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THE RIGHT TO ASYLUM: EVALUATING INTERNATIONAL HUMAN RIGHTS LAWS IN PROTECTING THE RIGHTS OF REFUGEES

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ABSTRACT

The right to asylum is a fundamental human right that grants protection to people who have fled their countries due to persecution, war, or violence. However, the implementation and enforcement of this right vary across different regions and contexts, depending on the legal frameworks and policies of the host countries and the international community. This article aims to evaluate the effectiveness and adequacy of international human rights laws in safeguarding the rights of refugees. It will examine the main challenges and gaps in the current legal system, such as the lack of a universal definition of refugees, the inconsistent application of the principle of non-refoulement, and the limited access to durable solutions. It will also propose some recommendations and best practices to improve the protection and integration of refugees, such as enhancing regional cooperation, strengthening accountability mechanisms, and promoting social inclusion and participation.

KEYWORDS

Right to Asylum, International Human Rights, Principle of Non-refoulement, International human rights monitoring bodies (IHRMBs), Supreme Court of India on Right of Refugees

I. THE DEFINITION AND EVOLUTION OF THE RIGHT TO ASYLUM IN INTERNATIONAL LAW

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The right to asylum is a fundamental human right that allows individuals to seek protection from persecution or serious harm in another country. The origin of this right can be traced back to ancient times, when people fleeing from war or oppression could find refuge in temples or sacred places. However, the modern concept of asylum emerged after the Second World War, when the international community recognized the need to protect refugees and stateless persons from the horrors of genocide, ethnic cleansing and totalitarian regimes. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol³ are the main legal instruments that define who is a refugee, what rights they have and what obligations states have towards them. The right to asylum is also enshrined in other regional and universal human rights treaties, such as the European Convention on Human Rights, the American Convention on Human Rights⁴ and the Universal Declaration of Human Rights⁵. The evolution of the right to asylum has been influenced by various factors, such as political changes, humanitarian crises, security threats and environmental challenges. As a result, the scope and content of this right have been expanded and refined over time, to address new forms of persecution and vulnerability, such as gender-based violence, sexual orientation and identity, climate change and terrorism. However, the right to asylum also faces many obstacles and limitations in practice, such as restrictive policies, lack of resources, xenophobia and discrimination. Therefore, it is essential to uphold and promote the right to asylum as a cornerstone of international solidarity and human dignity.

According to Article 14 of the Universal Declaration of Human Rights,

"Everyone has the right to seek and enjoy in other countries asylum from persecution."

³ Convention and Protocol relating to the Status of Refugees

⁴ Article 22 (7)

⁵ Article 14

The Refugee Convention provides a legal definition of a refugee as someone who-

*"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."*⁶

The Refugee Convention also sets out the rights and obligations of refugees and states in relation to the right to asylum. One of the most important principles is the principle of non-refoulement⁷, which prohibits states from returning refugees to countries where their life or freedom would be threatened. The Refugee Convention also grants refugees certain basic rights, such as access to education⁸, health care, work⁹, and freedom of movement¹⁰. However, states may also impose some restrictions or limitations on these rights, such as requiring refugees to register, reside in designated areas, or obtain permission to travel.

The right to asylum is not absolute and may be subject to some exceptions or exclusions. For example, the Refugee Convention excludes from its scope those who have committed serious crimes, such as war crimes, crimes against humanity, or terrorism. Moreover, states may deny asylum to those who pose a threat to their national security or public order.¹¹

The right to asylum is also regulated by other regional and national instruments, such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa¹², the 1984 Cartagena Declaration on Refugees, the 1950 European Convention on

⁶ Article 1 of the Refugee Convention

⁷ Article 33 of the Refugee Convention

⁸ Article 22 of the Refugee Convention

⁹ Article 14 and 24 of the Refugee Convention

¹⁰ Article 26 of the Refugee Convention

¹¹ Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR)

¹² Article 2

Human Rights, and the 1990 Dublin Regulation. These instruments may expand or complement the definition of a refugee, provide additional safeguards or mechanisms for asylum seekers and refugees, or establish criteria for determining which state is responsible for examining an asylum claim.

The right to asylum is a complex and evolving area of international law that aims to balance the interests and obligations of states with the needs and rights of individuals seeking protection. The right to asylum is based on the recognition of human dignity and solidarity among nations.

II. ROLE OF THE UNITED NATIONS AND OTHER INTERNATIONAL BODIES IN PROTECTING REFUGEE RIGHTS

The role of the United Nations in protecting refugee rights is crucial, as refugees are often vulnerable and lack the protection of their own states. The UN Refugee Agency (UNHCR) is the main UN body that is responsible for delivering life-saving assistance, safeguarding fundamental human rights, and finding long-term solutions for refugees. UNHCR works with governments and partners to promote accession to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which are the key legal instruments that define who is a refugee and what rights they have. UNHCR also assists states to enact or revise national refugee legislation, strengthen relevant institutions, train staff, and liaise with human rights bodies. UNHCR advocates for refugees to have access to documentation, education, work, and health care, and to be protected from refoulement, which means being forcibly returned to a country where they could face persecution. UNHCR also helps refugees find durable solutions, such as voluntary repatriation, local integration, or resettlement in a third country. UNHCR also works to prevent and reduce statelessness, which affects millions of people who are denied a nationality and basic rights.

