

SITUATING THE RIGHT TO WORK IN INTERNATIONAL HUMAN RIGHTS LAW: AN AGENDA FOR THE PROTECTION OF REFUGEES AND ASYLUM-SEEKERS

*Saurabh Bhattacharjee**

The right to work has occupied a central place in the human rights discourse. Yet, a vast majority of the world population survives without meaningful employment. This crisis of employment is more acute among vulnerable communities like refugees and asylum-seekers who are often systematically denied access to the labour market and opportunities for self-employment, thus accentuating the trauma of forced migration. From this vantage point, this paper examines the status of the right to work under international law and its applicability to refugees and asylum seekers. It argues that while there are avenues for the right to work of refugees under the Refugee Convention, there are significant limitations and questions hovering over asylum-seekers' right to work. In contrast, international human rights law envisages a universalist conception of rights and thus extends to both refugees and asylum-seekers. The paper further avers that situating the right to work within the framework of the International Covenant on Economic, Social and Cultural Rights and related international human rights instruments can create new legal space for protection of refugees and asylum-seekers, especially in countries that have not ratified the Refugee Convention.

“Every day we are reminded that, for everybody, work is a defining feature of human existence. It is the means of sustaining life and of meeting basic needs. But it is also the activity through which individuals affirm their own identity, both to themselves and to those around them.”

—Juan Somavia, Director General, International Labour Organisation (‘ILO’)¹

* Assistant Professor at the W.B. National University of Juridical Sciences, Kolkata. I would like to thank Prof. Penelope Mathew, Professor of Law, Australian National University, Canberra, for her comments on a preliminary draft of this article.

¹ International Labour Organisation [ILO], Report of the Director General to the International Labour Conference, *Reducing the Decent Work Deficit—A Global Challenge* (June 2001).

I. INTRODUCTION

The right to work has occupied a central place in the human rights discourse. It is increasingly being acknowledged as inextricably linked with human dignity,² life,³ identity⁴ and privacy⁵ among a host of other fundamental rights.⁶

The right itself finds direct mention in major international human rights treaties. The Universal Declaration of Human Rights ('UDHR') 1948⁷ recognized it as one of the universally applicable human rights.⁸ Later, this right was transformed into an obligatory norm through Article 6(1) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),⁹ which mandates every State Party to recognize everybody's/everyone's right to work.¹⁰

However, a vast majority of the world population continues to survive without meaningful employment. The International Labour Organisation ('ILO') estimates that around 210 million persons are currently unemployed across the world.¹¹ This crisis of employment is further accentuated among

² Minister of Home Affairs and Others v. Watchenuka and Another, No. 10/2003, South Africa: Supreme Court of Appeal, 28 November, 2003 (The South African Court of Appeal emphasized on the relationship between right to work and human dignity in this case).

³ Richard T. De George, *Right to Work: Law and Ideology*, 19 VAL. U. L. REV. 15, 17 (1984).

⁴ Guy Mundlak, *The Right to Work: Linking Human Rights and Employment Policy*, 146 INT'L LAB. REVIEW 189 (2007); Guy Mundlak, *The Right to Work, The Value of Work* in SOCIAL RIGHTS: EXPLORING THEORY AND PRACTICE 341 (Daphna Barak-Erez and Aeyal Gross ed., 2007).

⁵ Tekle v. Secretary of State for the Home Department, 2008 EWHC 3064 (This case highlights the nexus between the freedom to work and privacy).

⁶ See *The Michigan Guidelines on the Right to Work*, 31 MICH. J. INT'L L. 293 (2009) ("Work is interrelated, interdependent with, and indivisible from the rights to life, equality, the highest attainable standard of physical and mental health, an adequate standard of living, the right to social security and/or social assistance, freedom of movement, freedom of association, and the rights to privacy and family life, among others").

⁷ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948).

⁸ *Id.*, Art. 23(1): "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".

⁹ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966).

¹⁰ *Id.*, Art. 6 (1): "The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right".

¹¹ International Labour Office, *Global Employment Trends for Youth*, August 2010, available at [http://www.ilo.org/public/libdoc/ilo/P/09316/09316\(2010-August\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09316/09316(2010-August).pdf) (Last visited on June 12, 2012).

refugees¹² and asylum-seekers,¹³ who are often systematically denied access to the labour market and opportunities for self-employment.¹⁴ Barriers to the right to work are not just structural and economic but also extend to legal prohibition. For example, most refugee communities and asylum-seekers are not formally allowed to work in India.¹⁵ While these restrictions have not prevented refugees and asylum-seekers from finding economic opportunities in the informal sector, such employment remains invisible and illegal.¹⁶ This sort of relegation of employment into illegality, through either express prohibition or the absence of a defined status, extends to other countries in South Asia too.¹⁷

Such denial of the right to work can have particularly serious consequences for these vulnerable communities as it accentuates the trauma of forced migration and endangers their very subsistence.¹⁸ Moreover, it is pertinent to note that employment is not only vital for subsistence of refugees and

¹² A Refugee is defined in Art. 1(A)(2) of the Geneva Convention relating to the Status of Refugees 1951 as a person 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.”

¹³ Asylum-seekers on the other hand refer to persons awaiting the determination of their status. If they are found to have fled persecution and satisfy the ingredients mentioned in Article 1(A)(2) of the Geneva Convention relating to the Status of Refugees 1951, they are declared to be refugees and are accorded the legal protection and the rights that refugee status entails.

¹⁴ Penelope Mathew, *Fifth Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on the Right to Work Explanatory Note*, 31 MICH. J. INT'L L. 289, 290 (2009); See generally U.S. Committee for Refugees and Immigrants, *World Refugee Survey: 2008*, available at <http://www.refugees.org/resources/refugee-warehousing/archived-world-refugee-surveys/2008-world-refugee-survey.html> (Last visited on April 5, 2013) (For a detailed survey on the status of work for asylum-seekers and refugees in 60 countries); 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 (2004).

¹⁵ Sarbani Sen, *Paradoxes of the International Regime of Care in REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA 1947- 2000* 410 (Ranabir Samaddar ed., 2003); THE OTHER MEDIA, *BATTLING TO SURVIVE: A STUDY OF BURMESE ASYLUM SEEKERS AND REFUGEES IN DELHI* 51 (2010); South Asia Human Rights Documentation Centre, *Refugee Protection in India*, October 1997, available at http://www.hrdc.net/sahrdc/resources/refugee_protection.htm (Last visited on June 12, 2012).

¹⁶ *Id.*

¹⁷ Tapan K. Bose, *Protection of Refugees in South Asia: Need for a Legal Framework* in SAFHR PAPER SERIES-6 (2000); Angela Li Rosi, Esther Kiragu & Tim Morris, *States of Denial: A Review of UNHCR's Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh* in UNHCR POPULATION DEVELOPMENT AND EVALUATION SERVICE 22-23 (2011).

