# Migration and Decent Work

## Challenges for the Global South

Lucía Ramírez Bolívar
Jessica Corredor Villamil
(Editors)

Dejusticia
Series

# MIGRATION AND DECENT WORK

CHALLENGES FOR THE GLOBAL SOUTH

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# Introduction

*Lucía Ramírez Bolívar and Jessica Corredor Villamil*

## Perspectives on Migration in the Global South

Research, knowledge, and narratives on human mobility have been dominated by the global North, particularly Europe and the United States, which are the main destinations for migrants (Awad and Natarajan 2018). This dynamic not only limits our understanding of the complexities of migration but also impacts the manner in which public policies on migration are shaped.

Despite the importance of migration and the fact that it is on the rise—indeed, the total number of international migrants is currently estimated at 272 million, already surpassing the 230 million that had been projected for 2050 (International Organization for Migration 2019)—there is little discussion of the phenomenon and its implications for the global South.

Immigration policies, which are formulated by states in the global North and are paradoxically focused on closing borders, allow these states to avoid assuming an equitable share of responsibilities in terms of caring for migrants and refugees. This position deepens inequalities between the global North and South and exacerbates the vulnerability of many migrants and refugees (Dejusticia and Legal Agenda 2020).

Welcoming migrants and refugees who decide to leave their countries out of necessity or in search of a better life represents an important challenge for countries in the global South, which, despite having less institutional capacity than countries in the global North, carry the bulk of the responsibility. According to data published by Dejusticia and Legal Agenda, two human rights organizations from the global South, the countries that account for 66% of the world's GDP host only 10% of the world's refugees, while the main refugee host countries in the global South—which already face significant structural barriers and account for just 5% of the world's GDP—are home to 72% of this population (Dejusticia and Legal Agenda 2020).

Many of those who migrate to and from countries in the global South do so because their lives are in danger in their countries of origin. According to the United Nations High Commissioner for Refugees (2021a), there are 82.4 million forcibly displaced persons worldwide.[1] Of these, 68% come from just five countries, all in the global South (Syria, Venezuela, Afghanistan, South Sudan, and Myanmar), and 39% are received by five countries, four of which are also in the global South (Turkey, Pakistan, Colombia, and Uganda).

Moreover, the dominant narrative transmitted through the media paints a simplistic and one-sided picture of migration, portraying it largely as a problem, particularly for countries in the global North that must "face the threat of immigrant waves" not only in social and economic terms but also—and especially—in terms of security. News stories and photographs of migrant caravans traveling from the Central American corridor toward the United States, or of the boats that arrive to Europe from the Maghreb and Sub-Saharan Africa, dominate the media landscape. But the reality of human mobility is more complex and nuanced.

There are many reasons behind migration; it can be voluntary or forced, and regular or irregular. Whatever the case, it is critical that migrants and refugees have access to paid work in their destination countries. Being able to work allows them not only to meet their basic needs and enjoy better living conditions but also to contribute to the economic and social development of the host community (International Organization for Migration 2019). While migrants' integration into the host community is a dynamic concept shaped by surrounding political, social, and cultural circumstances (International Organization for Migration 2011), their access to the labor market is without a doubt a key tool for facilitating this process.

## Migration and Decent Work

According to a number of studies, migrants' labor market inclusion has a positive impact on outcomes in other areas, such as education level, family reunification, political participation, and regularization (International Organization for Migration 2019). Further, in 2015, one study concluded that migrants contributed 9.4% of the global GDP and that if they were more integrated, they could add another one trillion dollars to the global economy annually (International Organization for Migration 2019).

1 The agency classifies forcibly displaced persons according to three categories: refugees, asylum seekers, and internally displaced persons.

The preexisting vulnerabilities of many migrants, in addition to the economic, political, and cultural contexts of receiving countries, directly affect this population's ability to obtain formal, decent employment and increase their chances of falling victim to labor exploitation and other human rights violations. According to the Counter Trafficking Data Collaborative (2021), approximately 30% of human trafficking victims are trafficked for the purpose of labor exploitation. For example, in the Persian Gulf, the *kafala*, or sponsorship, system requires migrant workers to hand over their identity documents and to rely entirely on their employers to complete their migration procedures, which opens the door for forced labor, low pay, and, in many cases, physical and psychological abuse (International Organization for Migration 2019, 194).

Additionally, the risk of labor exploitation increases in situations of irregular migration and in crisis contexts such as pandemics. Irregular migrants are more likely than regular migrants to work in so-called 3D—dirty, dangerous, and demanding—jobs and to be pigeonholed for specific sectors, such as agriculture and domestic work, which results in segregation and can affect their integration (International Organization for Migration 2019). In terms of the COVID-19 pandemic, according to the United Nations High Commissioner for Refugees, "in the Middle East and North Africa, 84% of surveyed people of concern reported a loss of livelihoods and income [as a result of the pandemic]. In Jordan, 35% of Syrian refugees employed before COVID-19 lost their jobs, compared to 17% of Jordanian citizens" (United Nations High Commissioner for Refugees 2021a, 223). And in Costa Rica, the percentage of refugee families with steady work-related income dropped from 93% to 59% as a result of the pandemic (ibid.).

Under these circumstances, advocating for migrants' and refugees' right to work is more urgent than ever. International human rights law has set out standards for the protection of migrant workers that should be upheld by all state parties and incorporated into their domestic legislation. One of the most important instruments in this regard is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the United Nations General Assembly in 1990 and ratified by fifty-six states, most of which are expellers of migrants and refugees (United Nations Treaty Collection 2021). This convention is applicable to all migrant workers without distinction as to their nationality, sex, race, language, religion, political opinion, or other status (article 7). It establishes that migrant workers shall enjoy the same treatment as nationals in terms of pay, working hours, weekly rest, holidays with pay, access to social

security, and other conditions of work (article 25). Further, they shall have the right to join and participate in the meetings and activities of trade unions and any other associations (article 26).

The International Labour Organization—a tripartite United Nations agency that brings together governments, employers, and worker representatives—has the mission of promoting labor rights. Since 2004, it has embraced the concept of decent work, which involves

> work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men. (International Labour Organization 2021)

The decent work agenda consists of four pillars: employment creation, social protection, rights at work, and social dialogue.

Decent work is a key part of Sustainable Development Goal 8, whose targets include the explicit protection of labor rights and the promotion of safe and secure working environments for migrant workers (United Nations 2021). The recognition of decent work as a human right means that states may not pursue economic growth at the expense of the exploitation of migrants and refugees, but instead must seek to ensure opportunities and prosperity for all. In this regard, it is critical to foster discussions, such as the ones featured in this book, that facilitate the sharing of experiences and lessons learned on the labor conditions of migrants and refugees.

The migration forecast for the near future does not look promising. As demonstrated in the International Organization for Migration's *World Migration Report 2020*, migration has been on the rise over the past several years due to factors such as political instability—a recent example is Afghanistan, where thousands of people were forced to flee in a matter of days—and socioeconomic crisis as a result of the COVID-19 pandemic. Another important contributing factor is the climate crisis. According to a recent report by the World Bank, up to 216 million people could be internal climate migrants by 2050 (Clement et al. 2021). These are just some of the factors that will continue to push people to leave their homes in search of protection and better living conditions.

With this in mind, it is critical that human rights-based regularization and integration policies for migrant and refugee populations be developed by and for countries in the global South. As demonstrated by the chapters in this book, countries in the global South are the ones

currently facing the greatest challenges related to migration. Guaranteeing migrants' right to work is one such challenge, in addition to the ones that these countries are already confronting in terms of employment prospects for their own citizens: job insecurity, informality, and wage disparities. Promoting the right to decent work for migrants and refugees would help facilitate social inclusion and cohesion, as well as the security and stability of host countries.

## About This Book

*Migration and Decent Work: Challenges for the Global South* features nine chapters written by sixteen activists, academics, and members of civil society who have worked on the issue of migration from different angles and who address the challenge of migrants' labor inclusion from an interdisciplinary and rights-based perspective. Their contributions offer an overview of migrants' and refugees' right to work in a range of countries in the global South—from Mexico to India to Argentina to Turkey—based on an analysis of local contexts, public policies, and the everyday realities faced by these workers.



