

SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART II

RETHINKING INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION OF MIGRANT WORKERS: THE CASE FOR A “CORE RIGHTS” APPROACH

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The [UN General Assembly](#) decided in September 2016 that it would

start negotiations leading to an international conference and the adoption of a global compact for safe, orderly and regular migration in 2018. The agreement to move toward this comprehensive framework is a momentous one. It means that migration, like other areas of international relations, will be guided by a set of common principles and approaches.¹

Given the well-known and long-standing efforts of various high-income countries to prevent the development of a stronger and more effective global framework for the regulation of international migration, there are obvious reasons to be skeptical that the announced “Global Compact for Migration” will indeed bring about any major change. The ambition to achieve this “Global Compact” has, however, created a window of opportunity to rethink the current approach and debate alternative (or additional) mechanisms for protecting the rights of migrant workers.

This essay discusses the role of international legal standards in protecting migrants and their rights in the global labor market. My starting point is that the three international legal instruments specifically designed for the protection of the rights of migrant workers—the UN’s International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families adopted in 1990 (CMW) and the International Labour Organization (ILO)’s 1949 Migration for Employment Convention (ILO Convention 97) and 1975 Migrant Workers (Supplementary Provisions) Convention (ILO Convention 143)—have largely failed, or at least had very limited success, in protecting migrants in practice. This is primarily because the great majority of high-income countries have refused to ratify and implement these conventions. Consequently, while the existing international legal instruments for migrant workers have clearly played an important role in setting out ideals and aspirations, it is, I argue, high time for a new approach that complements (rather than replaces) existing international legal norms and is focused on helping to provide more effective protection for migrant workers *in practice*.

Drawing on my [recent and ongoing](#) research on the regulation of international labor migration and the rights of migrant workers² I make the case for a “core-rights” approach to the global governance of international labor migration. This would involve the creation of a list of core rights of migrant workers that would include fewer rights than the CMW. This list of core rights should complement rather than replace the existing international

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¹ For more details, see the [New York Declaration](#), ADDRESSING LARGE MOVEMENTS OF REFUGEES AND MIGRANTS (UN).

² See MARTIN RUHS, [THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR MIGRATION](#) (2013); Martin Ruhs, [The Rights of Migrant Workers: Economics, Politics and Ethics](#), 155 INT’L LAB. REV. 281 (2016).

legal standards. The essay explains the rationale of this new approach and begins a discussion about what rights should be included among the core rights for migrant workers. The aim is to stimulate discussion rather than provide answers to the fundamental questions raised.

The case for core rights for migrant workers

Together with the more general human rights treaties, the existing international legal instruments for protecting migrant workers lay out a comprehensive set of civil, political, economic, social, and other rights for migrant workers, including the right to equal protections under labor laws, antidiscrimination laws, and family laws. In particular, the CMW articulates a broad set of rights for migrants, including those living and/or working abroad illegally. The CMW includes ninety-three articles (compared to the twenty-three articles of the ILO Convention 97 and the twenty-four articles of the ILO Convention 143) and extends fundamental human rights to all migrant workers, both regular and irregular, with additional rights being recognized for regular migrant workers and members of their families. Crucially, the CMW is based on the principle of [equal treatment](#) of migrants and nationals rather than on a “minimum standards” approach, which characterizes many other international legal instruments.³

The first reason for thinking about creating a shorter list of rights for migrant workers is that, in practice, the ratifications of the CMW and ILO conventions on migrant workers by state parties have been disappointing. With [forty-eight ratifications](#) as of August 2016,⁴ the CMW is the least ratified treaty among all major human rights treaties. The few countries that have ratified the CMW are predominantly migrant-sending rather than migrant-receiving countries. They are all low- or middle- income countries with three-quarters having a low or medium human development index. The great majority of countries that have ratified the CMW have poor records of protecting human rights (e.g. according to Freedom House, most countries that have ratified the CMW are “partly free” or “not free”). [A similarly low number](#) of countries has ratified ILO Convention 97 ([forty-nine countries](#) as of August 2016)⁵ and even fewer ILO Convention 143 ([twenty-three countries](#)).⁶ Partly because of the low numbers of ratifications, it is widely agreed that the effectiveness of global migration norms in protecting migrant workers in practice has been extremely limited. It is important to add that it is by no means clear that these conventions are offering effective protection even in the few countries that have formally ratified them. The relationship between states’ ratifications of international rights treaties and their respect for rights in practice is unclear and an important issue for [empirical research](#).⁷

As I have showed elsewhere, there is considerable evidence to suggest that the primary reason why high-income countries have not ratified the CMW, and have no intention of doing so in the future, is that they consider the convention “too demanding” in terms of the potential impacts and costs involved for the population of the host country.⁸ Arguably, a list of core rights would be more acceptable to a larger number of countries including states that admit large numbers of migrants.

