Symposium: Managing Mixed Migration

Refugees as Workers

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Though popular in the media and political spheres, the dichotomy between refugees and “economic migrants” has little grounding in international refugee law. The 1951 Convention Relating to the Status of Refugees identifies refugees as workers, providing for both the humanitarian and economic needs of individuals seeking international protection. The drafters of the Convention indicated that labor is a core component of the refugee identity and engaged with the challenges that refugees might face as laborers in wage-earning employment, self-employment, or the liberal professions. This Essay reviews the drafting history of those provisions as well as the treaty law relevant to labor migration, raising concerns around states’ limited ratification of international treaties that protect migrant workers, as well as the exclusion of refugees from some of their protections. It proposes that international law and organizations might play a role in dismantling the constructed dichotomy between refugees and workers, nudging the political conversation towards a more accurate understanding of the realities of mixed migration.

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INTRODUCTION

Labels matter. In just one recent example, U.K. Home Secretary Priti Patel agreed to ask the BBC to “reflect” on its use of the term “migrants” to describe humans who had drowned in the English Channel seeking entry to British

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territory.\(^2\) Patel’s announcement was greeted with charges of hypocrisy, given her statement to the UK House of Lords just one month before: “In the last year, 70% of individuals on small boats are single men who are effectively economic migrants. They are not genuine asylum seekers.”\(^3\) This claim was disputed by the U.K. Refugee Council, which provided data to establish that ninety-eight percent of Channel crossers seek asylum, and sixty-one percent receive refugee protection.\(^4\) The arguments presented on both sides of these political debates rest on an invidious distinction between refugees and “economic migrants,”\(^5\) a binary that labels the former as deserving of access to territory and protection against return and the latter as lawbreakers and criminals who should be kept out at all costs.\(^6\)

This binary is constructed against the backdrop of the international refugee law framework, grounded primarily in the 1951 U.N. Convention Relating to the Status of Refugees (“Refugee Convention”).\(^7\) This multilateral treaty is a foundational source of the definition used globally to determine who is a refugee. Yet, in contrast to the political conversation tethered to its structure, the Refugee Convention does not offer a negative depiction of migrants seeking employment, nor does it attempt to draw a bright line between refugees and workers. Instead, the treaty depicts refugees as workers, recognizing that humans may have humanitarian and economic needs. Several provisions of the Refugee Convention conceptualize refugees as laborers, either in wage employment, self-employment, or liberal professions.\(^8\) The drafters viewed these labor specifications as a core component of the refugee identity.\(^9\) Indeed, the US


\(^5\) See, e.g., European Commission, Migration and Home Affairs, Definition of Economic Migrants, https://ec.europa.eu/home-affairs/glossary/economic-migrant_en (defining economic migrant as “a person who leaves their country of origin purely for economic reasons that are not in any way related to the refugee definition, in order to seek material improvements in their livelihood”).

\(^6\) See, e.g., Grierson, supra note 2 (quoting former U.K. Prime Minister David Cameron’s 2015 description of Channel crossers, “They are economic migrants and they want to enter Britain illegally and the British people and I want to make sure our borders are secure and you can’t break into Britain without permission”).

\(^7\) International protection against return is also available to individuals who seek protection under the provisions of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment among other multilateral treaties. Given space constraints, this essay focuses only on the Refugee Convention.

\(^8\) “The term ‘liberal professions’ may have a different meaning in different countries. It includes, in any case, lawyers, doctors, dentists, veterinarians, engineers and architects working on their own account. It may also include pharmacists, artists and accountants. The term ‘liberal’ means that the persons must possess certain qualifications or a special licence.” THE REFUGEE CONVENTION, 1951: THE TRAVAILUX PRÉPARATOIRES ANALYSÉS WITH A COMMENTARY BY DR. PAUL WEIS 113 (1990) https://www.refworld.org/docid/53e1dd1d14.html.

\(^9\) These labor rights apply by their terms to recognized refugees, not to all asylum seekers. The point here is that the drafters viewed labor rights as essential to the protection of refugees, devoting a chapter of the Convention to that end. In other words, the need to work did not shift an individual into
representative to the Refugee Convention’s drafting conference stated that, “without the right to work all other rights [a]re meaningless.”