The book is the result of nearly two years of work by staff at Dejusticia, partners from other organizations, and, above all, each and every author, who made this text possible by sharing their knowledge and experiences. In early 2020, we began working on a proposal for a collaborative publication that would bring together a variety of actors who could offer diverse perspectives and suggestions for addressing the challenges posed by forced migration to and from the global South. After several discussions, we agreed that the book should focus on the right to work of migrants and refugees given that labor insertion, while one of the most effective means of integration, is also a key challenge for receiving countries, especially developing countries.

With this in mind, we published a call for papers. Of those that we received, we selected nine that represented a range of countries and perspectives on the subject, including several written from a gender perspective. Writing from Mexico, Vanessa Maldonado analyzes the experience of migrant women sex workers and of police officers involved in the fight against human trafficking in a context of the criminalization of sex work. Cynthia Mora Izaguirre explores the rising numbers of Nicaraguan women who come to Costa Rica for work, their experiences as paid domestic workers, and the challenges that they face in realizing their rights. Lucía Ramírez and Lina Arroyave take stock of the Colombian government's efforts to guarantee the right to work for Venezuelan migrants within the framework of national and international

laws and the barriers that this population faces in accessing the labor market. Descending the Andes mountains, Gustav Brauckmeyer, Marta Castro, and David Licheri offer an assessment of the Peruvian labor market, how it has been affected by the COVID-19 pandemic, and how Venezuelan migrants have fared in this scenario. Writing from Argentina, Luz Espiro and Bernarda Zubrzycki analyze the ways that Senegalese migrants have inserted themselves into the country's labor market, the informal jobs to which they are largely confined, and the racist practices that they must endure as a result of hypervisibilization by government authorities, which in turn affects the world of work.

Turning our attention toward the African continent, Nyamori Victor and Charity Wangui explore the socioeconomic inclusion of refugees in Kenya by looking at the refugee situation in urban areas and in camps, as well as the legal framework protecting the rights of this population. Sherylle Dass, Mandivavarira Mudarikwa, and Petra Marais examine South Africa's legal framework protecting the right to work for forced migrants and discuss the social impacts of these laws, as well as the tensions between the legislative branch, which seeks to limit this population's rights, and the judicial branch, which has issued rulings that recognize refugees' right to work as falling within the scope of constitutionally protected rights. Writing from Turkey, Doğukan Sevinç argues that the Turkish government's interpretation and application of international and domestic law regarding the right to work is insufficient for ensuring the effective realization of this right for migrants, asylum seekers, and refugees. Finally, Tripti Poddar draws on the case of India to discuss the risks of not having a comprehensive legal framework protecting the rights of refugees, as it pushes them toward informality and puts them at risk of labor exploitation and other human rights violations.

This book would not have been possible without the support of professors Gabriella Sánchez (Mexico) and Ligia Bolívar (Venezuela), who helped us refine the book's focus and who put several of the authors on our radar. We are grateful to Silvia Ruiz for making important contributions to the initial proposal; to Lina Arroyave and Erin Formby for participating in the editorial committee that reviewed applicants' submissions; to Alejandro Rodríguez for providing feedback on the Colombia chapter; and to Claudia Luque, coordinator of Editorial Dejusticia, for her dedication and support throughout the entire publication process. Lastly, we thank Morgan Stoffregen and Sebastián Villamizar Santamaría for their careful editing and translation work, and Open Society Foundations and the Swiss Agency for Development and Cooperation for their generous financial support. It is our hope

that this text inspires reflection and debate on the human rights dimensions of the relationship between migration and work.

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# Sex Workers Who Question Anti-Trafficking Operations on the Mexico (Chiapas)–Guatemala Border[1]

*Juliana Vanessa Maldonado Macedo*

1 A preliminary, shorter version of this work appears in V. Maldonado, "Being a Sex Worker and Migrant in Times of Trafficking: Experiences from the Mexico (Chiapas)–Guatemala Border," *Victims and Offenders* 15/3 (2020).

## Introduction

In Mexico, sex work is not legally recognized as work. There are no general laws or regulations on prostitution at the federal or state levels; instead, prostitution is regulated at the municipal level in each of Mexico's thirty-two states. Although prostitution is considered an autonomous and voluntary act, and hiring a sex worker is not a crime, some laws and regulations—such as the General Law to Prevent, Punish and Eradicate Crime in Trafficking in Persons—do criminalize sex work and related activities.[2] This law is one of the consequences of Mexico's "anti-trafficking apparatus"[3] that has fostered a dominant narrative promoting misplaced connections between human trafficking, the sex trade, and irregular migration.

This chapter is based on research that I conducted on Mexico's southern border between 2013 and 2016 as part of my master's thesis. After this introduction, I explore[4] the functioning of the anti-trafficking apparatus on Mexico's border with Guatemala, in the region known as Soconusco (see map 1), and describe the experiences of two specific groups: women sex workers[5] who are irregular migrants, and members

2 The law, commonly known as the anti-trafficking law, entered into force on June 14, 2012.

3 The Foucauldian concept of *dispositif* (apparatus) consists of a network of knowledge and power relations that produces subjectivities (Foucault 1988), while also constructing subjects and regimes of truth at a particular historical, social, and political moment in time. These relations and economies of power are embodied in diverse technologies that operate at different levels and generate discourses of truth on and about the social body.

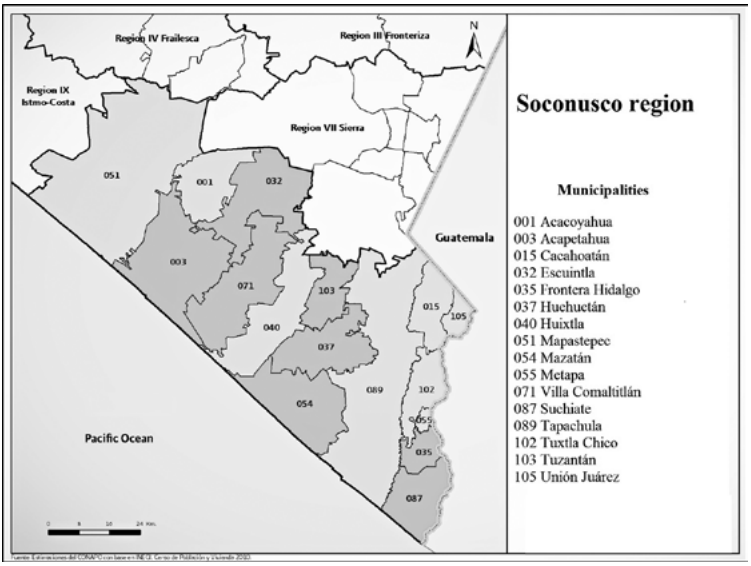
4 This chapter, like my academic work, is written in the first person because it acknowledges my role as narrator, reflects the notion of situated knowledges (Haraway 1991), draws on knowledge dialogues (Hernández 2016), and uses dialogic approaches (Scheper-Hughes 1992). In my research, I share knowledge, questions, frustrations, and reflections with my interlocutors and create affective relationships based on close and respectful contact.

5 The sex workers who participated in my research are cisgender women

of the police force charged with combating trafficking in this part of the country, known as the Operative Group against Transborder Trafficking and Gangs (GOTTPA by its initials in Spanish).

**MAP 1**

**Mexico and Soconusco**




Source: B. Sánchez Sandoval, Programa de Sistemas de Información Geográfica para las Ciencias Sociales y Humanidades – AntropoSIG, Centro de Investigaciones y Estudios Superiores en Antropología Social

Then, I analyze the tensions and contradictions between the lived experience of these actors and the state's "battle against" and "eradication" of trafficking through punitive means alongside border securitization measures. Lastly, I explore how this anti-trafficking apparatus moralizes and victimizes bodies and subjectivities through the violation of the right to exercise one's sexuality, the right to work, and the right to mobility.

from Central America between the ages of seventeen and fifty who work on the streets in border towns in Soconusco and who have firsthand experience with anti-trafficking raids. They use different terms to describe their work, referring to themselves variously as *putas* (whores), *trabajadoras sexuales* (sex workers), *sexoservidoras* (sex servers), *mujeres de rollo* (colloquial term used in Guatemala), and *trabajar de meterse con los hombres* (literally, to work by getting involved with men). This chapter features the voices of five of them—using pseudonyms—in dialogue with the voices of anti-trafficking police officers.