¹⁸ *The Michigan Guidelines on the Right to Work*, *supra* note 6.

asylum-seekers but also for their sense of dignity,¹⁹ privacy²⁰ and self-worth.²¹ Further, as Alice Edwards notes, “It provides them with an opportunity to participate in and contribute to their host community, while improving language and other skills” and reduces reliance on social assistance.²² In sharp contrast, denial of the right to work pushes refugees and asylum-seekers into exploitative illegal employment arrangements where they remain perennially vulnerable to abuse and incarceration²³ or are exposed to risks of smuggling and human trafficking. In light of such tragic implications of its denial, availability of the right to work is of paramount importance for refugees and asylum-seekers.

In this paper, I examine the status of the right to work under international law and its applicability to refugees and asylum seekers. The paper begins with a scrutiny of the Geneva Convention relating to the Status of Refugees, 1951 (‘Refugee Convention’) and argues that this instrument is relatively unqualified in its recognition of the right for refugees. Nonetheless, it lacks clarity on the status of the right to work for asylum-seekers who await determination of their refugee status. In order to elucidate this ambiguity over the applicability of the right to work for asylum-seekers, I examine the relevant international human rights law norms on this issue. International human rights law and international refugee law “form part of the same legal schema and tradition” and the former has become central to the evolution of refugee rights.²⁴ Indeed, as Hathaway has noted, “Maturation of human rights over the last fifty years has filled some of the vacuum in international refugee law.”²⁵ Therefore, I draw upon this linkage and assert that international human rights law recognizes a robust conception of the right to work that can be unquestionably extended to asylum-seekers as well. Relying upon the comments and observations of international human rights bodies, I further critique the traditional objections against the enforceability of the right to work and indeed, other socio-economic rights and argue that states do have an obligation to not discriminate against asylum-seekers and refugees on the basis of the right to work.

The reliance on international human rights norms for articulating the right to work for refugees and asylum-seekers has special significance for India and other South Asian countries which have not yet signed and acceded

¹⁹ Minister of Home Affairs and Others v. Watchenuka and Another, No. 10/2003, South Africa: Supreme Court of Appeal, 28 November, 2003.

²⁰ Tekle v. Secretary of State for the Home Department, 2008 EWHC 3064.

²¹ Alice Edwards, *Human Rights, Refugees and the Right to Enjoy Asylum*, 17 INT’L J. REFUGEE L. 293, 324 (2005).

²² *Id.*, 323.

²³ Ninette Kelley, *International Refugee Protection Challenges and Opportunities*, 19 INT’L J. REFUGEE L. 401, 433 (2007).

²⁴ See Edwards, *supra* note 21, 299.

²⁵ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES* 284 (2005); See also MANFRED NOWAK, *INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME* 39-40 (2002).

to the Refugee Convention.²⁶ This failure to sign the Refugee Convention along with a tradition of *ad hoc* policies governing refugees, has contributed to a legal vacuum for refugees and asylum-seekers in the region.²⁷ However, the universality of the international human rights law norms means that placing the right to work for refugees and asylum-seekers within this framework would cast an inescapable obligation on all nations including these South Asian states. It would also enable refugee-rights advocates to skirt the contentious debate on accession to the Refugee Convention by the South Asian states.²⁸

II. A RIGHT TO WORK OR A FREEDOM TO WORK? – A PRELIMINARY CAVEAT

Even as right to work has acquired growing normative recognition, its exact nature and scope has proved to be profoundly controversial; with states disputing whether it can be conceptualized as a right to employment, as freedom to work or as rights at work.²⁹

The right to employment envisages a sort of guarantee of a job and indeed, the Soviet Bloc States had argued during the drafting of the Universal Declaration of Human Rights ('UDHR') that there should be a guarantee of work.³⁰ As opposed to this, freedom to work envisions a purely negative right which only restrains the state from interfering with a person's freedom to work.³¹ Proponents of this approach argue that the provisions of the right to work in international instruments do not articulate any positive guarantee of work but only a freedom to gain a living by work freely chosen or accepted.³² Different from these two notions, rights at work (also referred to as labour rights), seek to establish just and fair conditions of work. Some writers have asserted that the rights at work or labour rights are secondary to the right to work to the extent that they become applicable only where a relationship of employment already exists.³³

²⁶ See generally B. S. Chimni, *Status of Refugees in India: Strategic Ambiguity* in REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000 443 (Ranabir Samaddar ed., 2003) (For an analysis of India's stance on signing the Refugee Convention).

²⁷ Saurabh Bhattacharjee, *India Needs a Refugee Law*, 43 (9) EPW 71-75 (March 1, 2008); Sen, *supra* note 15, 396.

²⁸ See, e.g., Chimni, *supra* note 26 (B.S. Chimni is of the opinion that the Refugee Convention is Eurocentric and does not recognise the protection needs of refugees and forced migrants in Asia).

²⁹ Jose Luis Rey-Perez, *The Right to Work Reassessed: How We Can Understand and Make Effective the Right to Work*, 2 RUTGERS J. L. & URB. POL'Y 217, 218 (2005); See also De George, *supra* note 3, 18-19.

³⁰ M.C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 195 (1998).

³¹ Rey-Perez, *supra* note 29.

³² *The Michigan Guidelines on the Right to Work*, *supra* note 6, 293-294.

³³ Rey-Perez, *supra* note 29.

While this debate over the substantive content of the right to work has deep philosophical implications, this paper steers clear of this debate. It would refer to the right as meaning only the ‘freedom of work’. This is a conscious strategic choice in so far as a more expansive notion of this right may be politically unacceptable in the current milieu of xenophobia and pervasive hostility against refugees, migrants and asylum-seekers in various parts of the world.³⁴ Moreover, I submit that recognition and entrenchment of even an arguably limited notion of ‘freedom of work’ would represent a radical breakthrough for the asylum-seekers and refugees, particularly in light of the widespread legal restrictions on their freedom to work.³⁵ Thus, even though I acknowledge the possibility that the right to work may perhaps also include rights at work and a positive right to employment, the agenda of this paper is limited to articulating only a normative basis for freedom of work. With this introductory caveat, I shall move on to the status of right to work under the Refugee Convention, the primary treaty-law dealing with international refugee law.