In other words, the political conversation that constructs the binary between refugees and workers has little grounding in international legal sources. Rather than reflecting the mixed reasons for which humans cross borders, the political imaginary constructs refugees as vulnerable aid recipients rather than human beings with skills and talents who must work to support themselves and their families. At the same time, migrants who seek work are depicted as unworthy of protection rather than as humans who move for complicated reasons that often involve vulnerability. This dichotomy entrenches a popular framing of refugee protection as a beneficent act of charity, obscuring the work that refugees perform and the ways in which they can contribute to their host communities. It also creates the “out-group” of economic migrants whose exclusion can be justified through their desire to seek work without any further analysis of national economic needs let alone individual needs for protection.

This Essay proceeds by describing the provisions of the Refugee Convention that undermine the dichotomy between refugees and workers, demonstrating that the treaty’s drafters viewed asylum seekers as whole human beings with a range of needs. It then examines treaty law relevant to labor migration, focusing on three International Labour Organization (ILO) conventions relating to migrant labor and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Essay raises concerns about the limited recognition of the international legal regimes that protect migrant workers, as well as the exclusion of refugees from some of their protections. It ends with a proposal outlining the ways in which international law and organizations might play a role in dismantling the constructed dichotomy between refugees and workers. In so doing, this Essay aims to push the political conversation towards a greater understanding of the realities of mixed migration.

REFUGEES AS WORKERS

The Refugee Convention is best known for Article 33, the non-refoulement provision, which prohibits the return of a refugee to persecution, and Article 1, which provides the international legal definition of a refugee. Sandwiched between these articles, and often overlooked, are the work provisions of the Convention, found in Articles 17 through 19. Both the drafting history and the text of the treaty itself conceptualize refugees as laborers, with the U.S. representative to the drafting convention pushing for stronger labor protections

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11. Wyszynski et al., supra note 1, at 615.
13. Refugee Convention Arts. 1 and 33.
for refugees. As long as refugees are lawfully present, which is true for all individuals who have been recognized as refugees (and in some cases, pre-recognition), the text of the treaty requires particular standards of treatment.\textsuperscript{14}

Article 17 requires that refugees in wage-earning employment receive the most favorable treatment accorded to foreigners.\textsuperscript{15} This provision allows states parties to require a work permit of refugees if they require them of other noncitizens. Read in conjunction with Article 15, which provides the right of association, refugees should be able to form and join unions. Noting that refugees were not covered by the Migration for Employment Convention, the ILO’s representative to the drafting convention emphasized the importance of ensuring that refugees received that right by according them the most favorable treatment given to foreign nationals under bilateral or multilateral treaties or usage.\textsuperscript{16} In addition, states agree not to impose restrictive measures relating to employment on refugees who have resided in the host state for three years or are married to or have children who are nationals of the host state. During the drafting conference, the U.S. suggested including language more favorable to refugees, encouraging “favourable consideration to [sic] the possibility of according the treatment given to national wage-earners” and permitting reservations for states parties who were not willing to award refugees treatment similar to nationals.\textsuperscript{17} In the face of concerns expressed by the U.K. about large numbers of refugees seeking such benefits, the text of the Convention was watered down to provide for “sympathetic consideration” of the possibility of providing refugees with labor rights on par with those of nationals. Notably, the language of that provision points specifically to “those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes,” envisioning that people who might today be considered “economic migrants” might actually merit refugee protection.\textsuperscript{18}

Articles 18 and 19 protect those who fall outside the scope of wage-earning employment, namely the self-employed and professionals with recognized diplomas, such as doctors, dentists, lawyers, veterinarians, engineers, and architects, as well as other professionals who must possess certain qualifications

\textsuperscript{14} Article 7(1) of the Refugee Convention requires that refugees, whether or not lawfully in the territory, must be given “the same treatment as is accorded to aliens generally” unless provisions of the Convention provide for more favorable treatment. Refugee Convention, Art. 7(1); Weis, supra note 10, at 109.

\textsuperscript{15} Several states parties entered reservations to Article 17, with a few indicating that they would not consider the provisions of the article binding (e.g., Austria); a few indicating that they would not provide automatic exemptions to the work permit requirement (e.g., Sweden); and a few indicating that the requirement of “most favored treatment accorded a foreign national” would not be applied with respect to nationals of states with which the host country has special work agreements (e.g., United Kingdom). UNHCR, States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention, https://www.unhcr.org/en-us/protection/convention/5d9ed32b4/states-parties-including-reservations-declarations-1951-refugee-convention.html; UNHCR, States Parties, Including Reservations and Declarations, to the 1967 Protocol Relating to the Status of Refugees, https://www.unhcr.org/en-us/protection/convention/5d9eb66a4/states-parties-including-reservations-declarations-1967-protocol-relating.html.