## The Anti-Trafficking Apparatus on the Mexico (Chiapas)–Guatemala Border

The anti-trafficking apparatus operates via a variety of global organizations and alliances that function within the framework provided by the United Nations Convention against Transnational Organized Crime and its protocols. Signed in Palermo, Italy, in 2000, this convention identifies human trafficking, migrant smuggling, and arms trafficking as serious international problems. Due to the binding nature of the convention's protocols, their definitions of human trafficking and migrant smuggling are routinely used by individual countries—including Mexico—in the development of national and subnational laws, as well as by academics, journalists, and others conducting different types of research.

The anti-trafficking apparatus is connected to Mexico's political agenda on migration and to a legal framework on sex-trade-related practices that do not necessarily involve trafficking. In recent years, Mexico's southern border—specifically the town of Tapachula—has been branded with two major stigmatizing labels: criminality and a "hot spot for sex trafficking" (Comisión Nacional de Derechos Humanos 2013; Comisión Nacional de Derechos Humanos and Centro de Estudios de Investigación en Desarrollo y Asistancia Social 2009; Secretaría de Seguridad Pública 2011; United Nations Office on Drugs and Crime 2014).[6]

Mexico lacks a comprehensive migration policy. Instead, through a discourse of "national security" and the "protection of migrants," the state engages in the de facto persecution, criminalization, and capture of certain impoverished and racialized subjects who are deemed unwelcome in the country. As a result, these individuals are persecuted and stigmatized for contravening the border control regime (Álvarez 2017).

Mexico's migration agenda is designed to answer to US security interests, as the relationship between these two countries revolves around the issues of "migration, border security, lawless areas, and the threat that links them all together—drug trafficking" (Rodríguez

6 According to a 2014 report by the United Nations Office on Drugs and Crime and Mexico's Ministry of the Interior, which draws on data supplied by the Special Prosecutor's Office on Violence against Women and Human Trafficking (FEVIMTRA by its initials in Spanish) and the Assistant Attorney General's Office on Organized Crime (SIEDO by its initials in Spanish), Chiapas is the state with the highest number of preliminary investigations of human trafficking, and its border towns are sites of extreme vulnerability for human trafficking.

2017, 447). This permits the justification of a variety of human rights violations and the presence of US forces in Mexico. While the illegal drug trade is the main star in this bilateral relationship, undocumented migration, human trafficking, and human smuggling are also key concerns.

Between 1974 and 2008, irregular migration was known as "illegal" migration and was criminalized through the General Population Act. In 2011, this law was repealed following the publication of the Migration Law in the *Federal Official Gazette.* The Migration Law sets forth three migratory statuses for foreigners in Mexico: temporary resident, permanent resident, and visitor. Visitors may be regional visitors, border workers, visitors for humanitarian reasons, visitors for the purpose of adopting a child, visitors authorized to perform compensated activities, or visitors not authorized to perform compensated activities. While irregular migration is not a crime, it is treated as one in practice when irregular migrants are detained by migration agents and placed in holding centers.

In this context—one in which migration is securitized and trafficking is approached as an immigration "problem"—the anti-trafficking apparatus has become the dominant discourse, regulated and operated by a punitive state in alliance with anti-prostitution and anti-pornography feminist groups. This discourse deliberately conflates the terms "sex work" and "sex trafficking," converging these two distinct phenomena into one by classifying any erotic or sexual act performed in exchange for material or symbolic payment as sexual exploitation or trafficking.

During my fieldwork,[7] I did not encounter anyone who had actually been trafficked; the women I met were working in sex trade venues of their own volition—experiences that are not reflected in anti-trafficking discourse or practice. These sex workers expressed their frustration with the incessant victimizing and colonialist gaze of the researchers and journalists who interview them. One of these women is Estrella, a twenty-year-old migrant from Honduras who

7 My research methodology is ethnographic, meaning that I engage in dialogue with participants in the field to document their perspectives and reflections firsthand. It is based on the lived experiences of more than fifty women, ethnographic interlocutors who helped me reconstruct their life stories. We talked in the street, in bars and *botaneros* (a type of bar where snacks are provided with drinks), and in *cuarterías* (shared apartments), where they allowed me to get closer to their life experiences. My dialogue with participants was constructed from daily interactions based on the notion of "situated knowledges" (Haraway 1991) and the creation of caring and warm relationships.

does sex work at a bar in the "tolerance zone"[8] of Huixtla, Chiapas (see photo 1). The first time we talked, she questioned me:

> Why do you want to talk with us? I'm sick of it! Not all of us were raped and beaten and don't have families—you people always see it that way. So if you want to talk about that, then no! I have a family at home who loves me, and I haven't been raped.

**PHOTO 1**

**Morning in a tolerance zone in Huixtla, Chiapas**


Source: Photo taken by the author, January 30, 2019

Along this border, the anti-trafficking apparatus situates undocumented, poor, working migrant women as subordinated victims devoid of agency; they are assumed to be mere "vulnerable subjects" at the mercy of international trafficking rings. In other words, they are passive subjects who need to be "rescued" from the "dangers" that the state considers to be inherent in migration and in sex work. However, this supposed protection justifies and legitimizes policies that criminalize and racialize these social groups.

In Chiapas, there are no public policies aimed at preventing human trafficking, much less at dismantling the structures that perpetuate inequality and impoverishment. The only type of "prevention" and

8 In Mexico, "tolerance zones" are designated areas where commercial sex work is permitted.

"eradication" undertaken is that carried out via "anti-trafficking" raids at the hands of federal, state, and municipal police in coordination with the National Institute of Immigration and other government agencies. Together, these entities make up the GOTTPA, whose official geographical focus is the entire Mexican southeast but which in practice limits its operations to the Soconusco border region, where it searches for "sex trafficking" in commercial sex work venues.[9]

## Sex Work in the Region



Mexico's Chiapas-Guatemala border, beyond a political demarcation or geographic region, embodies social and historical relationships under constant transformation. The border context is also lived through the bodies, identities, practices, and life experiences of those who circulate within it. Its location is strategic in geopolitical terms, as it connects Central and North America and is a crossing point for migrants coming from Central America, the Caribbean, South America, Africa, and Asia.

This region—on account of its climate, geology, hydrography, customs, vocabulary, and gastronomy—is closer to Central American countries than to other states in Mexico. The border is constructed and understood through everyday human movements that go beyond institutional border regulation; people travel back and forth between Guatemala and Mexico on a daily basis, crossing the Suchiate River by floating on rafts, swimming, and even walking when the river's flow permits (see photo 2).

This border area, particularly Tapachula, is a place where migrants insert themselves into the local social and economic life. They engage in a variety of jobs and economic activities, particularly in the primary and service sectors, making a vital contribution to the regional and local economies. The jobs they perform are racialized and segmented by sex, age, class, and even nationality.[10] While these jobs are by definition

9 Human trafficking in agricultural and domestic settings, as well as trafficking in men, is rendered invisible; moreover, any trans women found during raids are masculinized and automatically branded as "traffickers." Thus, the state's focus in these operations is on the systematic persecution of women sex workers.

10 Undocumented migrant men work in diverse sectors, including fishing, construction, and services such as shoe shining, mechanics, metalworking, plumbing, ironwork, driving (mainly bike and motorcycle taxis), house painting, grocery bagging, garbage collection, and parking services (as *franeleros*). Men also participate in sex-related markets, largely as waiters, cashiers, security guards, and entertainers. The jobs mostly available to migrant women are domestic work, jobs in grocery shops, and jobs across the sex trade, including

poorly paid and devoid of access to labor rights and social security, their conditions are even worse if the individuals performing them are undocumented migrants. Nonetheless, these individuals contribute their experiences and their knowledge, thereby shaping the local landscape and culture.

**PHOTO 2**

**The Suchiate River along the Mexico-Guatemala border**

Source: Photo taken by the author, November 24, 2018

Migrant women with irregular status tend to work in housekeeping, in restaurants, and across the entire spectrum of the sex trade: bars, cantinas, *botaneros*, strip clubs, and *cuarterías*. The sex trade is an accessible option for them because it does not require proof of one's migration status, has flexible work schedules, and offers relatively better pay—and the learning experiences that they gather through this sexual and emotional labor (Piscitelli 2011, 2016) become sexual-erotic, social, symbolic, and economic capital that they can then use in other spaces of their lives.

in bars, cantinas, *botaneros*, strip clubs, and *cuarterías*, where they work as sex workers, cooks, waitresses, *ficheras*, cashiers, or entertainers. Moreover, some jobs in the region are performed by men, women, children, and families alike; these include farming (coffee, plantain, papaya, and sugarcane, among others), street vending, informal commerce, and garbage collection. LGBTI+ migrants with irregular status tend to work as beauticians, clothing salespersons, personal care salespersons, and sex workers.