III. STATUS OF FREEDOM OF WORK UNDER THE REFUGEE CONVENTION

Article 17 (1) of the Refugee Convention requires refugees to be given the equivalent of a ‘most favoured-nation’ treatment with respect to wage-earning employment.³⁶ Critically however, this right is limited only to refugees ‘lawfully staying’ in the host country. In view of the unequivocal prescription of this provision, there is very little doubt that these rights are applicable to recognized refugees.³⁷

The extension of these rights to asylum-seekers, though, has been clouded by disagreements. A literal interpretation may arguably suggest that Article 17 refers only to refugees and therefore, asylum-seekers cannot,

³⁴ See generally Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13(3) JOURNAL OF REFUGEE STUDIES 243 (2000); Executive Committee of the High Commissioner’s Programme, *Note on International Protection*, 16 INT’L J. REFUGEE L. 479 (2004); James C. Hathaway, *Harmonising for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT’L L.J. 719 (1993); Satvinder Juss, *The Decline and Decay of European Refugee Policy*, 25(4) OXFORD J. LEGAL STUDIES 749-792 (2005); Arthur C Helton and Dessie P. Zagorcheva, *Globalization, Terror and Movements of People*, 36 INT’L L. 91 (2002); Guy S. Goodwin-Gill, *International Law and Human Rights: Trends Concerning International Migrants and Refugees*, 23(3) INT’L. MIGRATION REV. 526-546 (Autumn, 1989).

³⁵ See generally *World Refugee Survey: 2008*, supra note 14 for a detailed survey on the status of work for asylum-seekers and refugees in 60 countries.

³⁶ See Refugee Convention, Art. 17 (1): “Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.”

³⁷ JAMES C. HATHAWAY & JOHN A. DENT, *REFUGEE RIGHTS: REPORT ON A COMPARATIVE SURVEY* 25, 31 (1995).

before their refugee-status determination, claim any right under this provision. Nevertheless, as refugee status determination has been held to be merely declaratory and not constitutive of any status,³⁸ the term ‘refugee’ may perhaps extend to asylum-seekers as well.

Even if this claim were to be accepted at face value, scholars have sparred on whether or not the qualification, ‘lawfully staying’ would serve to exclude asylum-seekers from the scope of the provision. John A. Dent, for instance, asserts that the term refers only to ‘established’ refugees who have been granted asylum and not to asylum seekers.³⁹ Similarly, Goodwin-Gill contends that refugees ‘lawfully staying’ means “something more than mere lawful presence” and would be predicated upon something more enduring such as permanent residence status, recognition as a refugee, issue of a travel document, [or] grant of re-entry visa.⁴⁰ Such a test also would exclude asylum-seekers in most cases.⁴¹ These views point towards a growing consensus that all asylum-seekers do not fall under the ambit of the phrase ‘lawfully staying’ and cannot enjoy the right to work. Even those scholars who contend that ‘lawfully staying’ embraces asylum-seekers do accept that the term has only limited application.

For instance, James Hathaway argues that ‘lawfully staying’ means officially sanctioned, ongoing presence in a state party whether or not there has been a formal declaration of refugee status.⁴² Thus, he concludes that asylum-seekers may avail of the right to work if their presence is officially sanctioned. However, he acknowledges that in countries that follow a formal refugee status determination process, an asylum-seeker awaiting status determination is only ‘lawfully present’ and not ‘lawfully staying’ as she would not have secured an official sanction.⁴³

Grahl-Madsen also argues that ‘lawfully staying’ can extend to certain, but not all asylum-seekers. He suggests that lawful stay can be implied from an officially tolerated stay beyond the last date that an individual is

³⁸ See UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, ¶ 28, available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html>, (Last visited on September 3, 2011):

“A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”

³⁹ HATHAWAY & DENT, *supra* note 37.

⁴⁰ G. GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 526 (2007).

⁴¹ Edwards, *supra* note 21, 323.

⁴² HATHAWAY, *supra* note 25, 730.

⁴³ HATHAWAY, *supra* note 25, 159.

allowed to remain in a country without securing a residence permit.⁴⁴ He avers that any stay that extends to three months or a longer period beyond the last date beyond which stay without a visa is permitted would constitute ‘lawful stay’.⁴⁵ The implication thereof is that the accrual of the rights which arise out of ‘lawful stay’ is separate from the grant of refugee status and as a result, the right to work can be available to asylum-seekers also. However, as evident from Grahl-Madsen’s formulation, the right would be subject to stringent temporal limits.⁴⁶ Further, we must also appreciate that this view was put forth in the context of the immediate aftermath of World War II where refugees were often already lawfully staying in a country without having secured refugee status.⁴⁷ Therefore, the relevance of this argument in the current context is indeed questionable.

In light of these limits on Article 17 (1), theorists have sought to expand and use the duty of *non-refoulement*, the cornerstone of international refugee law, as a basis for the right to work of asylum-seekers.⁴⁸ The essence of this duty is that no state shall expel or return an asylum-seeker or refugee to any country where he or she is likely to face threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion. It has been argued that the principle of *non-refoulement* is very broadly worded in Article 33 (1) of the Refugee Convention in so far as the provision prohibits expulsion “in any manner whatsoever”.⁴⁹ Thus, it has been argued that constructive or indirect *refoulement* arising out of return to the country that is forced by economic compulsion⁵⁰ would also be covered by prohibition on *refoulement*.⁵¹ In view of the fact that absence of freedom of work

⁴⁴ ATLE GRAHL-MADSEN, STATUS OF REFUGEES IN INTERNATIONAL LAW 374 (1966).

⁴⁵ *Id.*

⁴⁶ See Edwards, *supra* note 21, 323 (This time-frame based demarcation has however been criticised herein as arbitrary and artificial and having no support in the text of the Refugee Convention).

⁴⁷ The definition of refugee was established only after the Refugee Convention came into force in 1951.

⁴⁸ Edwards, *supra* note 21, 323-324.

⁴⁹ See Refugee Convention, Art. 33(1): “No Contracting 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.”

⁵⁰ Edwards, *supra* note 21, 323-324 (It is argued that the absence of right to work and other socio-economic rights and the consequent deprivation may force refugees and asylum seekers to return to their home country where they might be persecuted).

⁵¹ Edwards, *supra* note 21, 324. See also Ryszard Cholewinski, *Economic and Social Rights of Asylum-Seekers in Europe*, 14 GEO. IMMIGR. L. J 713-714 (1999-2000). However, there could be a huge question over this point of view in light of its rejection by the English Court of Appeal in *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* and *ex parte B*, (1996) 4 All ER 385 at 402b. Yet, the fact that it is only a decision of the Court of Appeal weakens its persuasive value for other foreign courts. The decision of the United States Supreme Court in *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) may also act as a hurdle to the acceptance of the idea of constructive *refoulement*. In this case, it was held that the phrase ‘expel or return’ have a “legal meaning narrower than its common

is likely to compel asylum-seekers to return, any legal prohibition on work for asylum-seekers would amount to constructive *refoulement*.

It is further argued that, in addition to Article 33, asylum-seekers can also rely upon Article 31 of the Refugee Convention to eke out a claim for right to work. This provision requires that “contracting States shall not impose penalties on refugees coming directly from a country of persecution, on account of their illegal entry or presence”.⁵² It has been asserted that the term ‘penalties’ in Article 31 has a broader meaning; that the provision has at its base the concept of non-penalisation for illegal entry or presence.⁵³ The denial of socio-economic rights, including the right to work, to asylum-seekers on account of their unauthorized entry into the host country would arguably be a form of penalty and would thus be in contravention of Article 31(1).⁵⁴ Therefore, asylum-seekers can claim the benefit of Article 31 in claiming socio-economic rights like the right to work and the right to social security.

