

Chapter 1

The Rights of Migrant Workers

Reframing the Debate

In 1990, the General Assembly of the United Nations (UN) adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). It stipulates a very comprehensive set of civil, political, economic, and social rights for migrants, including those living and/or working abroad illegally. Hailed as a major achievement in the struggle for improving the rights of migrants, the CMW has become a cornerstone of the human rights–based approach to regulating labor immigration advocated by many national and international organizations concerned with the protection of migrant workers. Kofi Annan, the former UN secretary general, described the CMW as “a vital part of efforts to combat exploitation of migrant workers and their families.”¹

In practice, ratification of the 1990 convention has been disappointing, both in absolute and relative terms. Although the CMW was introduced more than twenty years ago, so far fewer than fifty countries have ratified it—and the great majority of these countries are predominantly migrant sending rather than migrant receiving. This makes the CMW the least ratified convention among all the major international human rights treaties. It has a quarter of the ratifications of the Convention on the Rights of the Child (passed a year before the CMW) and less than half of the ratifications of the Convention on the Rights of Persons with Disabilities (passed sixteen years *after* the CMW). Despite having signed general human rights treaties, most nation-states, especially major immigration countries, are clearly reluctant to ratify international conventions that limit their discretion and ability to restrict the rights of migrants living and working in their territories.

The most cursory review of the rights of migrant workers around the world confirms that the majority of them, and especially those working in low-waged jobs, enjoy few of the rights stipulated in international conventions. For example, under most existing temporary migration programs (TMPs) in North America and Europe, migrants have neither the right to free choice of employment nor the access to welfare benefits given to citizens and long-term residents. In many of the Persian Gulf States in the Middle East, which have long admitted significant numbers of migrant workers, the protections of local labor laws do not apply to certain types of migrant labor. In Singapore, another major employer of

¹ Kofi Annan, International Migrant’s Day, December 18, 2003, <http://www.un.org/News/Press/docs/2003/sgsm9081.doc.htm> (accessed February 1, 2011).

migrant workers, migrants working in low-waged jobs are officially prohibited from cohabiting with or getting married to a Singaporean citizen. Illegally resident migrants, whose global numbers are substantial, have few rights regardless of what country they are working in (with few exceptions).

Aims and Approach of the Book

This book analyzes how and why high-income countries restrict the rights of migrant workers (“migrant rights”) as part of their labor immigration policies and discusses the implications for policy debates about regulating labor migration and protecting migrants. It engages with theoretical debates about the tensions between human rights and citizenship rights, the agency and interests of migrants and states, and the determinants and ethics of labor immigration policy. The empirical analysis of the book is global, and includes an examination of the characteristics and key features of labor immigration policies and restrictions of migrant rights in over forty high-income countries as well as in-depth analysis of policy drivers in major migrant-receiving and migrant-sending countries.

Based on this theoretical and empirical analysis, the book aims to contribute to normative and policy debates about the rights that migrant workers should have when working abroad. In particular, the book explores whether there is a case for advocating a limited set of “core rights” for migrant workers rather than the comprehensive set of rights demanded by the CMW, and if so, what these core rights should be, and what implications might ensue for human rights–based approaches to international labor migration. As these research questions suggest, the book separates hard-nosed political economy analysis of the determinants of migrant rights in practice (i.e., what *is* current reality) from the equally important normative discussion of what rights migrant workers *should* have from a moral/ethical point of view.

Many UN agencies and other international and national organizations concerned with migrant workers have responded to the widespread restrictions of migrant rights by emphasizing that migrant rights are human rights that are universal, indivisible, and inalienable; they derive from a common humanity and must be protected regardless of citizenship. The key argument and starting point of this book is that we need to reframe as well as expand current debates and analyses of migrant rights by complementing conversations about the human rights of migrants with a systematic, dispassionate analysis of the interests and roles of nation-states in granting and restricting the rights of migrant workers. This is because the rights of migrant workers not only have *intrinsic* value as underscored by human rights approaches but also play an important *instrumental* role in shaping the effects of international labor migration for receiving countries, migrants, and their countries of origin.