The sex trade, deep rooted in this region, is shaped by the characteristics of such transactional human mobility. Records dating back to 1942 indicate the existence of a "tolerance zone" in Tapachula, located in the city's eastern side. Like today, sexual services then were offered on the streets and in what used to be called "brothels" (Alcalá 1992).

Today, the border region continues to boast numerous bars, *botaneros*, night clubs, cantinas, strip clubs, hotels, guesthouses, and public bathrooms where sexual services are offered (Fernández 2009; Maldonado 2016). A variety of services—including prostitution practiced autonomously by women, without intermediaries—are available in these venues and on the streets.

As stated earlier, Mexican law does not prohibit sex work. What the law does criminalize, however, in article 207 of the Federal Penal Code, is the act of procuring[11] and the exploitation of the prostitution of others. At the state level, prostitution is regulated in Chiapas by the Health Law. Chapter XII of this law, titled "tolerance zones," provides that "sexual services may be exercised" only in the tolerance zones established by individual cities, which are also responsible for setting hours of operation and for issuing "health control cards" to individuals who offer sex work, whether on the street or in establishments. Articles 203 and 204 of this law also note that individuals who engage in "sex services as a form of livelihood" must register at the local health center and obtain a "health control card," as well as get regular medical check-ups.

These rules apply only to persons of legal age. The sex trade, which is prohibited outside of tolerance zones, may not be exercised by minors, pregnant women, individuals with a sexually transmitted infection, persons "addicted to drugs," persons with psychiatric illnesses or other mental impairments, or "foreigners staying illegally in the country."

This health-focused regulation of the sex trade functions as a strategy in which sex work is not recognized as work, and sex workers are not recognized as workers. Such a conception violates the fundamental right to work.

11 The provision describes the crime of procurement as "anyone who habitually or accidentally exploits the body of another through the sex trade, who makes a living from this trade, or who derives a profit from it."

## Sex Workers as a Target of the Anti-Trafficking Apparatus

In this border region, I interviewed women working as waitresses and as sex workers who, despite never being victims of human trafficking, had been "rescued" in anti-trafficking raids. These women agreed to report someone as a "trafficker" and to live in forced isolation in shelters for a period of time, in exchange for a humanitarian visa.[12]

One such woman is María, a thirty-two-year-old from El Salvador whom I met in Tapachula as federal and municipal police offers were transferring her from a victims' shelter (operated by a religious Scalabrinian organization) to the bus terminal. María has been living a border life for the past seventeen years, moving back and forth between northern and southern Mexico and El Salvador. Her constant state of motion is due to work and family (she has four children: one in the United States, one in El Salvador, and two in the Los Altos region of Chiapas). She explained to me that the last time she arrived in Mexico, in 2014, she didn't have migration documents:

> I came willingly. I crossed the river in Tecún [Umán, Guatemala] and then went to Huehuetán [Mexico] to look for work. I found a job in a cantina called Flores del Sur. They had an ad for a waitress and they hired me. I was there for four months, until the police came. They paid me 80 pesos [about US$4] a day just to wait on tables—I didn't have to offer myself or *fichar*[13]—I just waited on tables from noon till ten at night ... [In the cantina], we had it all, they gave us the same food they sold ... And we would have one day off each week. But since I didn't know anybody, [on my day off] I would just go to the park for a while and come back. I was also scared that Migration would deport me because I had been deported once before and was afraid, since, well, it was hard for me to get to Huehuetán.[14]

12 Humanitarian visas are available to, among others, anyone who is an injured party or a victim of or witness to a crime committed in the national territory; they are valid for one year or for as long as the judicial proceedings last. This visa allows them to freely enter and leave the country and to obtain paid employment.

13 *Fichar*, an activity performed largely by women, refers to dancing or drinking with clients in bars and cantinas. Clients purchase tokens (*fichas*) from the bar, which they give to the *fichera* in exchange for having a drink with them (alcoholic or not) or dancing with them. At the end of their shift, the *ficheras* hand in their tokens for money. Under this control system, women earn just a portion of the income generated by the tokens, with the other portion going to the establishment. Women working as *ficheras* may also autonomously decide to offer sexual services in addition to dancing and drinking, though not all do.

14 Tapachula, December 2014.

As she noted, María came to Mexico of her own volition to look for work; and even though she was not a victim of human trafficking, she was detained in an anti-trafficking raid conducted by the police and migration officials. These raids are a reflection of the inaccuracies and contradictions within the law. The first and most fundamental contradiction is what GOTTPA defines as "trafficking." When I interviewed a commanding officer of GOTTPA about what trafficking is and how they identify it, he responded:

> Trafficking is when girls are in a vulnerable situation, when they have to prostitute themselves because of their circumstances. I already explained to you what they're fleeing from [in Central America]. So [the bar owners] take advantage of them and put them to work as prostitutes, doing those things that take away their dignity, because they don't have a choice.[15]

The process of searching for and locating "victims" stems from this understanding. Law enforcement authorities understand trafficking based on how they construct "vulnerability," "poverty," and "forced migration." GOTTPA agents are trained on trafficking-related issues by US agencies.[16] However, neither during our interviews nor during operations did agents make any reference to the factors established by Mexican law and the Palermo Protocol: entrapment, transfer, and exploitation. GOTTPA relates trafficking, first and foremost, to women's traditional gender identity and to a specific ideal type for migrant women living in these border areas. It equates prostitution with human trafficking and situates "indignity" within commercial sex. This is the result of a coloniality exercised against bodies—in other words, Mexican society is still permeated by a patriarchal imaginary of a feminine ideal type, which, when threatened, is stigmatized, singled out, or persecuted.

## Two Views of Anti-Trafficking Operations: The State versus Sex Workers

The GOTTPA commander explained that prior to a raid, police officers conduct an undercover investigation in which male officers, dressed in plainclothes, enter sex trade establishments pretending to be clients. Once inside, they have a drink as they look for women thought to be sex workers or *ficheras*. They do not search for men who might

15 Tapachula, December 2014.

16 Including the Central Intelligence Agency, Federal Bureau of Investigation, Immigration and Customs Enforcement, and State Department.

be victims; men are pursued only in the context of migration raids on trains, highways, and the like,[17] with the aim of deporting them.

Although law enforcement operations to inspect sex trade venues and night clubs in Mexico are authorized by the anti-trafficking law, in the border region these raids take the form of immigration checks conducted by the National Institute of Immigration. In other words, paradoxically, operations supposedly aimed at searching for people to "rescue" from trafficking function simultaneously as immigration raids and a form of sexual policing.

Anti-trafficking raids consist of violent incursions into establishments where undercover investigations have supposedly identified trafficking. GOTTPA agents, upon entering, demand immigration papers from all personnel, men and women alike, including *ficheras*, sex workers, cashiers, cooks, and security guards.

However, the way these anti-trafficking raids are experienced by sex workers is the complete opposite of what the state claims to do. These women give a different sense and meaning to this display of state power and violence. Once agents locate the "trafficking victims" identified during the undercover investigation, these women, like it or not, are processed and detained at federal police facilities. There, officers take their statements and conduct a victimology assessment to determine whether they are victims of the crime of trafficking, regardless of what the women themselves have to say about their working conditions or whether they perceive themselves as victims.

María's experience highlights this state practice of violating sex workers' rights. When I asked her to describe the raid she endured—where she was and what she was doing when the police arrived—she responded:

> M: I was alone, sitting there texting [when the police arrived], and then they put us in the patrol cars. They didn't even let me get my things. It happened very fast. Then they took us to [FEVIMTRA[18]], and then they sent us to the shelter.
>
> V: Which shelter?

17 Mexico has a freight railway system that has been used by less privileged irregular migrants over the past twenty-five years to travel from the southern to the northern part of the country. It is an extremely risky journey because they must travel on the rooftops and sides of the cars and can fall off due to exhaustion, hunger, or dehydration. Such falls can be fatal or cause serious injury, including lost limbs. The Mexican government conducts constant migration raids along this railway route.

