declaration on Human Rights

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General Assembly resolution 2100 (XX) of 20 December 1965

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Official Records of the General Assembly, Twenty-First Session, Summary Records of the Sixth Committee, 919th-923rd, 926th and 953rd Meetings (A/C.6/SR.919-923, 926, 953).

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