However, the utility of Articles 31 and 33 in articulating a generally applicable right to work is restricted since they can be invoked only in cases where asylum-seekers (or refugees) are denied the right specifically for their unauthorized entry or presence. If the host state generally prohibits employment for all asylum-seekers until the determination of their status and regardless of the legality of their entry into or presence in the territory, Article 31 and 33 arguably would not provide any relief.

Thus, it is evident that while there are ample guarantees for protection of the right to work for refugees in the Refugee Convention, doubts persist over the availability of comparable protection to asylum-seekers prior

meaning” and speaks only to “a defensive act of resistance or exclusion at the border.” This judgment though has been subjected to very harsh criticism by several writers. See HATHAWAY, *supra* note 25, 336-337; GILL & McADAM, *supra* note 40, 247-250; Anna William Shavers, *The Invisible Others and Immigrant Rights: A Commentary*, 45 Hous. L. Rev. 99 (2008); Joy M. Purcell, *A Right to Leave But Nowhere to Go: Reconciling an Emigrant’s Right to Leave with the Sovereign’s Right to Exclude*, 39 U. MIAMI INTER-AM. L. REV. 177 (2007); Mariano Florentio Cuellar, *The Limits of the Limits of Idealism: Rethinking American Refugee Policy in an Insecure World*, 1 HARV. L & POL’Y REV. 401 (2007).

⁵² See Refugee Convention, Art. 31(1): “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

⁵³ G. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 189 (E. Feller, V. Turk and F. Nicholson eds., 2003) cited in Edwards, *supra* note 21, 324.

⁵⁴ Cholewinski, *supra* note 51, 714. This line of reasoning is substantiated by the ruling of the English High Court of Justice in *R v. Uxbridge Magistrates Court, ex parte Adimi*, (1999) EWHC Admin 765 where it has been held that “Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees)”.

to the grant of the refugee status. Admittedly, there are some potential avenues available to asylum-seekers to claim the right to work. However, they are relevant only in limited cases and do not provide the basis for a universal claim to right to work for all asylum-seekers. As opposed to the Refugee Convention, the universalist orientation of international human rights law, specifically the ICESCR, as argued later in this paper, provides a firmer basis for the right to work for asylum seekers.⁵⁵ Since Article 5 of the Refugee Convention states that the rights and benefits granted to refugees under any other instrument are not to be impaired, I submit that refugees and asylum-seekers can avail of the additional protection under these international human rights norms.

In the next part of the paper, I first map out the various international human rights law treaties that recognize and protect the right to work and subsequently examine the applicability of those provisions to refugees and asylum-seekers.

IV. RIGHT TO WORK IN INTERNATIONAL HUMAN RIGHTS LAW

One of the first international law instruments to allude to a state duty to provide employment was the United Nations Charter ('Charter').⁵⁶ Article 55 of the Charter declares that the United Nations shall promote, *inter alia*, higher standards of living, full employment, and conditions of economic and social progress and development.⁵⁷ In addition, Article 56 of the Charter requires Member-States to take 'joint and separate action' for the achievement of the purposes articulated in Article 55.⁵⁸

However, the question as to whether Article 56 articulates a 'legal right to work' remains unsettled. *Firstly*, it envisages 'full employment' as a state duty instead of an individual human right. Paragraph 2 of the Article certainly obliges states to promote and protect human rights but the Charter does not provide any definition of human rights.⁵⁹ Moreover, there is significant discord over the substantive content of the term 'full employment'. It has been argued that the term 'full employment' in common usage in the discipline of economics does not refer to complete elimination of unemployment but only to

⁵⁵ Edwards, *supra* note 21, 325.

⁵⁶ United Nations Charter, 1 U.N.T.S. XVI (October 24, 1945).

⁵⁷ *Id.*, Art. 55: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment and conditions of economic and social progress and development".

⁵⁸ *Id.* Art. 6: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

⁵⁹ MADSEN, *supra* note 44, 376.

a level of unemployment seen as necessary to keep inflation in check.⁶⁰ Even though many scholars have rejected this technocratic interpretation and averred that the phrase means “elimination of all but the most temporary frictional and seasonal unemployment”,⁶¹ this confusion seriously undermines the normative utility of Article 55.

A. UDHR AND THE RIGHT TO WORK

The right to work morphed from a mere state value to an individual human right with Article 23 of the UDHR.⁶² This provision not only protects the right to work, but also obligates states to provide the right to compensation while unemployed.⁶³ It must also be noted that the drafters intended the “protection against unemployment”⁶⁴ to be not just limited to compensation to victims of unemployment but also to encompass measures protecting people against the occurrence of involuntary unemployment.⁶⁵

Admittedly, the UDHR is only a soft law instrument and at the time of its promulgation, it was not generally viewed as imposing legally binding obligations on individual governments. However it has, along with the U.N. Charter, as already mentioned, assumed the status of a rule of customary international law and is thus treated as obligatory.⁶⁶

B. ICESCR

As is well known, the hortatory norms articulated in the UDHR were translated into binding obligations through the coming into force of

⁶⁰ Philip Harvey, *Liberal Strategies for Combating Joblessness in the Twentieth Century*, 33 *Journal of Economic Issues* 497, 499-500 (1999). For a more detailed analysis of ‘full employment’, see generally WILLIAM BEVERIDGE, *FULL EMPLOYMENT IN A FREE SOCIETY* (1945) and JM KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1935).

⁶¹ See Phillip Harvey, *Human Rights and Economic Policy Discourse: Taking Social and Economic Rights Seriously*, 33 *COLUM. HUM. RTS. L. REV.* 374-375 (2002); See also Richard T. De George, *supra* note 3, 15, 21 (It has been argued that the term ‘full employment’ in Article 55 of the Charter was used in the sense of the “elimination of all but the most temporary frictional and seasonal unemployment” as opposed to the common usage in the discipline of economics where it refers to a level of unemployment seen as necessary to keep inflation in check).

⁶² Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948).

⁶³ Aleah Borghard, *Free Trade, Economic Rights, and Displaced Workers: It Works If You Work It*, 32 *BROOK. J. INT’L L.* 161, 185 (2006).

⁶⁴ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948), Art. 23.

⁶⁵ JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 157-68* (1999) cited in Harvey, *supra* note 61, 378.