18 The Special Prosecutor's Office on Violence against Women and Human Trafficking, part of the Attorney General's Office.

M: First, I spent three days in Viva México,[19] and then they brought us here to Albergue Belén.[20]

V: How did you feel there? How did they treat you?

M: Good, but at first I felt flustered because I didn't know where they were going to take me and I needed to work to send money to my children.

V: Did they let you go out when you were at the shelter?

M: No, because they said I was under the protection of the Prosecutor's Office and that they wouldn't let us go out in case something happened to us, because, I didn't know it, but they told me that I was there because of trafficking, as a victim. But well, I didn't know that I was a trafficking victim ... And to be honest, I still don't know what it is, but I know that that's what happened and that's why I got my visa ... Looking at it that way, I am a victim because you do things, like work in those places, which isn't good, because places with alcohol are not good. That's what the priest at the shelter taught us.[21]

Once María signed the complaint alleging that she had been trafficked by the owner of the bar where she worked, she was held in isolation at a victims' shelter. She never read the criminal complaint; she was simply coerced into signing it and declaring that she had been a victim. In exchange, she received a humanitarian visa from the National Institute of Immigration.

But not all stories were like María's. Some of the sex workers I spoke with refused to see themselves as victims, knowing clear well that there is a difference between trafficking and sex work. For example, Brenda, a twenty-six-year-old Guatemalan sex worker in Tapachula who had lived through anti-trafficking raids, talked about how the state marginalizes, criminalizes, and persecutes sex workers in the name of "national security," eliminating "violence against women," and "combating trafficking." She explained how government policies deepen the marginalization of and violence against sex workers by reproducing gender stereotypes and invisibilizing these workers' labor demands:

Here, the Mexican authorities get trafficking wrong. Why do they close down hotels if we're walking around in the open air? If you're walking around in the streets, it's because you're free! Who is making us prostitute

19 Temporary shelter for migrant minors in Tapachula, run by the National System for Integral Family Development.

20 A Scalabrinian shelter for trafficking victims that operated until 2019, when a different religious order took over the shelter's management.

21 Tapachula, December 2014.

ourselves? Nobody! We can go wherever we want, and that is not trafficking, they are wrong! And so it's bullshit that they come and get us ... Last time, I was there at the hotel one night. We weren't even inside the hotel because the hotel doesn't let us come in—we were about half a block away. The police come, grab us, bring us inside the hotel and take our pictures, saying that's where they found us. That's not what happened. And even so, they took us to the feds and said, "You're not under arrest, you're victims." I said, "What are we victims of? I'm not a victim, I'm walking around freely in the street! I'm a victim here because you're saying I am and have me under arrest," I told him. That's when I realized they don't know what trafficking is, maybe because they want to get money out of those poor people at the hotel, and they shouldn't have done that.[22]

To understand sex work and sex trafficking as two distinct realities, one must first recognize the relations and practices that each implies. This must be done by listening to the voices of those involved, as they are the ones who can provide insights based on their realities.

Sex workers are not victims in need of rescuing; they are political agents. They make tactical decisions on the basis of their identities and experiences, which are shaped by different parts of the social order that position them as persons who are either excluded from or have access to rights. These identities and experiences, in turn, act dialectically as the source of their resistance, creativity, decisions, and agency.

Based on their lived experiences, sex workers have a very clear idea about the aim of these anti-trafficking raids: police persecution against them, the abuse of power, extortion, and other human rights violations. Ela, a twenty-year-old from Tapachula, provided an insightful description of how anti-trafficking raids embody the governmentality of women's bodies:

> [They do these raids] so there aren't any women on the streets. They don't want to see women working there on the streets. And sometimes they take us away because we don't have our [health] card,[23] but then the same cops ask us for money to let us go ... Because sometimes we only do one or two little jobs, or sometimes we don't have any money, and for them to just come and pick us up, working just pay the fine—no way! The fine is 400 or 500 pesos [about US$20–25] and to just be locked up without food, and even being made to clean [the police facility]. They've arrested me like six times; the last one was just this December. That's why I'd rather just give the 500 to the cop and not have to sleep there [in the police station].[24]

22 Tapachula, January 2015.

23 The municipal government requires that women working in tolerance zones register with the public health system, pay for a health card that indicates their health status, and obtain weekly medical check-ups.

24 Tapachula, January 2015.

Chocolata, a twenty-two-year-old Guatemalan who has lived alternately in Mexico and Guatemala for the past eight years, offered another insight into the raids. She explained:

> The police harass us a lot. When the police come, we run, and if they catch us, sometimes we cry. The first time they took me away I was so scared because I didn't know where we were going. But then I got used it, because there was a time when they would take us every day to [the police station at] Huacas or Los Cerritos. During the raids, they would ask us if anyone was forcing us to be there, but I've never met anyone who's being forced to do it. But they don't care.[25]



Thus, although the official definitions of trafficking are vague, GOTTPA agents assume that they are "rescuing trafficking victims." But based on the stories of these sex workers, it is clear that law enforcement authorities are not looking for actual victims of trafficking. Their goal, rather, is to look for *ficheras*, waitresses, cashiers, and sex workers in bars, strip clubs, hotels, and cantinas, as well as on the streets—in other words, they are looking for women who are participating in the sex trade, but without distinguishing trafficking from autonomous sex work. At the same time, they are looking for supposed "culprits," without caring whom that might be. During an anti-trafficking raid, one is either a victim, a trafficker, or an undocumented immigrant who needs deporting.

## After the Raid

Two aspects are worth highlighting about these law enforcement operations. First is the fact that the people who are being sought after and labeled "victims" are exclusively cisgender women. Second is the infantilizing of women under the argument that they are unable to grasp the fact that they are victims. As the GOTTPA commander explained, "the poor things, due to their circumstances, don't know that the bars are exploiting them and making them prostitute themselves."

After police raids, sex workers are held for several hours and often coerced into stating that they are victims and initiating criminal proceedings against a "trafficker." Any migrants among the "rescued victims" are offered a humanitarian visa in return for filing a criminal complaint against the alleged traffickers. This migration regularization procedure takes at least three months, during which time the women must remain isolated in victims' shelters. Once a woman acquiesces to claiming that she is a victim of trafficking, she cannot retract her

25 Tapachula, January 2015.

statement and is held in the shelter, even against her will if necessary. For women who are heads of household, this is a serious problem, as being unable to work for such a long period has significant repercussions for those who depend economically on them. Faced with this dilemma, women must calculate the costs and benefits of filing a criminal complaint, as was the case with María.

After María finished her mandatory three-month stay in the shelter, she traveled "very happy" toward northern Chiapas to reunite with family. She was no longer an irregular migrant because she now had a humanitarian visa after filing a criminal complaint against the owner of the bar where she worked. When I asked her how she knew that she had been a victim of human trafficking, she said, "I knew that since I didn't have papers, what they did was human trafficking because they were exploiting me there at the bar."[26]

Although both the Palermo Protocol and Mexico's anti-trafficking law address the "exploitation of the prostitution of others," their definitions are vague. It is worth asking, then, if the engine of capitalism is dispossession and labor exploitation (Harvey 2003), why does labor involving women's sexuality lead to moral panic, persecution, and criminalization?

As we saw in the case of María, she was never held against her will. She didn't even engage in prostitution, either forced or autonomous. She was also never deceived. She simply worked as a waitress in a commercial sex venue that served alcohol. However, to the state, she was a "victim of trafficking." And she agreed to this characterization in light of the benefits it would bring to her transnational life: "I didn't know it, but they told me that I was there because of trafficking, as a victim. But well, I didn't know that I was a trafficking victim ... And to be honest, I still don't know what it is, but I know that that's what happened and that's why I got my visa."[27]

These cases have resulted in the construction of the presumed guilty—people who have been imprisoned even though they have not committed trafficking crimes, and whose families and friends have collectively mobilized to support them. In Tapachula between 2014 and 2016, there were a variety of such grassroots initiatives calling for the release of individuals—some men, but mostly women—who had been arrested in trafficking raids. These actions included marches, roadblocks, and hunger strikes to highlight the arbitrary detention of women working in the sex industry—not necessarily in prostitution

26 Tapachula, December 2014.

27 Tapachula, December 2014.

but as waitresses, managers, and cooks—who had been imprisoned for sex trafficking.