³ Juhani Lonnroth, *The International Convention of the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT’L MIGRATION REV. 710 (1991).

⁴ For the ratification status of human rights treaties, including the Migrant Workers Convention, see [Status of Ratification Interactive Dashboard](#), UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS.

⁵ See [Ratifications of C097 – Migration for Employment Convention \(Revised\), 1949 \(No. 97\)](#), INTERNATIONAL LABOUR ORGANIZATION.

⁶ See [Ratifications of C143 – Migrant Workers \(Supplementary Provisions\) Convention, 1975 \(No. 143\)](#), INTERNATIONAL LABOUR ORGANIZATION. For a recent overview and discussion of the ratifications of ILO instruments on migrant workers, see INTERNATIONAL LABOUR ORGANIZATION, [PROMOTING FAIR MIGRATION. GENERAL SURVEY CONCERNING THE MIGRANT WORKERS INSTRUMENTS](#) (2016).

⁷ See, e.g., BETH SIMMONS, [MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS](#) (2009).

⁸ See RUHS, [supra](#) note 2.

My second reason for advocating a core rights approach that focuses on a shorter list of rights for migrant workers than the CMW stems from the trade-offs (i.e. inverse relationship) between openness and some rights in high-income countries' labor immigration policies. Examining the characteristics of labor immigration policies in over thirty high-income countries, I provided evidence that labor immigration programs in high-income countries can be characterized by trade-offs between openness and some migrant rights, that is, programs that are more open to admitting migrant workers are also more restrictive with regard to specific rights. The study found that the trade-off between openness and rights affects only a few specific rights rather than all rights, and that they most commonly include selected social and economic rights as well as rights relating to residency and family reunion. I showed that trade-offs between openness and migrant rights can be found in policies that target a range of skills, but are generally not present in labor immigration programs specifically designed for admitting the most highly skilled workers, for whom there is intense international competition.⁹

The trade-off between openness and some specific migrant rights in high-income countries' labor immigration policies means that insisting on equality of rights for migrant workers can come at the price of more restrictive admission policies and, therefore, discourage the further liberalization of international labor migration. Put differently, rights-based approaches to migration that demand all the rights stipulated in the existing international labor standards run the danger of doing good in one area (i.e. promoting the rights of existing migrants) while doing harm in another (i.e. decreasing opportunities for workers to migrate and legally work in higher-income countries). Given this trade-off between openness and some rights, I argue that there is a [strong normative case for tolerating the selective](#), evidence-based, temporary restrictions of a few specific rights under new and expanded temporary migration programs that help liberalize international labor migration, especially of lower-skilled workers whose international movement is currently most restricted and who would therefore reap large human development gains from employment abroad.¹⁰

Third, as I show in some of my current work, labor immigration policies of high-income countries—including restrictions of the rights of migrant workers—are characterized by significant variations across political regimes (i.e. across democracies and autocracies) and “varieties of capitalism” (i.e. across liberal market economies with liberal welfare states and coordinated market economies with other types of welfare states). Compared to policies in democracies, labor immigration programs in autocracies are characterized by fewer restrictions on the conditions of employment of migrants, greater openness to labor immigration, more restrictions of migrants' rights, and stronger trade-offs between openness and rights.¹¹ With regard to variations across types of capitalism, I find that the admission policies in liberal market economies (LMEs) impose fewer limitations on the employment conditions of migrants and are less likely to require migrants to be self-sufficient than policies in coordinated market economies. However, LMEs place relatively more restrictions on the social rights of migrants.