⁶⁶ LOUIS HENKIN ET AL, *HUMAN RIGHTS 322* (1999); See also PAUL SIEGHART, *THE LAWFUL RIGHTS OF MANKIND: AN INTRODUCTION TO THE LEGAL CODE OF HUMAN RIGHTS 65* (1985).

the International Covenant on Civil and Political Rights ('ICCPR')⁶⁷ and the ICESCR⁶⁸. We have already seen that Article 6 of the ICESCR recognizes the right to work of every person.⁶⁹ Critically, the Covenant also secures rights at work including the right to just and favourable conditions of work, fair wages and equal remuneration for work of equal value, safe and healthy conditions of work, rest and leisure.⁷⁰

However, the right to work under Articles 6 and 7, like all other rights guaranteed by the ICESCR, requires only 'progressive realization' rather than full and immediate implementation.⁷¹ Moreover, Article 2(1) of the Covenant limits the implementation of such rights by requiring member nations to undertake steps only "to the maximum of its available resources". These qualifications have inevitably led to many questions about the actual enforceability of these rights.⁷² Some of these reservations and their implications on the asylum-seekers' right to work would be elaborated on later in this paper.

Apart from the International Bill of Rights, the right to work has also found recognition in several major regional human rights treaties spanning continents as well.⁷³ The main concern of this paper, however, is limited to the provisions of ICESCR and the ICCPR and it does not foray into a thorough analysis of the aforementioned provisions of these regional human rights treaties.

⁶⁷ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (December 16, 1966).

⁶⁸ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966).

⁶⁹ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 6.

⁷⁰ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 7.

⁷¹ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 22.

⁷² Harvey, *supra* note 61, 374. *See also* SIEGHART, *supra* note 66, 124.

⁷³ For example, Art. 14 & Art. 15 of the American Declaration of the Rights and Duties of Man, approved by the Organization of American States, 1948 recognize the right to work and the right to leisure time. This right has found further acknowledgment in Art. 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. In addition, the European Council approved the European Social Charter in 1961 which stated that "everyone shall have the opportunity to earn his living in an occupation freely entered upon". This principle was further reiterated in the Revised European Social Charter, 1996. Importantly, Art. 15 of the Charter of Fundamental Rights of the European Union also acknowledges that everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Another regional human rights instrument which recognizes the right to work is the African Charter on Human and Peoples' Rights *vide* Art. 15.

V. AVAILABILITY OF THE RIGHT TO WORK FOR ASYLUM-SEEKERS UNDER INTERNATIONAL HUMAN RIGHTS LAW

The previous section mapped the evolution of the right to work as an international human rights norm. This section shall argue that on the basis of the principle of non-discrimination, the said right also extends to refugees and asylum-seekers. In addition, I shall examine the extent to which the enforceability of the right is qualified by the principle of progressive realisation.

As alluded to earlier, international human rights norms seek to recognise universal entitlements⁷⁴ and as a commentator notes, “The provisions concerning individual rights’ protections, with a few exceptions, embrace all human beings”.⁷⁵ The right to work is no exception to this and is also universally applicable.⁷⁶ For example, Article 6 (1) of the ICESCR provides that the state-parties shall recognize the right of everyone to work.⁷⁷ Thus, these rights, at least textually, clearly embrace both citizens and non-citizens including refugees and asylum-seekers.

Further, the operation of Article 6(1) would necessarily be mediated through the non-discrimination principle provided under Article 2(2) of the Convention.⁷⁸ Admittedly nationality is not one of the explicitly enumerated grounds of discrimination that has been prohibited under the Convention.⁷⁹ However, the prohibited grounds are clearly open-ended by virtue of the residuary clause ‘other status’ in Article 2(2) and would include nationality within their sweeping ambit.⁸⁰ This view is reflected in the practice of the Committee on Economic Social and Cultural Rights (‘CESC’) which shows that discrimination against non-nationals is a matter of concern under Article 2(2). For example, in its concluding observations regarding Belgium’s initial report under ICESCR, the Committee urged the Government “to fully ensure that persons belonging to ethnic minorities, refugees and asylum seekers are fully protected from any acts or laws which in any way result in discriminatory

⁷⁴ HATHAWAY, *supra* note 25, 122.

⁷⁵ Cholewinski, *supra* note 51, 714.

⁷⁶ Nsongurua J. Udombana, *Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa*, 39 CORNELL INT’L L. J. 181, 196 (2006).

⁷⁷ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 9.

⁷⁸ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 2(2): “The state parties shall respect the rights provided in the Convention without any discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.

⁷⁹ See RICHARD LILICH, HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 47 (1981) referred to in CRAVEN, *supra* note 30, 168 (Richard B. Lillich thus concludes that the ICESCR does not contain a general norm of non-discrimination against aliens).

⁸⁰ CRAVEN, *supra* note 30.

treatment within the housing sector” so that the obligations under Article 2(2) could be met.⁸¹ Later in one of its Reports, the CESC also commented on the effects of Venezuela’s failure to issue personal documentation to refugees and asylum-seekers and its effect on their rights to work, health, and education.⁸² The CESC noted that such failure was in breach of Venezuela’s commitment under ICESCR. While the substantive content of the right articulated in these observations were different, they certainly show that discrimination on the ground of nationality is prohibited under the Convention.

The relevance of the non-discrimination principle in the context of work has also been emphasized by the General Comment 18 on the Right to Work.⁸³ Critically, the CESC has noted that the “labour market must be open to everyone under the jurisdiction of the State’s parties”.⁸⁴ More specifically, the principle of non-discrimination has been invoked in the special context of asylum-seekers in order to accord them the protection of the right to social security. The CESC observed in its General Comment No. 19 that the non-discrimination principle under Article 2(2) pervades the right to social security and the Covenant, “prohibits any discrimination...which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security”.⁸⁵ Thus, it emphasized on the responsibility of the states to give special attention to groups and individuals that traditionally face difficulties in the exercise of this right including asylum-seekers and refugees.⁸⁶ The CESC further declared that the Covenant contains no express jurisdictional limitations⁸⁷ and declared that refugees, stateless persons and asylum seekers shall enjoy equal treatment in access to non-contributory social security schemes related to access to health care and family support up to a level consistent with international standards.⁸⁸

⁸¹ United Nations Economic and Social Council Resolutions, [U.N. ESCOR], *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium*, ¶ 14, U.N. Doc. E/C.12/1994/7 (1994) (emphasis supplied).

⁸² United Nations Committee on Economic, Social and Cultural Rights [CESCR], *Report on the Twenty-fifth, Twenty-sixth and Twenty-seventh Sessions (23 April-11 May, 2001, 13-31 August, 2001, 12-30 November, 2001)*, E/2002/22; E/C.12/2001/17 (June 6, 2002) referred in Edwards, *supra* note 21, 326.

⁸³ United Nations Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 18: The Right to Work*, E/C.12/GC/18 (February 6, 2006), available at <http://www.unhcr.org/refworld/docid/4415453b4.html> (Last visited on May 23, 2012).

⁸⁴ *Id.*, ¶12(b)(i).