The results of my fieldwork suggest that the anti-trafficking apparatus in this border region has emerged in a racialized, sexist-genderistic, and classist manner through spoken and unspoken discourses, the silencing of certain voices and experiences, and the privileging of others that then become self-legitimizing. Discourses that privilege the anti-trafficking apparatus are generalizing narratives and images featuring cisgender, precarized women from the global South: women who are nonwhite, non-middle class, and irregular migrants, represented as a single, vulnerable subject—the ideal victim waiting to be "rescued."



At the same time, these anti-trafficking laws and policies are focused on the individual punishment of criminal subjects vis-à-vis victimized women—a dichotomy that reproduces a sexist and paternalistic model casting the state as the "protector" of women and their sexuality. The state, through its bureaucracy and its police, is the one who determines what trafficking is, who is a victim, and who is not. In this process, the "victim" is blurred and disregarded; she is given this label regardless of how she sees herself, similar to the way that the possibility of sex work as work is denied.

## Final Considerations

Drawing on both ethnographic fieldwork and critical analysis of the dominant discourse on trafficking, I argue in this chapter that the state's criminal arm—through anti-trafficking operations—is failing to differentiate between sex work and human trafficking. On the contrary, the state is criminalizing both sex work and undocumented migration. It is also evident that anti-trafficking efforts in the region are failing to address the actual problem of human trafficking, as they neither seek nor find individuals who are true victims, much less address the structural dimensions of the sex trafficking problem.

This also leads us to question the Mexican government's data on human trafficking. How many of the state's preliminary investigations and trafficking sentences were in pursuit of actual trafficking efforts, as opposed to being human rights violations committed in the quest to meet performance targets or to deport migrants or to condemn sex work? The experiences of women sex workers during anti-trafficking raids, as shown in this chapter, also prompt us to question whether Mexico's punitive legal framework is truly reducing violence against women—or rather exacerbating it.

There is no clear answer to these questions. However, research such as this, which places women's experiences front and center, offers an ethnographic richness vis-à-vis the position of the Mexican state by illuminating how laws, their shadows, and their contradictions are experienced on an everyday basis. In this light, and based on my extensive fieldwork recording the claims of sex workers, I would like to close this chapter with a final consideration that those of us in academia, government, and civil society should ask ourselves: how can we combat trafficking without criminalizing women sex workers and migrants?

In this regard, it is critical that the Mexican state reform its anti-trafficking law and the way it is being applied by law enforcers. Neither sex work nor migration should be criminalized, and the protection of human rights should be placed at the center of the state's agenda.

Sex work is also an issue of labor rights. Currently, a prominent group of women sex workers is calling on the state to strengthen the protection of their rights. This mobilization highlights the need for academia, civil society, and the state to see sex workers as political actors in their own right. Sex workers should also be able to engage as full participants in debates on the regulation of the sex trade, drawing on their lived experiences and thus becoming allies in the development of legal instruments and in the fight against sex trafficking.

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# Between Institutionality and (Non) Compliance: Nicaraguan Domestic Workers in Costa Rica

*Cynthia Mora Izaguirre*

## Introduction

In the 1980s, Costa Rica adopted an economic development model that, among other things, encouraged women to join the labor force (Martínez et al. 2010). The creation of this new space created a vacuum in terms of who would perform the domestic and caregiving work that had traditionally been done by Costa Rican women. One of the niche markets for women in general has been paid domestic work, which has become a standard service consumed by upper-class families and is accessible to many women because it does not require specific educational qualifications.

To fill this need for domestic and care work, many Costa Rican families began hiring Nicaraguan women in the 1990s, leading to a feminization of migration from Nicaragua. Between 1990 and 2005 in particular, Nicaraguan women sometimes accounted for more than 50% of migrants in Costa Rica (Fundación Promotora de la Vivienda 2004), a trend that has generally been maintained over time, as indicated by the 2011 census (the last one conducted), which registered 151,648 Nicaraguan women compared to 136,118 Nicaraguan men (in other words, 100 women for every 90 men) (Instituto Nacional de Estadística y Censos 2014).

This chapter explores how the shift in Costa Rica's productive model—which opened the door for Costa Rican women's labor market participation—led to changes in households and, over time, changes in the legal framework for domestic work, including with regard to working hours and access to public health services. Political actors such as the Association of Domestic Workers (Astradomes), the Ministry of Labor and Social Security, and the Costa Rican Social Security Fund facilitated these changes, which have benefitted the domestic services sector in general but which often overlook migrant workers.

The chapter begins by describing the economic development model that led to Costa Rican women's increased participation in the labor market and to increased immigration to Costa Rica. I then describe the situation faced by these women upon deciding to join the labor force, which contributed to a heightened demand for paid domestic work. Next, I look at the domestic services sector and explore relevant legislative reforms. I then look specifically at the situation of migrant women who perform these services, discuss how the COVID-19 pandemic affected this sector in 2020, and, lastly, outline some challenges and recommendations that warrant consideration.



## Costa Rica's New Economic Development Model

Costa Rica is a small country with a small population. Following its independence from Spain in 1821, the country sought to integrate itself into the international economy through agricultural commodities, particularly during the nineteenth century; according to the 1883 census, Costa Rica had a population of 182,073 at the time (Bermúdez and Pochet 1980). To this end, the country pursued an agricultural model based on crops such as coffee and banana, taking advantage of the abundant "free" land for agriculture.

These crops were very important for decades, until the 1960s, when the state began rolling out a variety of reforms, including the diversification of agricultural exports, a push toward industrialization, and the promotion of a more modern state with a new economic development model (Bermúdez and Pochet 1980).

This shift was solidified in the 1980s with the implementation of structural adjustment programs that embraced a new industrial economic approach. The aim was to "develop the private sector, streamline the public sector, and develop exports" (Torres 1990, cited in Carvajal 1993, 47). These measures unleashed an economic crisis in 1982 during the administration of President Rodrigo Carazo. This new economic model boosted "economic activities such as tourism and the flow of foreign capital and foreign direct investment (for the real estate market and foreign companies), as well as the diversification of export products" (Segovia 2004; Rosa 2008; Román 2010, cited in Acuña et al. 2011, 16).

As a result of this transformation, the demand for labor shot up, and a good "supplier" in this regard was Nicaragua. Certain productive activities began to fall to foreigners, especially during the 1990s and 2000s, and remained this way for years. In 2016, Costa Rica's largest employers of immigrants were the wholesale and retail trade sector

(15.8%), domestic services (13.6%), agriculture (14.3%), and construction (14.3%) (Organisation for Economic Co-operation and Development and International Labour Organization 2018, 71–72).

Against this backdrop, the census population data are telling, as they show a growth from 1973 onward—particularly in 2000—that is linked to the dynamics of labor migration.

**TABLE 1**

**Censuses in Costa Rica**

| | 1950 | 1963 | 1973 | 2000 | 2011 |
|---|---|---|---|---|---|
| Number of persons born in Costa Rica | 766,054 | 1,306,111 | 1,825,088 | 3,518,112 | 3,915,813 |
| Number of persons born abroad | 34,821 | 30,128 | 34,857 | 242,910 | 385,899 |
| Total | 800,875 | 1,336,274* | 1,871,780** | 3,810,179*** | 4,301,712 |

Source: National Institute of Statistics and Census

* In 1963, there were 35 people whose origin category was "ignored."
** In 1973, naturalized persons (11,835) were counted separately.
*** In 2000, naturalized persons (49,157) were counted separately.

As revealed by the 2000 census, conducted by the National Institute of Statistics and Census (INEC), the number of foreigners in Costa Rica increased substantially between 1973 and 2000. Of the foreigners registered, 190,963 were from Nicaragua (95,448 men and 95,515 women). This suggests that migration is often a good option not only for men but also for women.

The political, economic, and social conflicts that Nicaragua was facing around this same period meant that emigration was a survival strategy for many of its people, as noted by Guzmán (2004, 120):

> the gap between the rich and the poor has widened since 1990, and, astonishing as it might seem, the migration of Nicaraguans has been greater after the Sandinista regime; in other words, social exclusion and poverty have sparked more migration than the civil war of the 1980s. And nonetheless, inequality continues to be ignored in public debate.