The role of the international bodies in protecting refugee rights is crucial,

especially in the absence of an international body with jurisdiction to receive individual applications under the 1951 Refugee Convention and its 1967 Protocol. International human rights monitoring Bodies (IHRMBs) have filled this gap by developing a rich jurisprudence on the rights of refugees and asylum seekers, based on the principle of non-refoulement and other human rights norms. Non-refoulement is the prohibition of returning a person to a place where they would face a risk of persecution or other serious harm.¹³ IHRMBs have interpreted this principle in an inclusive and expansive way, recognizing that the risk of prohibited treatment may arise on account of one of the Refugee Convention grounds, such as race, religion, nationality, membership of a particular social group, or political opinion. Moreover, IHRMBs have gone beyond non-refoulement to address matters of status, such as security of residence and access to citizenship, for refugees and asylum seekers. By doing so, IHRMBs have contributed to the development of international refugee law and to the promotion of complementary forms of protection by States and the UN High Commissioner for Refugees (UNHCR).

III. CHALLENGES REFUGEES FACE IN ACCESSING THEIR RIGHTS AND POTENTIAL SOLUTIONS

Refugees are people who have been forced to flee their homes due to persecution, conflict, violence or human rights violations. They often face many challenges in accessing their rights and potential solutions in their host countries or regions. Some of these challenges include:

- ❖ **Legal barriers:** Refugees may not have legal status or documentation that allows them to access basic services, such as health care, education, employment, social protection or justice.

¹³ United Nations Human Rights Office of the High Commissioner, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> (last visited Sept. 15, 2023)

They may also face discrimination, harassment or exploitation by authorities or employers.

- ❖ **Socio-economic barriers:** Refugees may struggle to find adequate housing, food, water or sanitation. They may face poverty, unemployment, underemployment or low wages. They may also lack access to financial services, such as banking, credit or remittances.
- ❖ **Cultural and linguistic barriers:** Refugees may face difficulties in communicating with local communities, service providers or authorities. They may experience isolation, marginalization or exclusion due to cultural differences, stereotypes or prejudices. They may also face challenges in preserving their identity, culture or religion.
- ❖ **Psychological and emotional barriers:** Refugees may suffer from trauma, stress, anxiety, depression or other mental health issues due to their experiences of displacement, violence or loss. They may also face stigma, discrimination or violence due to their mental health status. They may lack access to psychosocial support or counselling services.

IV. IMPACT OF POLITICAL, SOCIAL, AND ECONOMIC FACTORS ON THE ENFORCEMENT OF REFUGEE RIGHTS

The impact of political, social, and economic factors on the enforcement of refugee rights is a complex and multifaceted issue that requires a comprehensive and nuanced analysis. Refugee rights are the legal and human rights that apply to people who have been forced to flee their countries of origin due to persecution, violence, or conflict. These rights include, but are not limited to, the right to seek asylum, the right to non-refoulement, the right to protection, the right to dignity, the right to education, the right to health, and the right to work. However, these rights are often violated or undermined by various factors that affect the host countries, the international community, and the refugees themselves.

Political factors include the policies and practices of host governments, regional organizations, and global institutions that shape the legal frameworks, institutional arrangements, and operational mechanisms for refugee protection and assistance. Some of these factors may facilitate the enforcement of refugee rights, such as the ratification of international conventions and protocols, the adoption of national laws and regulations, the establishment of dedicated agencies and bodies, and the provision of financial and technical support. Other factors may hinder the enforcement of refugee rights, such as the lack of political will or commitment, the influence of domestic or external pressures or interests, the imposition of restrictive or discriminatory measures, and the violation of international norms and obligations.

Social factors include the attitudes and behaviours of host societies, local communities, civil society organizations, and media outlets that affect the social integration, inclusion, and participation of refugees. Some of these factors may promote the enforcement of refugee rights, such as the recognition of refugees' contributions and potentials, the promotion of intercultural dialogue and mutual understanding, the mobilization of solidarity and advocacy campaigns, and the provision of humanitarian and development assistance. Other factors may impede the enforcement of refugee rights, such as the prevalence of xenophobia, racism, or discrimination, the incitement of hatred or violence, the spread of misinformation or stereotypes, and the exploitation or abuse of refugees.

Economic factors include the opportunities and challenges that affect the livelihoods, well-being, and empowerment of refugees and their host communities. Some of these factors may enhance the enforcement of refugee rights, such as the availability of decent work and income opportunities, the access to quality education and health services, the participation in local development initiatives, and the creation of synergies and partnerships. Other factors may undermine the enforcement of

refugee rights, such as the scarcity of resources or infrastructure, the competition for jobs or markets, the disruption of trade or supply chains, and the exposure to shocks or crises.