Since the design of national labor immigration policies is correlated with national institutions (particular political systems, labor markets, welfare states, etc.), I argue that any common global policy approach needs to take account, at least to some extent, of institutional variations across countries. A list of universal core rights that allows some

⁹ Recent papers that identify similar tensions between “access” and “rights/conditions” include David McKenzie et al., *Distortions in the International Migrant Labour Market: Evidence from Filipino Migration and Wage Responses to Destination Country Economic Shocks*, 6 AM. ECON. J.: APPLIED ECON. 49 (2014); BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* (2016); Jeannette Money et al., *Why migrant rights are different than human rights*, in HANDBOOK ON MIGRATION AND SOCIAL POLICY 399 (Gary P. Freeman & Nikola Mirilovic eds., 2016); Suresh Naidu et al., *Monopsony Power in Migrant Labor Markets: Evidence from the United Arab Emirates*, 124 J. Pol. Econ. 1735 (2016); E. Glen Weyl, *The Openness-Equality Trade-Off in Global Redistribution*, ECON. J. (forthcoming).

¹⁰ See RUHS, *supra* note 2, at 9.

¹¹ Martin Ruhs, *Labour Immigration Policies in High-Income Countries: Policy Variations Across Political Regimes and Varieties of Capitalism* (2016) (available upon request).

room for differential restrictions on migrants' access to the welfare state, for example, has a much better chance of acceptance and implementation than an approach that demands equality or near-equality in rights in all countries regardless of their institutional differences.

The overall logic of core rights for migrants would not be too dissimilar from that underlying the emphasis placed on the ILO's core labor standards in the 1998 Declaration on Fundamental Principles and Rights at Work, which was adopted in the context of dwindling numbers of ratifications of ILO Conventions and general criticism that the ILO's labor standards were not effective enough at protecting workers' rights in a rapidly globalizing economy.

What are "Core Rights" for Migrant Workers?

What rights should be included in a list of core rights for migrant workers? Given the inherently normative character of this question, there is no one "right" answer. I suggest that the list of core rights must emerge through the kind of "public debate and reasoning" that [Amartya Sen](#) advocated in the context of the need to value and prioritize competing capabilities and objectives when thinking about how to best advance human development.¹² I am attracted to Sen's capability approach to development because it is explicitly "people-centered" in the sense that it focuses on agency and choice. It also forces an open discussion of potential tensions and trade-offs between different types of capabilities and rights. As the [United Nations Development Programme's](#) report on human rights and human development argues:

Human rights advocates have often asserted the indivisibility and importance of all human rights. This claim makes sense if it is understood as denying that there is a hierarchy of different kinds of rights (economic, civil, cultural, political and social). But it cannot be denied that scarcity of resources and institutional constraints often require us to prioritize concern for securing different rights for the purposes of policy choice. Human development analysis helps us to see these choices in explicit and direct terms.¹³

We know that employment in a higher-income country is usually associated with very large gains in income for migrants and their families. We also know that the vast majority of migrant workers in the world are "volunteers" who have decided to migrate and take up employment abroad, sometimes under severely restricted rights, because they consider this to be their best option among the choices available to them. This also applies to the great majority of migrants employed under severely restricted rights in the Gulf States in the Middle East and in Singapore, for example. While it is clearly critical to discuss the meanings and limits of individual migrants' "agency" and "choice" in these cases, it is in my view equally important to take seriously the fact that millions of workers around the world have actively decided to migrate and take up employment abroad under what most people would consider highly exploitative conditions.

With this in mind, my starting position is that the list of core rights for migrant workers should protect basic civil, political, and labor rights, such as the right to keep your own identity documents, the right to equal access to the protections of the courts, and the right to equal employment conditions. Arguably, core rights for migrant workers do not need to include extensive social rights. For example, core rights could exclude, at least for a limited period of time, access to needs-based benefits such as social housing and low-income support. In practice, these welfare benefits are already restricted under most labor immigration programs around the world.

Clearly, different people, organizations, and countries will disagree about what rights should be included in a list of universal core rights for migrant workers. The aim of this essay is to encourage debate about (rather than give

¹² Amartya Sen, [Human Rights and Capabilities](#), 6 J. HUM. DEV. 151 (2005).

¹³ UNITED NATIONS DEVELOPMENT PROGRAM, [HUMAN RIGHTS AND HUMAN DEVELOPMENT](#) 23 (2000).

answers to) what I think are important and urgent questions. It is a debate that is long overdue and that, in my view, should be at the center of international initiatives such as the UN's "Global Compact for Migration" that aim to find more effective ways of protecting migrants in practice.