\textsuperscript{16} Weis, supra note 10, at 93.

\textsuperscript{17} Weis, supra note 10, at 100.

\textsuperscript{18} Refugee Convention Art. 17(3).
or a special license.\textsuperscript{19} In terms of their employment rights, these groups must be granted treatment “as favorable as possible” and in any case “no less favorable” than noncitizens “generally in the same circumstances.”\textsuperscript{20} With respect to self-employed refugees, the U.S. representative to the drafting conference wanted the text to provide refugees with treatment more favorable than that accorded to noncitizens generally, but that view did not prevail.\textsuperscript{21} With respect to professionals, the travaux préparatoires note that bilateral treaties have often regulated diploma recognition.\textsuperscript{22} In short, in stark contrast with the current debate over “economic migrants” and refugees, these Convention provisions recognize that most refugees have economic needs and that migrants who seek employment may simultaneously have protection needs.

**LABOR RIGHTS FOR REFUGEES?**

The Refugee Convention’s vision of refugees as workers did not translate from paper to practice.\textsuperscript{23} In the wake of World War II, the United Nations High Commissioner for Refugees (UNHCR) focused on refugee protection to the exclusion of the right to decent work.\textsuperscript{24} Cold War politics played an important role in constructing this binary, as Western nations prioritized civil and political rights over social and economic rights. More importantly, the United States began to favor refugee protection as a mechanism to weaken communist regimes, enabling political dissidents to vote with their feet, and viewed international labor initiatives with suspicion given the participation of communist states in those efforts.\textsuperscript{25}

International labor law treaties providing labor rights for migrants fared poorly in the kettle of Cold War politics.\textsuperscript{26} The 1949 ILO Convention No. 97 on Migrant Workers, ratified by only forty-nine states, primarily serves the interests of migrant-receiving countries.\textsuperscript{27} (In contrast, the Refugee Convention has 146 states parties.)\textsuperscript{28} In terms of protections, it provides that migrants lawfully in the territory receive treatment no less favorable than nationals with respect to pay, trade union membership, accommodation, social security (with some limits), employment taxes, and legal proceedings. The 1975 ILO Convention No. 143,

\begin{itemize}
  \item \textsuperscript{19} Id. at 113.
  \item \textsuperscript{20} Id. at arts. 18, 19, and 22(2).
  \item \textsuperscript{21} WEIS, supra note 10, at 108.
  \item \textsuperscript{22} WEIS, supra note 10, at 122-23.
  \item \textsuperscript{23} For a thorough examination of the “blurring of refugee and migrant identities” prior to World War II, see Katy Long, When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection, 1 MIGRATION STUDIES 4, 8-17 (2013).
  \item \textsuperscript{24} Jennifer Gordon, Refugees and Decent Work: Lessons Learned from Recent Refugee Jobs Compacts 6 (Int’l Labour Office Working Paper No. 256, 2019).
  \item \textsuperscript{25} Long, supra note 2323, at 18.
  \item \textsuperscript{26} Virginia A. Leary, Labor Migration, in MIGRATION AND INTERNATIONAL LEGAL NORMS 229 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003).
\end{itemize}
which provides protections for migrant workers facing abusive conditions and guarantees equal opportunity and treatment, has been ratified by only 28 countries. These treaties providing for the right to decent work “have been essentially ignored by the international community, and especially by [migrant] receiving countries,” resulting in limited international governance of labor migration.

By the 1980s, in response to large-scale refugee movements in Africa and elsewhere in the Global South, UNHCR and host governments began to “warehouse” refugees in vast encampments, in which they were denied the right to work and subject to a damaging culture of dependency. The refugee-migrant binary became firmly entrenched in the international legal imagination, so much so that the 1990 International Convention on the Rights of All Migrant Workers and Their Families contains a provision specifically excluding refugees from its protections. This treaty was drafted in part to respond to concerns about the limited effectiveness of the ILO Conventions, but it, too, enjoys limited effectiveness—it counts the fewest ratifying states of any of the major international human rights treaties. The drafters drew a sharp distinction between refugees and other workers because the labor rights of the former were already protected in other international legal instruments—namely, the Refugee Convention. This line-drawing exercise painted refugees as anomalous creatures who did not need to work to support themselves in the destination country.