V. SUPREME COURT OF INDIA ON THE RIGHTS OF REFUGEES

The Supreme Court of India has made several rulings concerning the rights of refugees. Here are some key points:

- ❖ **Non-Refoulement:** In the case of **Mohammed Salimullah v. Union of India**¹⁴, the Supreme Court ordered the deportation of Rohingya refugees according to the procedure prescribed for deportation. The court observed that “It is also true that the rights guaranteed under Articles 14 and 21 are available to all persons who may or may not be citizens. But the right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e).
- ❖ **Right to Life:** In 1996, the Supreme Court ruled that the principle of non-return of a refugee is part of the right to life under Article 21 of the constitution. This covers everyone within the territory of India - "citizens and non-citizens alike".¹⁵
- ❖ **Other Cases:** The Supreme Court has passed several historical judgments concerning the deportation of refugees such as the case of *Maiwand’s Trust of Afghan Human Freedom vs. State of Punjab*¹⁶ and *N. D Pancholi vs. State of Punjab & Others*¹⁷.

¹⁴ Mohammad Salimullah v. Union of India, 2021 SCC OnLine SC 296

¹⁵ Khushboo Sandhu and Meryl Sebastian, *Rohingya and CAA: What is India's refugee policy*, BBC News (Sept. 15, 2023 05:20 PM) <https://www.bbc.com/news/world-asia-india-62573446>

¹⁶ The Mailwand's Trust of Afghan Human Freedom v. State of Punjab and Others, Writ Petition (Crl.) No.125 and 126 of 1986, https://www.refworld.org/cases,IND_SC,3f4b8cfd4.html (last visited Sept. 18, 2023)

¹⁷ Jay Ramasubramanya, *India is chipping away at its past generosity towards refugee*, Refugee Law Initiative (Sept. 18, 2023) <https://rli.blogs.sas.ac.uk/2021/05/06/india->

Despite these rulings, it's important to note that India is not a signatory to the 1951 Refugee Convention nor to its 1967 Protocol on the Status of Refugees. Therefore, the protection of refugees is confined to ad-hoc measures taken by the Government of India.

VI. REFUGEES RIGHTS IN INDIA

India is not a signatory to the 1951 Refugee Status Convention or the 1967 Refugee Status Protocol. This means that the treatment of refugees in India is governed by the Foreigners Act, 1946, which does not distinguish between refugees fleeing persecution and other foreigners. This can lead to challenges in the enforcement of refugee rights. In the social context, India has faced a huge influx of refugees at various points in history, including during the partition of India and Pakistan in 1947, the Tibetan refugee crisis in 1959, the Bangladesh War in 1971, the Sri Lankan Civil War, and more recently, the Rohingya refugee crisis. The arrival of these refugees has had significant social impacts, including changes in demographics, cultural exchanges, and sometimes, social tensions. The arrival of refugees can lead to competition for resources such as land, water, housing, food, healthcare facilities, transportation, and employment. However, it's important to note that refugees also contribute to the economy in various ways, such as by taking up jobs, opening businesses, and contributing to the local economy.

VII. CONCLUSION

Refugees are people who have been forced to flee their homes due to violence, persecution, or human rights violations. They have the right to seek safety and dignity in other countries, as recognized by various international Conventions and treaties. However, many refugees still face challenges and hardships in accessing basic needs such as food, clothing, and shelter. They also struggle to obtain a legal identity and protection

[is-chipping-away-at-its-past-generosity-towards-refugees/#_ftn2](#).

from further harm. While hosting refugees may pose some difficulties for the host countries, it does not justify denying them their human rights. Refugees are not responsible for the failures of their home states, which have violated their rights on the basis of religion, class, gender preference, or other factors. Refugees deserve compassion and solidarity from the international community.

To address the challenges, refugees need comprehensive and durable solutions that respect their rights and dignity. Some of these solutions include:

- ❖ **Legal protection:** Refugees need to have their legal status recognized and documented by the host country or region. They need to have access to fair and efficient asylum procedures and legal assistance. They need to be protected from refoulement, detention, deportation or statelessness.
- ❖ **Socio-economic integration:** Refugees need to have access to basic services, such as health care, education, employment, social protection or justice. They need to have opportunities to improve their skills, livelihoods and income. They need to have access to financial services, such as banking, credit or remittances.
- ❖ **Cultural and linguistic inclusion:** Refugees need to have access to language training, cultural orientation and intercultural dialogue. They need to have opportunities to participate in social, cultural and civic activities. They need to have respect for their identity, culture and religion.
- ❖ **Psychological and emotional well-being:** Refugees need to have access to psychosocial support and counselling services. They need to have opportunities to heal from trauma, stress, anxiety, depression or other mental health issues. They need to have protection from stigma, discrimination or violence due to their mental health status.