⁸⁵ United Nations Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 19: The Right to Social Security*, ¶30, E/C.12/GC/19 (February 4, 2008), available at <http://www.unhcr.org/refworld/docid/47b17b5b39c.html> (Last visited on May 23, 2012).

⁸⁶ *Id.*, ¶31 (The Committee observed “...States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed...home workers, minority groups, *refugees, asylum seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees*”) (emphasis supplied).

⁸⁷ *Id.*, ¶ 36.

⁸⁸ *Id.*, ¶ 38.

Even though these observations were not made with regard to the right to work, they can readily be extrapolated to the context of right to work since the principle of non-discrimination under Article 2(2) of the ICESCR applies to right to work under Article 6 as well. As a result, it can be contended that the right to work under the ICESCR extends to refugees and asylum-seekers also.⁸⁹

The right to work of refugees and asylum-seekers arguably also has some normative support in the interpretation of the non-discrimination provision of the ICCPR. The Human Rights Committee ('HRC') in *Gueye v. France*,⁹⁰ refused to accept nationality as a valid ground for distinction and invalidated a law that excluded non-national soldiers from pension benefits. The HRC held that differentiation on the basis of nationality falls under the scope of 'other status' and is thus prohibited by Article 26 of the ICCPR.⁹¹ This principle is further supported by the General Comment No. 15 on the Position of the Aliens under the Covenant,⁹² in which the HRC asserted that, "Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant".⁹³

It has also been suggested that the notion of substantive equality, as encompassed by Article 26 of the ICCPR, can be applied to combat discrimination in implementation of economic and social rights as well.⁹⁴ The HRC in its General Comment No. 18 on Non-Discrimination asserted that Article 26 articulated an autonomous right and the obligation of non-discrimination thereunder was not limited to just the rights specified in the Convention.⁹⁵

⁸⁹ Cholewinski, *supra* note 51, 714; Edwards, *supra* note 21, 326 (However, they discuss socio-economic rights in general and not the right to work in particular).

⁹⁰ *IbrahimaGueye v. France*, Communication No. 196/1985, ¶ 9.4, U.N. Doc. CCPR/C/35/D/196/1985 (1989).

⁹¹ See International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (December 16, 1966), Art. 26:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁹² United Nations General Assembly [U.N. GAOR], Human Rights Commission, *General Comment 15/27 on the Position of Aliens under the Covenant*, 117, U.N. Doc. A/41/40 (1986).

⁹³ *Id.*, ¶ 2.

⁹⁴ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 630 (2005); Cholewinski, *supra* note 51, 716.

⁹⁵ United Nations General Assembly [U.N. GAOR], Human Rights Commission, *General Comment 18/37 on Non-discrimination*, ¶ 12, U.N. Doc. A/45/40 (1990). The Article, according to the Committee, "prohibits discrimination in law or in fact in any field regulated and protected by public authorities". Prior to the General Comment No. 18, the HRC had already stated in many of its opinions on individual communications that Article 26 also extends non-discrimination protection to socio-economic rights including those of non-nationals. See *Broeks v. Netherlands*, Communication No. 172/1984, ¶ 12.4, U.N. Doc. CCPR/C/OP/2 (April 9, 1987) and *Guye v. France* Communication, ¶ 9.4, No. 196/1985 (April 3, 1989).

Since socio-economic and civil-political rights are now considered as indivisible, interdependent and interrelated,⁹⁶ these approaches to the non-discrimination principle under the ICCPR would also be relevant for understanding the scope of the right to work under the same principle in ICESCR regime.⁹⁷

However, as Hathaway has noted with concern, the HRC has been inclined to accept differentiation on the basis of non-citizenship as presumptively reasonable. The HRC has also been reluctant to address discriminatory impact as a matter of concern and restricted itself to facial discrimination.⁹⁸ Hathaway believes that these trends along with the HRC's willingness to accord to states a very broad margin of appreciation, severely curtails the utility of Article 26 for refugees and asylum-seekers.⁹⁹

A. PROGRESSIVE REALISATION AND NEGOTIATING THE HURDLES TO THE RIGHT TO WORK

I have argued in the previous section of this paper that Article 6 of the ICESCR read with the principle of non-discrimination lays down a plausible case for recognizing the right to work for asylum-seekers. Nonetheless, the fact that the right requires only 'progressive realization' and is subject to 'maximum available resources',¹⁰⁰ has raised questions about its actual teeth.¹⁰¹ Indeed, state practice reveals that the rights of non-nationals to take up employment are limited and distinctions are drawn between nationals and non-nationals in order to safeguard the employment and economic welfare of the host nation in most countries.¹⁰²

However, as Alice Edwards argues, the permissible restrictions must be read restrictively and they cannot lead to a complete denial of the right

⁹⁶ See United Nations General Assembly, *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights: Resolution Adopted by the General Assembly*, A/RES/41/117 (December 4, 1968), available at <http://www.unhcr.org/refworld/docid/3b00effe2c.html> (Last visited on May 24, 2012); See also United Nations General Assembly, *Vienna Declaration and Programme of Action*, ¶ 5, A/CONF.157/23 (July 12, 1993), available at <http://www.unhcr.org/refworld/docid/3ae6b39ec.html> (Last visited on May 24, 2012); United Nations General Assembly, *Human Rights Council: Resolution Adopted by the General Assembly*, A/RES/60/251 (April 3, 2006), available at <http://www.unhcr.org/refworld/docid/4537814814.html> (Last visited on May 24, 2012).

⁹⁷ NOWAK, *supra* note 25, 25-26.

⁹⁸ See Hilary Charlesworth, *Concepts of Equality in International Law* in LITIGATING RIGHTS 139 (Huscroft and Rishworth ed., 2002).

⁹⁹ HATHAWAY, *supra* note 25, 129-136.

¹⁰⁰ See International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 2(1).

¹⁰¹ HATHAWAY, *supra* note 25, 741.

¹⁰² Cholewinski, *supra* note 51, 730.

to work to asylum-seekers.¹⁰³ The CESC has stressed that the principle of ‘progressive realization’, “should not be interpreted as depriving the obligations under ICESCR of all meaningful content”.¹⁰⁴ It also noted in the same document that this principle, “imposes an obligation to move as expeditiously and effectively as possible” and any deliberately retrogressive measures must be subjected to, “the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”¹⁰⁵ Most critically, it declared that, “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”¹⁰⁶ Thus, it is unmistakably clear that the ‘progressive realization’ principle cannot trump over the obligation of the states to protect the minimum core of a right. We must bear in mind in this regard that while these comments are not legally binding,¹⁰⁷ they nonetheless constitute authoritative interpretations of provisions of the ICESCR.¹⁰⁸

Importantly for the purpose of this analysis, the principle of non-discrimination is among the minimum core obligations which have immediate effect.¹⁰⁹ As a result, the principle of progressive realization has to be necessarily conjoined with the duty of non-discrimination.¹¹⁰ Thus, I argue that states are bound by the principle of non-discrimination in all the incremental steps they take to ensure the right to work and hence, cannot particularly exclude asylum-seekers.