For example, whether or not migrants enjoy the right to free choice of employment and other employment-related rights in the receiving country's labor market is likely to affect their productivity and earnings, remittances, and competition with local workers. The fiscal effects of immigration critically depend on whether and how migrants' social rights (including access to public services and welfare benefits) are restricted. Migrants' incentives and behavior in and beyond the labor market—for instance, the extent to which they acquire language and other skills relevant to employment and life in the host country—will be influenced by whether or not they have—or are on a path to acquiring—the rights to permanent residence and citizenship.

Because rights shape the effects of labor immigration, migrant rights are in practice a core component of nation-states' labor immigration policies. At its core, the design of labor immigration policy requires simultaneous policy decisions on: how to regulate the *number* of migrants to be admitted (e.g., through quotas or points-based systems); how to *select* migrants (e.g., by skill and/or nationality); and what *rights* to grant migrants after admission (e.g., temporary or permanent residence, access to welfare benefits, and limited or unlimited rights to employment). When receiving countries decide on these three issues, the impacts on the “national interest” (however defined) of the existing residents in the host countries are likely to be of great significance. Policy decisions on the number, selection, and rights of migrant workers can also be influenced by their consequences for the interests of migrants and their countries of origin, whose actions and policies can play an important role in supporting, sustaining, or undermining particular labor immigration policy decisions in migrant-receiving countries.

Viewing migrant rights as instruments of labor immigration policy has two key implications that motivate and inform the analysis in this book. First, any analysis of the reasons for migrant rights restrictions necessitates an explicit discussion of the economic, social, political, and other consequences of migrant rights (restrictions) for the national interests of migrant-receiving and migrant-sending countries as well as for migrants themselves. These consequences can include multifaceted benefits along with costs that may vary across different rights, between the short and long run as well as between migrants with different skills. Any analysis of the costs and benefits of migrant rights thus needs to be disaggregated and needs to look at the impacts of specific rights for specific groups of migrant workers.

Second, migrant rights cannot be studied in isolation from admissions policy, both in terms of positive and normative analysis. To understand why, when, and how countries restrict the rights of migrant workers, and explore what rights migrant workers *should* have, we need to consider how particular rights restrictions are related to policies that regulate the admission (i.e., the numbers and selection) of migrant workers. Do states grant skilled migrant workers more rights than low-skilled migrants, and

if so, why? Are the countries that grant migrant workers near equal rights with citizens also relatively open to labor immigration, or are labor immigration policies characterized by a trade-off between openness to admitting migrant workers and some migrant rights?

These questions and the overall approach to the analysis of migrant rights in this book are, in my view, critical to fostering a more realistic debate about the protection of migrant workers in the global labor market. They do, however, raise challenging and highly sensitive issues that can easily be misunderstood or misrepresented. For example, it can be argued that any discussion of the “impacts of rights,” and especially the use of the term “costs of rights,” carries the danger of being misused or misinterpreted to justify or argue for more restrictions of the rights of migrant workers. It is important to emphasize at the outset that just because some rights generate costs does not mean that there is a moral justification for condoning or even advocating for such restrictions. There is also no suggestion in this book that all discussion of migrant rights should be reduced to debates about costs and benefits. The book looks at the instrumental role and consequences of rights, because I believe that we cannot hope to close the gap between human rights as expressed in international conventions and migrant rights in practice unless we understand as well as account for the reasons why nation-states grant and restrict certain rights. In other words, the current analysis and debate of what “should be” needs to be complemented (but not replaced) by a thorough discussion of “what is.”

Outline of the Chapters and Main Arguments

The analysis and overall argument of the book are developed in seven relatively self-contained chapters. The discussion begins, in chapter 2, with an examination of why so few countries have ratified international legal instruments for the protection of the rights of migrant workers. The existing literature has identified a host of legal issues and complexities as well as a lack of campaigning and awareness of the CMW and other international conventions as key factors. I contend that the primary explanation for the low level of ratifications of international migrant rights treaties lies with the effects of granting or restricting migrant rights on the national interests (however defined) of migrant-receiving countries. This may sound like an obvious point, but the dearth of discussion about the multifaceted costs and benefits of specific migrant rights for receiving countries—and migrants and their countries of origin—suggests that this is an important gap in analysis and debates that needs to be urgently addressed.

