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Protecting Migrant Workers: The Case for a Core Rights Approach



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Protecting Migrant Workers: The Case for a Core Rights Approach¹

Martin Ruhs

Executive summary

This paper makes the case for a “core-rights” approach to the global governance of international labour migration. This would involve the creation of a list of core rights of migrant workers that would include fewer rights than the *UN’s International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (henceforth ‘CMW’, adopted in 1990). The list of core rights should complement rather than replace the CMW and other existing international legal standards for the protection of migrant workers. I provide three reasons for this new approach: 1) the low level of ratifications of the CMW which can be largely explained by the assessment of many high-income countries that the CMW is “too demanding” in terms of the potential impacts and costs involved for the population of the host country; 2) the tension in many high-income countries’ labour immigration policies between openness to admitting migrant workers and some of the rights granted to migrants after admission; and 3) the variations of labour immigration policies (including migrant rights restrictions) across different national institutional contexts, which make it hard to agree on a long list of common rights for migrant workers. The overall logic of core rights for migrant workers would be similar to that underlying the ILO’s “core labour standards” in the *1998 Declaration on Fundamental Principles and Rights at Work*. The paper concludes with a call for debate about what rights should be included in the shorter list of core rights for migrant workers – an inherently normative question with no one “right” answer. One option might be to focus on identifying core rights for migrant workers legally employed under *temporary* labour migration programmes which constitute the great majority of labour immigration programmes around the world.

Introduction and Background

This paper discusses the role of international legal standards in protecting migrants and their rights in the global labour 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* (henceforth ‘CMW’, adopted in 1990) and the ILO’s *Migration for Employment Convention (1949) and Migrant Workers (Supplementary Provisions) Convention (1975)* – 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 provide more effective protection for migrant workers in practice.

Drawing on my recent and ongoing research on the regulation of international labour migration and the rights of migrant workers², I make the case for a “core-rights” approach to the global governance of international

1 This paper is a marginally revised version of Ruhs, M. (2017a) “Rethinking International Legal Standards for the Protection of Migrant Workers: The Case for a ‘Core Rights’ Approach”, *American Journal of International Law (AJIL) Unbound* 111: 172-176.

2 See Ruhs 2013, 2016, 2017a, 2017b.

labour migration. This would involve the creation of a list of core rights of migrant workers that would include fewer rights than the CMW. The list of core rights should complement rather than replace the existing international legal standards. The paper 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 paper aims to stimulate discussion rather than provide answers to the questions raised.

Analysis

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 labour 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 ILO Convention 97 and the twenty-four articles of 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 migrant 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 51 ratifications as of July 2017,⁴ 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 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 (49 countries)⁵ and even fewer ILO Convention 143 (23 countries).⁶ Partly because of the low numbers of ratification, it is widely agreed that the effectiveness of global migration norms in protecting migrant workers 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’ ratification of international rights treaties and their respect for rights in practice is unclear and an important issue for empirical research.⁷

As I have shown elsewhere⁸, there is considerable evidence to suggest that the primary reason why high-income countries have not ratified the CMW, is that they consider the convention “too demanding” in terms of the potential impacts and costs involved for the population of the host country. In some countries, governments have expressed concern that ratifying the CMW could create problems for – and may well be incompatible with – their existing temporary migration programmes, especially for lower-skilled workers.⁹ Arguably, a shorter list of universal core rights would be more acceptable to a larger number of countries including states that admit large numbers of migrant workers.

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’ labour immigration policies. Examining the characteristics of labour immigration

3 Lonroth (1991).

4 For the ratification status of human rights treaties, including the Migrant Workers Convention, see <http://indicators.ohchr.org/>.

5 See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO

6 See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288:NO For a recent overview and discussion of the ratifications of ILO instruments on migrant workers, see ILO (2016).

7 See, for example, Simmons (2009).

8 See Ruhs (2013).

9 For example, see the discussion of the obstacles to ratification of the CMW in Canada by Piché, Depatie-Pelletier, and Epale 2009.

policies on over 30 high-income countries, I provided evidence that labour 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.¹⁰ My 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 labour immigration programmes specifically designed for admitting the most highly skilled workers, for whom there is intense international competition.¹¹

The trade-off between openness and some specific migrant rights in high-income countries' labour 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 labour migration. Put differently, rights-based approaches to migration that demand all the rights stipulated in the existing international labour 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, and temporary restrictions of a few specific rights under new and expanded temporary migration programs (TMPs) that help liberalize international labour 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.¹²

Third, as I show in some of my recent work¹³, labour 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, labour immigration programs in autocracies are characterized by fewer restrictions on the conditions of employment of migrants, greater openness to labour immigration, more restrictions of migrants' rights, and stronger trade-offs between openness and rights. With regard to variations across types of capitalism, I find that immigration programs in liberal market economies (LMEs) impose fewer limits on the employment conditions of migrants but they place more restrictions on migrants' social rights than policies in coordinated market economies (CMEs). Policy trade-offs between openness and social rights are more likely to occur in LMEs with liberal welfare states than in CMEs with other types of welfare states.