It must also be reiterated that nations cannot use their lack of available resources as an excuse for failing to undertake measures to respect, protect, and fulfil the rights. The CESC asserted in the aforementioned General Comment 3 that:

“In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in

¹⁰³ Edwards, *supra* note 21, 327.

¹⁰⁴ United Nations Committee on Economic, Social & Cultural Rights [CESCR], *General Comment No. 3: The Nature of States Parties Obligations*, Art. 2, ¶1, U.N. Doc. E/1991/23 (December 14, 1990), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument) (Last visited April 23, 2009).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, ¶10.

¹⁰⁷ Laurence R. Helfer & Ann-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273, 352 (1997).

¹⁰⁸ NOWAK, *supra* note 94. See also LOUIS HENKIN ET AL., *supra* note 66, 504-505.

¹⁰⁹ General Comment No. 3, *supra* note 104.

¹¹⁰ General Comment No. 18, *supra* note 83; General Comment No. 19, *supra* note 85.

an effort to satisfy, as a matter of priority, those minimum obligations.”¹¹¹

Although the principles of minimum core obligation and non-discrimination have expanded the scope of Article 6, it could be argued that its applicability to asylum-seekers in developing countries is qualified by the exception accorded in Article 2(3) of the Covenant. This exception states that developing countries have the freedom to determine the extent of applicability of the economic rights guaranteed in the Covenant to non-nationals.¹¹² I must however emphasize that the freedom under Article 2(3) is not unlimited and instead, is fettered by its language and drafting intent.¹¹³ According to Alice Edwards, the very inclusion of the words, ‘human rights and the national economy’ limit the ambit of the Article.¹¹⁴ Thus, Article 2(3) can be invoked to protect a restriction on a right of a non-national only when such restriction can be justified in the interest of the ‘national economy’. She further argues that this provision must be interpreted in light of its historical origin.¹¹⁵ This provision was the result of the apprehensions of newly independent post-colonial countries which feared that the rights granted in ICESCR could be used by dominant economic groups of non-nationals to block new redistributive socio-economic policies.¹¹⁶ Therefore, Article 2(3) has to be interpreted narrowly and only in furtherance of its original goals and any distinction between a citizen and an alien in respect of a basic economic right which undermines the human dignity of the discriminated person or which is not justified in the interests of the national economy, cannot be supported.

However, Craven does indicate that the aforesaid argument may be difficult to sustain due to contradictory general practice of states.¹¹⁷ Therefore, he argues that the ambit of Article 2(3) has to be understood in light of Article 4, which provides a firmer basis to constrain the ability of states to restrict the rights to work and social security for asylum-seekers and other non-nationals.¹¹⁸ This provision permits only such limitations that are determined

¹¹¹ General Comment No. 3, *supra* note 104, ¶ 10.

¹¹² International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 2 (3): “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”.

¹¹³ Edwards, *supra* note 21, 326.

¹¹⁴ Edwards, *supra* note 21.

¹¹⁵ *Id.* (Art. 31 of the Vienna Convention on the Law of Treaties requires contextual interpretation of a treaty provision when the ordinary meaning is ambiguous. Further, Art. 32(2) states that preparatory work or the circumstances of conclusion of a treaty could be used when the interpretation under Art. 31 provides a meaning that is ambiguous or manifestly absurd or unreasonable. It could be argued that allowing states to limit the economic rights to non-nationals under Art. 2(3) may be unreasonable and also undermine the objectives and purpose of the Convention. Therefore, this Article should be interpreted in light of its historical background).

¹¹⁶ Edwards, *supra* note 21, 326.

¹¹⁷ Edwards, *supra* note 21.

¹¹⁸ Edwards, *supra* note 21.

by law, are compatible with the nature of the rights in question and are “solely for the purpose of promoting the general welfare in a democratic society”.¹¹⁹ Though this provision does not act as a prohibition against any discrimination against non-nationals, it does require extra-ordinary justifications for any restriction that may be imposed.¹²⁰ It is argued that the onus of justifying a blanket denial of the right to work to asylum seekers would be very burdensome.¹²¹ This burden would be particularly difficult given that the ESC Committee has affirmed in this context that Article 4 “is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State”.¹²² Therefore, one can surmise that the room for imposing restrictions on the right to work is severely limited by the need to have justification under Article 4.

B. DEFINING THE LIMITS ON THE FREEDOM TO WORK

As discussed in the previous section, the qualifications placed by the doctrine of progressive realisation under Article 2(1) and the special exception in Article 2(3) on the right to work are very narrow. However, it is not the case of this paper that no such restrictions can be imposed. It certainly cannot be proposed that states must treat citizens and refugees and asylum-seekers alike for the purpose of employment, especially in the context of developing countries of South Asia with chronic high rates of unemployment.

Nonetheless such restrictions on the ambit of the right to work for asylum-seekers and refugees would be permissible if they are based on reasonable and objective criteria, pursue a legitimate aim, and are strictly proportionate to that aim.¹²³ Thus, it is open to argue that certain forms of restrictions on the right to work for asylum-seekers may indeed be permissible, if they satisfy the aforementioned criteria.

In addition, such restrictions cannot arguably extend to a complete denial of work for a protracted period of time, for any prolonged denial of the right to work would erode the core and the essence of the right itself

¹¹⁹ See International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 4.

¹²⁰ CRAVEN, *supra* note 30, 214.

¹²¹ Cholewinski, *supra* note 51, 731.

¹²² United Nations Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 13 on Education*, ¶42, UN doc. E/C.12/1999/10 (1999), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003e8b3b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003e8b3b?Opendocument) (Last visited on April 24, 2009) referred in Edwards, *supra* note 21, 328.

¹²³ The decision of the Human Rights Committee in *Zwaan-de Vries v. Netherlands*, Communication No. 182/1984, U.N. Doc. CCPR/C/29/D/182/1984 (1987) provides helpful guidance (though the decision was in the context of ICCPR) on the tests for permissible discrimination. Cholewinski, *supra* note 51, 717.

and would also infringe the autonomy aspects of human dignity. It is a well-established principle of international human rights law that any proportionate restriction on a ‘human right’ cannot destroy the essential content of the right itself.¹²⁴

In this context, Alice Edwards also argues that any distinction between a citizen and an alien in respect of a basic economic right which undermines the basic rights and human dignity is not permissible and cannot be allowed under the qualifications in Articles 2(1) and 2(3).¹²⁵ If this is indeed the case, there cannot be any restriction on the right to work of asylum-seekers or other non-nationals given the inextricable connection between the right to work and human dignity.