If restrictions of migrant rights are used to further the national interests of migrant-receiving countries, how can we expect high-income countries to regulate the rights of migrant workers as part of their labor immigration policies? What are the likely interrelationships between

nation-states' policies for regulating the number, selection, and rights of migrant workers? The analysis of these questions requires a conceptual framework for the process of labor immigration policymaking. Chapter 3 develops a basic approach that conceptualizes the design of labor immigration policy in high-income countries as a process that involves "choice under constraints." Nation-states decide on how to regulate the number, selection, and rights of migrant workers admitted in order to achieve a core set of four interrelated and sometimes-competing policy goals, including economic efficiency (e.g., maximizing the benefits of immigration for economic growth), distribution (e.g., making sure immigration does not harm the lowest-paid workers in the economy), national identity and social cohesion (concepts that are contested and hard to define in practice), and national security and public order. Although their importance and specific interpretations vary across countries, and over time, I argue that each of these objectives constitutes a fundamental policy consideration that policymakers can and do purposefully pursue in all countries.

Nation-states' labor immigration policy choices are made given a common set of potential constraints and institutional factors that limit and mediate the ways in which the pursuit of policy objectives translates into actual policies. The constraints include domestic and international legal constraints (e.g., imposed by domestic judiciaries and legal obligations arising from membership in supranational or international institutions) as well as a limited capacity to control immigration. Examples of institutional factors are the prevailing welfare state (e.g., liberal, social democratic, or conservative) and production systems such as labor market structures (e.g., liberal or coordinated). Just like policy objectives, the significance and impacts of these constraints and institutions are specific to country and time. Consequently, there can be substantial variation in the "policy space" for the regulation of labor immigration within which governments operate in different countries and at different points in time.

Based on this conceptual framework, and drawing on the existing literature on the effects of international labor migration, chapter 3 develops three hypotheses about the interrelationships between high-income countries' policies for regulating the openness, skills, and rights of migrant workers. I maintain that institutional variations across countries can be expected to affect the strength but not the existence of these three relationships.

First, high-income countries can be expected to be more open to high- than low-skilled immigration. This is partly because compared to low-skilled migrants, higher-skilled migrants can be expected to generate greater complementarities with the skills and capital of existing residents in high-income countries, greater long-term growth effects, and greater net-fiscal benefits. Second, we can expect labor immigration programs that target higher-skilled migrant workers to grant migrants more rights than those targeting lower-skilled workers. This expectation is partly motivated by the fact that the provision of some rights (e.g., social rights)

creates costs and benefits that can be expected to vary with the skill level and earnings of the rights holder. For instance, granting low-skilled migrants full access to the welfare state can be expected to create greater net costs (or smaller net benefits) for the host country than affording these same rights to high-skilled migrants in high-paid jobs.

The third expectation is that there can be a trade-off (a negative relationship) between openness and some of the rights of some migrant workers admitted to high-income countries—that is, greater openness to admitting migrant workers will be associated with relatively fewer rights for migrants and vice versa. The basis for this hypothesis is closely related to the first two: if certain rights for some migrants create net costs for the receiving country (e.g., full access to the welfare state for low-skilled migrant workers), policy openness to admitting such migrants can be expected to critically depend on the extent to which some of their rights can be restricted.

To explore these interrelationships in practice, chapter 4 analyzes the characteristics of labor immigration policies and migrant rights in high- and middle-income countries. Given that there are no readily available measures of admission policies and migrant rights, I constructed two separate indexes that measure the openness of labor immigration programs in forty-six high- and middle-income countries to admitting migrant workers and the legal rights (civil and political, economic, social, residency, and family reunion rights) granted to migrant workers admitted under these programs.