It was within this context that Costa Rica began cultivating an increasingly strong relationship with Nicaragua. And although Nicaraguan immigration in the 1980s consisted largely of refugees, in the 1990s it began to take on a more labor-oriented shape—especially manual labor—in addition to becoming more feminized. By 2009, foreigners in Costa Rica were working in the following sectors: (i) agriculture,

livestock, hunting, and forestry; (ii) manufacturing; (iii) construction; (iv) wholesale and retail trade; and (v) domestic services (León 2012). The foreign community in Costa Rica is very important: according to data from INEC and the Directorate General for Migration and Foreigners, foreigners make up an estimated 9% of the population. This makes Costa Rica the largest recipient of migrants in Central America and one of the countries with the greatest number of foreigners in proportion to its population size.

As a result, Nicaraguan women have been able to find a niche in paid domestic work, which does not require significant educational qualifications and which is generally a job performed by women. We can thus conclude that "the growing presence of Nicaraguan women in domestic services is linked to factors such as long-term changes in the female labor market, which decreased the supply of domestic workers in the country" (Morales and Castro 1999, 17). When formal labor opportunities began appearing for Costa Rican women, this opened the door for foreign women to take their place in the domestic services sector.



## Joining the Workforce versus Caring for the Household

In Costa Rica, women's role, historically and culturally speaking, has been linked to reproduction and care work, though the country's new economic model also brought with it changes in the labor market. In this regard, "one of the most important changes inspired by the economic crisis, and then consolidated in the new model, was the significant integration of female and youth labor" (Martínez et al. 2010, 16–17). Indeed, women's labor market participation rose from 32% during the 1990s to 40.7% by 2006 (Estado de la Nación 2007).

As a result of this integration, domains traditionally belonging to Costa Rican women—such as domestic and care work—are now being handed over to migrant women. This is occurring alongside the state's overall failure to roll out timely programs promoting gender equality in labor market integration. Only a few such programs have been created to date. One example is Law 9220 of 2014, which established the National Child Care and Development Network to support families living in poverty and in rural areas.

According to Morales and Segura (2018), Costa Rica is the fourth worst country in Latin America in terms of women's labor market participation. One reason for this is the lack of policies addressing gender inequality and maternity and paternity rights, which helps explain the value that many families place on paid domestic work in the absence

of state-led mechanisms for staying connected to the labor market and the need to stay on top of daily household chores. Here, it is important to not lose sight of the fact that the economic model's openness to Costa Rican women's labor market integration does not mean that the state has facilitated the necessary structures to allow women to leave the home without first having to make careful calculations about the associated costs and benefits. In other words, the state embraces a model promoting women's participation but not the services required within households. Thus, families who rely on paid domestic workers are those for whom it genuinely pays for women to leave the house because the salary being offered allows the family to substitute the "lady of the house" with a *muchacha*.

It is not for nothing that the consumers of paid domestic work are middle- and upper-class households, who refer to these workers as *empleadas* (maids) or *muchachas* (girls). These workers perform a range of tasks and hold a variety of schedules, ranging from just a few hours a day to part-time work to full-time work or even "live in." This last category refers to someone who works full time and lives at their employers' home, where they receive room and board in exchange for a reduction in salary, known as "salary in kind."

## The Domestic Services Sector and the Integration of Migrant Women

The informal and discretionary nature of the domestic services sector has made it a challenging object of study. That said, Natalia Morales, a researcher from the State of the Nation Program, offered a few insights in a personal communication.[1] She indicated that between 2001 and 2013, according to data from INEC's National Household Survey, workers in this sector had the following traits: (i) they were between thirty-five and fifty-four years of age (more than half of respondents fell into this age range); (ii) they had low levels of educational attainment, with approximately 40% having only a primary education, making this the economic activity with the lowest level of schooling; (iii) they worked part time; (iv) they had low levels of social security coverage, instead relying on other forms of insurance, especially family-type plans; and (v) they tended to lack employment guarantees. Furthermore, between 15% and 20% of workers in this sector were living in poverty; the households that hired paid domestic workers were from the wealthiest deciles; and more than 85% of domestic workers were

1 Personal communication, October 26, 2020.

employed in just one house, with nearly half of them working part time.

However, methodological challenges make it hard to know for certain how many people are employed as paid domestic workers. For example the National Household Survey defines paid domestic jobs as "activities of households as employers," which includes maids, cooks, servers, butlers, launderers, gardeners, doorkeepers, drivers, security guards, nannies, instructors, babysitters, private teachers, and secretaries, among others. Other studies have taken this broad definition as the one most representative of paid domestic work.



**TABLE 2**

**Distribution of paid domestic workers by sex, Q2 2019 versus Q2 2020**

| Sex | 2nd quarter of 2019 | 2nd quarter of 2020 |
|---|---|---|
| Women | 139,604 (88.2%) | 76,121 (85.9%) |
| Men | 18,632 (11.8%) | 12,495 (14.1%) |
| Total | 158,236 (100%) | 88,616 (100%) |

Source: INEC's Continuous Employment Survey

Table 2 shows that in 2019, more than 139,000 women were actively employed as domestic workers; but one year later, after the country (and the world) was hit with the COVID-19 pandemic, this number fell to almost half. This impact will be discussed later in the chapter.

These data also allow us to appreciate the sector's openness, which explains why Nicaraguan women represent an important part of its workforce. According to Martínez et al. (2010), as of 2010, 17% of paid domestic workers were Nicaraguan. Importantly, their status as foreigners places them in a state of greater vulnerability, meaning that they are more likely to lack labor rights protections and to suffer physical and moral harm.

The sector's structural characteristics reveal not only how unstable it is but also how easy individuals can obtain work, given that no special certifications or qualifications are needed. At the same time, the sector has significant shortcomings in terms of employment guarantees. In previous eras, the level of abuses against workers was so egregious that it sparked self-organizing and advocacy before political actors.

## Legal Reform concerning Paid Domestic Work and Challenges in Ensuring Compliance

Hand in hand with the increasing demand for paid domestic work among upper-class households come challenges concerning the regulation of such work, which by its very nature is performed within the private confines of people's homes. Domestic workers themselves thus have a need to demand better working conditions. This section highlights three key issues: (i) the payment of minimum wage; (ii) the regulation of working hours; and (iii) access to social security.

Domestic workers' struggle for better working conditions is not a new phenomenon. For decades, they have waged battles and achieved victories: "already by 1964 there was a reform of chapter VIII of the 1943 Labor Code on domestic workers thanks to the efforts of the Costa Rican Association of Domestic Servants" (Lerussi 2008, cited in Bonnie 2010, 78). Around the same time, wages in kind were regulated due to the fact that such payment lends itself to a range of abuses, including human trafficking and child labor. Further, the work day was reduced from fourteen to twelve hours, and domestic workers were granted the right to a half day of rest each week, as well as paid vacation (two weeks each year).

These conditions remained this way for decades, putting domestic workers at a disadvantage compared to other workers who enjoyed eight-hour work days and access to more rights (such as a full day of rest), social security, and better pay. As a result, in 1990, Astradomes was founded by Rosita Acosta, a Costa Rican domestic worker whose firsthand experience with labor abuses inspired her to lead the fight for better working conditions.

Following years of advocacy by Astradomes before a variety of government actors, on July 24, 2009, Costa Rica's legislature published Law 8726 modifying the 1943 Labor Code's provisions on domestic workers. This reform, titled "Amendment of Chapter Eight of the Second Title of the Labor Code, Act No. 2 Paid Household Work Act," stipulated a number of changes to domestic workers' working conditions, including the establishment of a minimum wage by the National Wage Council,[2] a reduction in the work day to eight hours during the day or six hours at night (as in other jobs), overtime protections (including overtime pay and a cap on overtime), and the duty of employers to register their employees with the Costa Rican Social Security Fund.

2 To get an idea of this issue, in 2020 the National Wage Council set the monthly minimum wage for domestic workers at ¢199,648 (about US$330).

Other changes included a full day of rest, recognition that wages in kind are not part of the minimum wage, a prohibition on the hiring of persons under fifteen, and the right to compensation in cases of unjustified dismissal. Although this reform was a step forward for these women's working conditions, the difficulties in achieving genuine compliance had only just begun.