It is relevant here to note that in its General Comment No. 18, the CESCR has affirmed that “[t]he right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity”.¹²⁶ The General Comment also highlighted the dual role of the right to work with regard to protection of survival and human dignity.¹²⁷ This decoupling of ‘survival’ and ‘dignity’ implies that the Covenant transcends the subsisting notion of dignity.¹²⁸ It recognizes self-determination and autonomy of individuals as an integral component of human dignity¹²⁹ and that the right to work is an integral way of protecting this facet of dignity.¹³⁰

Moreover, in accordance with the mandate of Article 4, any restriction on the right to work of asylum-seekers must be compatible with the nature of the right in question and must solely “promote the general welfare in

¹²⁴ General Comment No. 3, *supra* note 104; *See also* Katharine Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113, 119 (2008).

¹²⁵ Edwards, *supra* note 21, 325.

¹²⁶ General Comment No. 18, *supra* note 83, ¶ 1.

¹²⁷ *Id.*

¹²⁸ The subsistence notion of human dignity means that dignity imposes an obligation on the state to provide at least minimal subsistence to every individual. For a detailed discussion of this point and how various municipal courts have interpreted human dignity to imply an obligation to provide subsistence, *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 700-706 (2008).

¹²⁹ Under this notion, dignity entails the assurance of the possibility for individual choice and the conditions for ‘each individual’s self-fulfilment’, autonomy, or self-realization. *See* A. CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 536-538 (2006); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 689-690 (2008).

¹³⁰ The practical significance of this distinction is that even social security and assistance by the host states as an alternative to right to work will not be adequate protection of human dignity as such protection fails to effectuate the autonomy conception of dignity. While social security and assistance schemes may ensure the subsistence of asylum-seekers, the failure to respect individual fulfilment and autonomy means that the dignity of asylum-seekers is nevertheless compromised.

a democratic society¹³¹. Further, as CESC has affirmed, any interpretation of this provision must be more protective of the rights of individuals than of the constraints imposed by the state.¹³² In view of these comments by the CESC, a human rights friendly approach would necessitate that states must bear the onus of proving the existence of a legitimate purpose and its nexus with the restriction on the right to work.¹³³

While there has been tremendous political hostility to immigrants, refugees and asylum-seekers on the assumption that immigration is detrimental to the local economy, the economic case against immigration is more contested. Recent studies reveal that the perils of immigration are often exaggerated and that in certain cases, employment of refugees and asylum-seekers may indeed be beneficial for the economy.¹³⁴ For example, the Human Development Report, 2005 prepared by the State Government of Arunachal Pradesh, one of the frontier states of India, acknowledged the role of illegal immigrants from Bangladesh in the dramatic growth of agriculture in the State.¹³⁵ On the other hand, denial of the right to work to refugees may impose a drain on the host country by creating a class of people perennially dependent on the state and a criminalised underclass.¹³⁶

Such benefits of employment for migrants can indeed be context-specific and may not necessarily lead to a universal rule. However, these examples dismantle the almost *a priori* assumption that restrictions on the right

¹³¹ See International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966), Art. 4.

¹³² General Comment No. 13, *supra* note 104.

¹³³ See European Social Committee Decisions in European Roma Rights Centre v. Italy, Merits, Complaint No. 27/2004 (December 7, 2005) and European Roma Rights Centre v. Greece, Complaint No. 15/2003 (April 4, 2003). See also Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 892 (2008).

¹³⁴ See Eve Lester, *Work, the Right to Work and Durable Solutions: A Study on the Sierra Leonean Refugees in Gambia*, 17 (2) INT'L J. REFUGEE L. 331 (2005) (Eve Lester demonstrates how refugees from Sierra Leone have contributed to the growth of the Gambian economy); Gordon H. Hanson, *The Economic Logic of Illegal Immigration, The Bernard and Irene Schwartz Series on American Competitiveness, Council on Foreign Relations*, April, 2007, available at <http://www.cfr.org/content/publications/attachments/ImmigrationCSR26.pdf> (Last visited on April 21, 2009); See United Nations Human Rights Committee [HRC], *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant : International Covenant on Civil and Political Rights : 4th periodic report : Argentina*, CCPR/C/ARG/4 (March 13, 2008), available at <http://www.unhcr.org/refworld/docid/4885cf870.html> (Last visited on April 29, 2009) (The Government of Argentina acknowledged to the Human Rights Committee in its 4th Periodic Report submitted under Art. 40 of the ICCPR that restrictive immigration policies have not achieved their objectives and have instead resulted in many indirect costs).

¹³⁵ Government of Arunachal Pradesh: Dept. Of Planning, *Arunachal Pradesh Human Development Report 2005*, available at <<http://data.undp.org.in/shdr/ap/report.pdf>> (Last visited on April 29, 2009).

¹³⁶ George Tapionos, *Irregular Migration: Economic and Political Issues* in OECD: COMBATING THE ILLEGAL EMPLOYMENT OF FOREIGN WORKERS 24, 34, 36 (2000).

to work for asylum-seekers are inherently beneficial for the host country and suggest that the onus must lie on the states imposing any restriction on the right to work (based on the availability of social security) of refugees and asylum-seekers to prove that they are indeed strictly necessary and proportionate for the purpose of promoting the 'general welfare of the society' and hence, permissible under the ICESCR.

VI. CONCLUSION

This paper has attempted to show that while there are avenues for the right to work of refugees under the Refugee Convention, there are significant limitations and questions hovering over asylum-seekers' right to work. In contrast, international human rights law protects a universalist conception of rights and thus extends to both refugees and asylum-seekers. Both UDHR and the ICESCR grant the right to work to everyone and do not exclude non-nationals from their purview. Moreover, this right is mediated by the principle of non-discrimination as articulated in Article 2(2) of the ICESCR and Article 26 of the ICCPR. The jurisprudence and practice of the HRC and the CESCR indicate that the non-discrimination principle prohibits discrimination against non-nationals and thus, refugees and asylum-seekers can claim the protection of the right to work under the ICESCR. I submit that situating the right to work within the framework of the ICESCR and related international human rights law instruments can open up new legal frontiers for protection of refugees and asylum-seekers, especially in countries that have not ratified the Refugee Convention. It would enable refugees and asylum-seekers in India and other South Asian countries to assert a legally enforceable freedom to work and question the currently applicable regimes of blanket denial of this vital right.

At the same time, I acknowledge that states can continue to impose restrictions on the right to work for asylum-seekers. However, the utility of affirming refugees' and asylum-seekers' freedom to work lies in the fact that it would place a very strict burden on the state of proving a legitimate purpose underlying such a restriction. The existence of a legitimate purpose in restricting the right to work cannot be assumed under a human rights friendly approach and the onus must lie on states to show that every restriction is based on reasonable and objective criteria, pursues a legitimate aim, and is strictly proportionate to that aim.