My analyses of these new indicators provides strong evidence that labor immigration programs that target the admission of higher-skilled workers are more open and grant migrants more rights than programs targeting lower-skilled workers. The positive relationship between rights and targeted skills holds for many but not all rights. Economic and political rights are less sensitive to targeted skills than social, residency, and family rights. My analysis also shows that among programs in upper-high-income countries, labor immigration programs can be characterized by a trade-off between openness and some migrant rights. As expected, the openness-rights trade-offs affect only a few specific rights rather than all of them. The rights involved in this policy trade-off vary across countries and skill levels, but they most commonly include selected economic and social rights as well as rights relating to residency and family reunion. My analysis suggests that trade-offs between openness and some migrant rights can be found in policies that target a range of skills, although they generally are not present in labor immigration programs specifically designed for admitting the most highly skilled workers, for whom there is intense international competition.

Chapter 5 provides an in-depth analysis of labor immigration policy-making in a wide range of different countries to explore what drives the observed relationships between openness, skills, and rights in practice. The case study evidence discussed in this chapter shows that policy decisions on how to regulate the admission and rights of migrant workers in

high-income countries are firmly based on assessments of the consequences of admitting migrants as well as granting/restricting rights for the national interests of migrant-receiving countries. With few exceptions, high-income countries are more open to high- than low-skilled migrant workers because they consider these policies to be in their best national interests. Similarly, although governments are rarely explicit about the rationales for restricting the rights of migrant workers, there is considerable evidence that considerations about the costs and benefits of rights play a powerful role in high-income countries' decisions on what rights to grant to migrant workers with different skills, and in justifying trade-offs between openness and some rights that create costs.

Chapter 6 discusses two interrelated questions: How do high-income countries' restrictions of labor immigration and migrant rights affect the interests of migrants and their countries of origin? And how have migrants and sending countries engaged with these restrictions in practice? These questions are of central importance to the analysis in this book because the interests and actions of migrants and sending countries can play a key role in supporting, sustaining, or undermining particular labor immigration policies in high-income countries. The chapter shows that migrant workers and their countries of origin are acutely aware of and engaging with the trade-off between openness and rights in practice. Every day, migrant workers are making choices about whether to stay at home, or move and work abroad under restricted rights. Large numbers are currently choosing the latter—that is, they are tolerating restrictions of some of their rights in exchange for the opportunity to migrate and work abroad. To be sure, this choice is sometimes misinformed and in many ways constrained by larger structural factors, including global economic inequalities and nation-states that restrict access to their territories through immigration control measures. Nevertheless, there is at least some minimal degree of choice in most people's decisions to move abroad for employment purposes. This points to the significance of considering the agency, "voice," and overall interests of migrants when explaining existing migration flows and policies, and when thinking normatively about whether particular trade-offs should be tolerated. Given that the human development of people is multidimensional and includes more considerations than just access to legal rights, it is not surprising to see migrant workers making "sacrifices" in some dimensions of development (e.g., limited access to some legal rights) in exchange for advancing others (e.g., opportunities to access employment at higher wages and raise the household incomes of their families).

Many low-income countries sending migrant workers abroad make a similar choice. To the extent that they can influence the labor immigration policies of high-income countries, most low-income countries are pursuing emigration policies that are, often explicitly, based on the dual objectives of sending more workers abroad and better protecting them while there. The discussion in chapter 6 shows that most low-income countries are acutely aware of the trade-off between access to labor markets in

high-income countries and some migrant rights. For example, the policies of Asian countries sending migrants to the Gulf states, and Latin American countries sending low-skilled workers to the United States and Canada, clearly show that few of these countries are willing to insist on full and equal rights for fear of reduced access to the labor markets of higher-income countries. Again, this is not surprising given that labor emigration can generate large income gains for migrants and their families as well as benefit the wider development of migrants' home countries. The World Bank and other development organizations are actively promoting more international labor migration as one of the most effective ways of raising the incomes of workers in low-income countries.

There are also cases of migrant-sending countries that have explicitly rejected equality of rights for their nationals working abroad on the grounds that it constitutes a restrictive labor immigration policy measure. For example, many of the new European Union (EU) member states in eastern Europe wishing to use the European Union's Posted Workers Directive to increase the number of "migrant service providers" abroad have been critical of attempts by the old EU member states to require posted workers to be employed under exactly the same rights and conditions as citizens of the old EU member states. The new EU countries have argued that this insistence of complete equality of rights constitutes a protectionist policy that undermines their comparative advantage in cheaper labor. A similar assertion has been made by India and other low-income countries seeking to use the World Trade Organization (WTO, specifically General Agreement on Trade in Services [GATS] Mode 4) to liberalize labor migration to high-income countries. India has explicitly rejected the wage parity requirement demanded by high-income countries as a policy that makes it more difficult for low-income countries to send more migrant service providers to higher-income countries.