Since the design of national labour immigration policies is correlated with national institutions (particular political systems, labour 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 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 social 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 labour 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 labour standards were not effective enough at protecting workers' rights in a rapidly globalizing economy. The development of a core rights approach to the global governance of international labour migration would need to be informed by a careful assessment of the ILO's experience with its core labour standards.

10 See Ruhs (2013).

11 The precise nature, origins and variations of trade-offs between openness and rights in high-income countries' labour immigration policies is an important issue for future research. Recent papers that identify similar tensions between 'access' and 'rights/conditions' include McKenzie et al (2014); Milanovic (2016); Money et al (2016); Naidu et al (2016); and Weyl (forthcoming).

12 For a more detailed discussion of this argument, including the ethics of restricting labour immigration and the rights of migrant workers, see Ruhs (2013).

13 See Ruhs (2017b).

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.¹⁴ I am attracted to Sen’s capability approach to development because it is explicitly “people-centred” 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 UNDP’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.”¹⁵

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 labour 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 labour immigration programs around the world. A list of core rights for migrant workers could thus contribute to making the global governance of the rights of migrant workers more relevant to the realities of labour immigration policy-making around the world. In this context, one option of operationalising a “core rights” approach would be to focus on the core rights of migrant workers legally employed under *temporary* labour immigration programmes which constitute the great majority of labour immigration programmes in the world.¹⁶

Conclusions and recommendations

A major study of the UN’s International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), led by UNESCO and published in 2009, suggested that there were three options for responding to the low number of ratifications of the CMW: 1) consider the CMW a “lost cause” (i.e. de-facto abandonment); 2) consider alternatives including modifications that “incorporate the concerns of the developed destination countries”; and 3) “continue the efforts to promote the Convention and try to convince as many countries as possible to ratify”.¹⁷ The editors of the study concluded that the third option was best. Eight years later, and 27 years after the adoption of the CMW by the UN’s General Assembly in

14 Sen (2005).

15 UNDP (2000).

16 See Ruhs (2013).

17 Cholewinski et al. (2009).

1990, I am arguing that we should now consider the second of these options. As explained in this paper, my specific proposal is to consider drawing up a new and shorter list of core rights for migrant workers. This list of core rights could complement (rather than replace) existing international legal instruments for protecting migrant workers. Its explicit aim would be to provide more effective protection to a larger number of migrant workers in the global labour market. One option would be to focus on the core rights of migrant workers legally admitted and employed under temporary labour immigration programmes 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. My policy recommendation is simply to start a process of consulting and discussing the idea of a list of core rights for migrant workers (including the question of which specific rights should be included) with a wide range of relevant organisations and stakeholders (including, importantly, migrant rights organisations in different regions and countries). Among UN and other global institutions, these consultations and debates need to include a wide range of organisations working on different aspects of international labour migration. This includes organisations that advocate for “more migration” (especially of lower-skilled workers) because of its positive effects on poverty reduction and human development, such as the UNDP and the World Bank, as well as those primarily concerned with protection and equality of rights, such as the OHCHR and the ILO. This is because the protection of migrant workers’ rights needs to be considered in the larger context of the impacts of international labour migration, including the significant economic and other benefits of migration for migrants and their families.

Critically, to be effective, a new list of core rights for migrant workers would need to be accompanied by a clear mechanism for review and monitoring. As I have discussed in more detail elsewhere¹⁸, we urgently need a ‘global migrant rights database’ with indicators of the legal rights that different groups of migrants are accorded by the laws and regulations of different countries. Such a database could lead to a step-change in the analysis and protection of migrants’ rights. The creation of a “migrant rights database” could be a useful tool to review countries’ progress with protecting the core (and other) rights of migrant workers. The general idea of such a database was endorsed by the recent *Peter Sutherland report on migration* (see especially recommendation 12d¹⁹).

The aim of this paper is to encourage debate about (rather than give 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 centre of international initiatives such as the UN’s ‘Global Compact for Migration’ that aim to find more effective ways of protecting migrants in practice.

18 See “The case for a global migrant rights database” (2013) <http://priceofrights.com/blog/post.php?s=2013-11-30-the-case-for-a-global-migrant-rights-database#.Wd9ImDskqUk>

19 See www.un.org/en/development/desa/population/migration/events/coordination/15/documents/Report%20of%20SRSG%20on%20Migration%20-%20A.71.728_ADVANCE.pdf

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