Given international law’s limited labor protections for refugees, the shift to treating refugees as workers must be performed thoughtfully and cautiously. Recent proposals to create export processing zones as refugee work programs have appropriately been criticized for creating “a fertile environment for labour exploitation.”

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30. Leary, supra note Error! Bookmark not defined., at 233.
33. Lori A. Nessel, Human Dignity or State Sovereignty? The Roadblocks to Full Realization of the UN Migrant Workers Convention, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 329, 333 (Vincent Chetail & Céline Bauloz eds., 2014); see also Office of the High Comm’r for Human Rights, Status of Ratifications Dashboard, https://indicators.ohchr.org/ (indicating that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has only 54 parties).
35. Id.
36. See Gordon, supra note 2424, at 30. Cf. Alexander Betts & Paul Collier, Help Refuges Help Themselves: Let Displaced Syrians Join the Labor Market, 94 FOREIGN AFFS. 84 (2015) (advocating for the creation of special economic zones to employ Syrian refugees in Jordan). As described in more detail by Prof. Gordon, export processing zones are demarcated areas in which foreign investors can engage in
recognize refugees as workers. As the Refugee Convention recognizes, refugees should be provided with the ability to work consonant with their education and training. They should also be granted mobility and access to labor and social protections to prevent exploitation.

Moreover, the right to decent work for refugees must be approached differently in the less wealthy migrant-receiving states that host the vast majority of the world’s refugees than in wealthier destination states. The United States’s economy, for example, can easily incorporate refugees without impacting access to decent work for nationals. In contrast, countries like Lebanon, which hosts 1.5 million Syrian refugees in a population of less than 7 million, will need external resources to support both refugee employment and local communities impacted by refugee arrivals.

CONCLUSION: A ROLE FOR INTERNATIONAL LAW

Though the drafters of the Refugee Convention envisioned refugees as workers, subsequent implementation of the treaty has focused on humanitarian protection, drawing a sharp distinction between refugees and migrant workers. International law providing labor protections to migrants has either specifically excluded refugees or has had limited utility as a result of few signatories and poor compliance. We are left with a binary that draws an artificially sharp distinction between migrants seeking protection and migrants seeking employment, when in reality the two categories are better understood on a spectrum, if not often one and the same.

Through its expressive function, international law might play a role in recapturing the Refugee Convention’s vision of refugees as workers. United Nations bodies such as UNHCR and the ILO could work together to promote norms that guide law, policy, and decision-making, even if those norms are not legally binding. Such a partnership could help repair the dichotomy between refugees and “economic migrants,” making the case in the public imagination that refugees are workers and that migrants seeking employment are worthy of protection.

Soft law should also emphasize decent work and labor standards rather than “self-reliance” or “self-sufficiency.” Several UNHCR Executive Committee Conclusions utilize the language of self-reliance, which can obscure the precarious situations in which most refugees find themselves, both in terms of reliability of employment and potential expenses. The concept has been
critiqued as a “means for the international community to minimize the cost of prolonged refugee situations,” as risking “exacerbating socio-economic inequities within and between refugees,” and as obscuring “the fact that the attainment of ‘genuine’ self-reliance requires increased external inputs at certain points.”

The Global Compact on Refugees, in contrast, uses the language of decent work and training, but the discussion of refugee employment is limited to two short paragraphs. In another example of the refugee-migrant dichotomy, the Global Compact for Migration highlights the right to decent work as the focus of one of its core objectives, but it does not provide for the protection of migrants more generally. International organizations such as ILO and UNHCR should expand on the existing framework by assessing the protection needs of migrant workers beyond the refugee definition and ensuring that soft law is responsive to a range of obstacles to and concerns about refugee work. In particular, soft law efforts must recognize and address concerns that local populations raise around the employment of refugees and the potential for job losses among nationals.

Both the domestic and the international legal conversation should shift to reflect more accurately the reality that migrants and refugees need to work, and that those seeking work may also have protection needs. To that end, international refugee law may serve an expressive, agenda-setting function, guiding policy and revitalizing the drafters’ understandings of refugees as workers and economic migrants as deserving of international protection.

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42. Easton-Calabria, supra note 40, at 1466-68.