Chapter 7 moves the discussion from a positive analysis of "what is" to the equally important normative question of "what should be." Given what we know about labor immigration policies in practice, what can we say about how high-income countries *should* regulate the admission and rights of migrant workers? If high-income countries' labor immigration policies are characterized by a trade-off between openness and some rights for migrant workers, what rights restrictions—if any—are acceptable in order to enable more workers to access labor markets in high-income countries? It is important to emphasize that there is no one "right" answer to these inherently normative questions. I am skeptical of anybody who maintains that there are obvious or clear answers to any of these issues. Chapter 7 looks at relevant political theories and arguments to develop my own normative response, which readers can criticize and reject without rejecting the analysis in the remainder of the book.

As my intention is to contribute to national and international policy debates, I argue for a pragmatic approach that is both realistic, by taking account of existing realities in labor immigration policymaking, and idealistic, by giving more weight to the interests of migrants and countries of

origin than most high-income countries currently do when designing labor immigration policies. Based on this approach, I contend that there is a strong normative case for tolerating the selective, evidence-based, temporary restriction of a few specific rights under new and expanded TMPs 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. Any rights restrictions should, in my view, be limited to the right to free choice of employment, equal access to means-tested public benefits, the right to family reunion, and the right to permanent residence and citizenship. Rights restrictions need to be evidence based in the sense that there must be a clear case that they create specific costs that the receiving country wishes to avoid or minimize to enable greater openness to admitting migrant workers. In other words, restricting these rights would lead high-income countries to be more open to labor immigration than would be the case if the rights could not be restricted. I also hold that any rights restrictions should be time limited (e.g., limited to about four years). After this period, migrants need to be granted access to permanent residence (and thus eventually citizenship) or required to leave. Finally, these rights restrictions are only acceptable, in my view, if they are accompanied by a number of supporting policies including the transparency of policies along with the effective protection of opportunities for migrant workers to exit TMPs whenever they wish and choose to do so.

Chapter 8 concludes the book by returning to the human rights of migrant workers. What are the implications of the analysis in this book for human rights debates and the rights-based approaches to migration advocated by many international organizations and NGOs concerned with protecting and promoting the interests of migrant workers? The book highlights the danger of a blind spot in human rights-based approaches to migration. Such arguments are often focused on protecting and promoting the rights of *existing* migrants without considering the consequences for nation-states' policies for admitting new migrant workers—that is, without considering the interests of the large number of *potential future migrants* who are still in their countries of origin and seeking to access labor markets of higher-income countries. 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, human 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., in promoting the rights of existing migrants) while doing harm in another (i.e., by making it more difficult to increase opportunities for workers to migrate and legally work in higher-income countries). Most UN agencies and other organizations advocating a human rights-based approach

based on the CMW have been reluctant to acknowledge, let alone engage with, this dilemma.

I conclude that there is a strong case for advocating a rights-based approach to international labor migration that is premised on the protection of a universal set of core rights and accounts for the interests of nation-states by explicitly tolerating temporary restrictions of a few specific rights that can be shown to create net costs for receiving countries. Restricting these rights should encourage the further liberalization of international labor migration. My conclusion and recommendations imply a reframing—not a rejection—of the human rights-based approach to migration currently advocated by most UN agencies and many migrant rights organizations. The selective and temporary restriction of specific rights can be consistent with human rights that stress the agency of people. By bringing states and politics “back in,” the rights-based approach to international labor migration that I propose would open up a space for legitimate and important debates about the desirability of restricting specific rights in exchange for more open admission policies in high-income countries. Rather than ignoring or shying away from these questions, human rights advocates should be at the forefront of addressing them.

Terminology and Scope of This Book

The focus of the book is on international labor migration and the rights of migrant workers, as noted above. Given the common confusion in migration research and debates caused by the various different terminologies used, it is important to be clear about the definitions used in this book as well as the scope of the analysis.

International Labor Migration and Labor Immigration Policy

I define international labor migration as migration for the primary purpose of employment. The book is not concerned with international migration for the purpose of asylum and study. Family migration—migration as a family member, partner, or dependent—is only explored whenever relevant. Consequently, where I discuss admission policies, the focus is on labor immigration policies, defined as policies for regulating the number, skills, and rights of migrants who are admitted for the primary purpose of work.

Migrant Workers

The United Nations defines migrants as people who live outside their countries of birth for more than one year. Using this definition, the United Nations estimates that there were about 214 million migrants in 2010, up

from 155 million in 1990.² About half of the world's migrants are thought to be migrant *workers*: people born in one country and working for more than one year in another.³ As my aim is to analyze the restrictions of the rights of migrant workers, the analysis in this book concentrates on migrant workers who are born abroad *and* do not have citizenship—and thus do not hold all the rights of citizens—of their host countries. This definition is narrower than the UN one, which includes migrants who have become—or have always been—citizens of their countries of employment.

Migrant-Receiving and Migrant-Sending Countries

Most countries experience both immigration and emigration. The book uses the terms migrant-receiving countries and migrant-sending countries, for linguistic convenience, to distinguish between net-immigration countries (i.e., countries that are receiving more migrants than they are sending abroad) and net-emigration countries (i.e., countries that are sending more migrants than they are receiving).

Scope

It is also critical to be clear about the scope of this book. Although the issues analyzed in this book are relevant to all countries, most of my theoretical and empirical analysis centers on international labor migration to higher-income countries, most of which are net receivers of migrant workers. The majority of the world's migrant workers are employed in high-income countries, especially in Europe and North America, where many countries have experienced rapid increases in labor immigration over the past twenty years. In the United Kingdom, for example, the share of foreign-born persons in the labor force increased from about 7 percent in the mid-1990s to 14 percent in 2010.⁴ In the United States, migrants now constitute about 15 percent of the labor force, up from 11 percent in 1995. Although involving large absolute numbers, these shares are still relatively small compared to the proportion of foreign workers in the oil-rich Gulf states in the Middle East, another major global destination of migrant labor. Foreign nationals account for 90 percent of the labor force in the United Arab Emirates, over 80 percent in Qatar and Kuwait, and over 50 percent in Oman, Bahrain, and Saudi Arabia.⁵

My discussion of migrant-sending countries is primarily focused on lower-income countries. As shown in table 1.1 (which is based on data on migrants in general, not just migrant workers), about 60 percent of the

² UN Department of Economic and Social Affairs 2011.

³ ILO 2010.

⁴ MAC 2010.

⁵ UN Department of Economic and Social Affairs 2006.

TABLE 1.1. Global number of migrants who have moved between/across more and less developed countries, 2010

	In more developed countries	In less developed countries
From more developed countries	55 million	12.6 million
From less developed countries	72.7 million	73.6 million

Source: Henning 2012.

Note: This table is based on migrant stock data.

world's migrants live in more developed countries. Of the 127.2 million migrants in more developed regions in 2010, more than half came from less developed regions. It is important to emphasize that, as shown in table 1.1, there is also considerable migration within more and less developed regions.

Unless otherwise specified, my discussion of the rights of migrant workers in specific countries focuses on the rights granted by national laws and policies. I therefore concentrate on rights in law and regulations (or rights “on paper”) rather than rights in practice. In theory, migrants can be denied some rights that exist in law (e.g., if there is no effective state protection and enforcement of the existing legal right to a minimum wage) and/or enjoy rights that do not exist in law (e.g., medical doctors may in practice treat patients without the legal right to health care). Clearly, one would ideally like to measure and analyze rights in law *and* practice, but the latter would involve considerable and complex research as well as judgments that go beyond the scope of this book.

Finally, this book is about legal labor migration and the rights of migrant workers who have been legally admitted by their host countries. I do not examine illegal migration and the rights of migrants without legal residence status. While illegality in migration and employment is obviously an important issue in some countries, the vast majority of international labor migration occurs through legal channels that are regulated by nation-states.