## Migrant Domestic Workers: The Goal of Obtaining a Work Permit, Securing Insurance, and Managing Risks



Generally speaking, migrant women—especially those from Nicaragua—find paid domestic work to be an easy way to enter the labor market. However, securing improvements in their working conditions has never been an easy task, for access to the aforementioned legal benefits requires the commitment and support of employers. Sometimes, migrants even need a valid work permit sponsored by their employer.[3]

Table 3 displays the number of migrant women performing paid domestic work in Costa Rica. The data shown here resemble the 17% figure cited in 2010 by Martínez et al. regarding the proportion of Nicaraguan women in domestic service. In fact, this proportion even seems to be on the rise in recent years.

**TABLE 3**

**Distribution of paid domestic workers by nationality, Q2 2019 versus Q2 2020**

| | 2nd quarter of 2019 | 2nd quarter of 2020 |
|---|---|---|
| Costa Rica | 107,799 (77.2%) | 52,196 (68.6%) |
| Nicaragua | 29,727 (21.3%) | 22,899 (30.1%) |
| Honduras | 1,103 (0.8%) | 119 (0.2%) |
| Panama | 146 (0.1%) | 907 (1.2%) |
| Mexico | 721 (0.5%) | 0 (0.0%) |
| Venezuela | 76 (0.1%) | 0 (0.0%) |
| Other countries | 72 (0.1%) | 0 (0.0%) |
| Total | 139,644 (100%) | 76,121 (100%) |

Source: INEC's Continuous Employment Survey

3 Exceptions include when the person already enjoys a regular migration status, such as being married to a Costa Rican, being a parent to a Costa Rican, or being naturalized.

In order to secure formal employment, migrants need a work permit issued by the Directorate General for Migration and Foreigners, which means that their employer must be willing to support the process in terms of paperwork, costs, and time. Further, changing one's migration status costs US$200, and the law does not specify who should assume this burden—whether the applicant or the employer—so this must be agreed on privately between the migrant and their employer.

Other required documents need to be retrieved in the worker's home country, which deepens the pressure on the employer, who must be willing to permit this travel by their employee. Making matters even more complex, the applicant must present documents concerning the employer's financial position in order to convince the Directorate General for Migration and Foreigners that the employer is capable of maintaining an employment relationship with the worker. Providing such sensitive information to their domestic workers can cause significant discomfort for many employers.

Another pillar of protection for the general population is the Costa Rican Social Security Fund, which provides health services of all types, in addition to disability and retirement pensions. But only those foreigners with a regular migration status may register with the fund. This process is easier for individuals who work full time given that the system, until recently, prohibited part-time and hourly workers from registering.

As mentioned earlier, many women work by the hour, whether in one home or in several homes—this type of hourly schedule is known as "partial work days."[4] For many years, the Costa Rican Social Security Fund lacked a flexible type of insurance that could accommodate this kind of work; in response to this need, it eventually created an insurance plan for people who worked hourly instead of full time. However, applicants are still required to have a regular migration status. This new insurance plan, rolled out in August 2017, allows employers to register their workers at a cost proportional to the number of hours worked, and the process can even be completed online. As reported by the Social Security Fund in 2018, "as of October 15 of this year, 5,678 domestic workers had been insured. The financial administration unit's goal for 2018 was to increase the percentage of such workers covered by 11%; at this moment, that percentage is around 14.5%" (Caja Costarricense de Seguro Social 2018). We can thus see that this new insurance scheme was a much-needed step, for the number of workers enrolled has exceeded the fund's own expectations.

4 N. Morales, personal communication, October 26, 2020.

While improvements have been made, the road to better working conditions has been especially difficult for Nicaraguan migrant women. According to a member of Astradomes:

> What happens with the migrant population is that their rights are violated; the rights of Costa Rican women are also violated, but it's easier for them because they know about the ministry, they know how to defend themselves better, but for the migrant population it's more difficult, even when they're documented they're afraid to claim [their rights]—much less when they are undocumented. (Rosita Acosta, cited in Goldsmith 2007, 14)

These women's legal and social vulnerability on account of belonging to a minority group places them at risk of all kinds of abuse, including human trafficking. For example, in 2019, according to the *Trafficking in Persons Report* published by the US Department of State, twenty victims of trafficking were identified in Costa Rica that year; of these, three were victims of forced domestic servitude, four were victims of both sex trafficking and forced domestic servitude, and six were from Nicaragua (US Embassy in Costa Rica 2019). These conditions show how women—especially migrant women—can be abused in a variety of ways.

On top of this difficult socio-occupational context in Costa Rica are other global challenges that impact not just labor relations but human lives. Foremost among these challenges is the arrival of the COVID-19 pandemic in December 2019, which made 2020 a critical year in terms of deepening inequalities around the world, including in the domestic services sector.

## A Labor Landscape Pummeled by COVID-19

The domestic services sector has long been fraught with challenges. A *Semanario Universidad* interview with Astradomes founder Rosita Acosta in March 2019—prior to the COVID-10 pandemic (Flórez Estrada-Pimentel 2019)—corroborated what the organization's current director, Carmen Cruz, told me during an interview in October 2020. Both women noted that progress had been made in the sector in general but that much remained to be done. They pointed to a number of red flags and infringements, including an increase in part-time insurance plans (since it is possible that these workers are actually working full time); employers' failure to pay the legal minimum wage and social security benefits; mistreatment; and employers' failure to respect the working hours established by law. There are also cases of women over the age of sixty who continue to work and who, though aware of their rights, do not claim them out of fear that doing so could cause them to

lose their job and that they would be unable to find another job due to their age.

This was the state of affairs in 2019. In 2020, with the arrival of the COVID-19 pandemic in Costa Rica and the world, the government implemented certain measures that caused a further impact on domestic workers, including the adoption of Law 9832 authorizing employers to reduce their workers' hours in light of the national emergency declaration and even to suspend employment contracts for a time without needing to provide compensation.

In an interview conducted by *Semanario Universidad* in 2020, researcher Natalia Morales noted that "work as a domestic worker is very sensitive to the market; it is one of the first expenses that a household cuts" (Murillo 2020). As in other countries, the economy in Costa Rica has taken a hit, and many people are now staying at home to work remotely or because they lost their jobs. This means that many families have dispensed with paid domestic work, whether due to decreased household earnings or because household chores are now being performed by someone within the family nucleus in order to save money or prevent contagion.

In the context of the COVID-19 pandemic, the Ministry of Health has launched a vigorous campaign encouraging people to prevent infection by maintaining "social bubbles" and not mixing with other "bubbles." Here, the data from table 2 are suggestive in that the number of female domestic workers dropped from 139,604 in 2019 to 76,121 in 2020.

One forty-five-year-old woman whom I interviewed for this chapter stated the following about how her family has handled its domestic worker during the pandemic:

> The measures we've taken are that she has a different pair of shoes for working in the house. When she arrives, she changes her shoes, puts on a clean uniform, washes her hands, does a whole sanitizing routine, and she works like that. Also, we give her a face shield and a mask to protect herself and to protect us.[5]

The woman also explained that the employee would arrive on foot at 6 a.m. so that she would not come into contact with other people along the way to work and that the family, at the end of the day, would drive her to her house located about five kilometers away.

In addition, I interviewed Astradomes's current director, Carmen Cruz, in October 2020. Cruz explained that the pandemic has caused many domestic workers to lose their jobs: "many of them, upon

5 Interview, October 2020.

arriving to their employers' homes, were told that the families would call them [later] depending on how the COVID situation went. And [then] the families didn't even answer [when the employee called them on the phone]. A second group of women were locked up and not allowed to leave."[6] I also wrote to the Ministry of Labor and Social Security requesting data on the number of infringements reported in the domestic services sector, but I did not receive a response.

The data and information highlighted here allow us to see the impacts that the labor landscape has suffered in general, including cutbacks, inactivity, and the absence of guarantees. For this reason, the domestic services sector in particular warrants further analysis, in addition to measures that promote greater equity. This is especially true in the wake of the havoc that the COVID-19 pandemic has wreaked in most countries, particularly the poorest ones.



## Conclusion

In Costa Rica, the liberalization of markets has sparked major changes in the labor landscape and, in turn, household dynamics. Although women's integration into other spheres beyond the private one has helped make their contributions more visible, it has also had the effect of reinforcing other stereotyped market niches that reveal the state's lack of support for women. As noted by Morales and Segura (2018), women in Costa Rica face extreme disadvantages at the institutional and social levels due to the state's failure to recognize gender inequalities and its lack of policies in support of gender equity, such as policies promoting equal pay for women, women's access to positions of leadership and to government services, and better labor conditions for working mothers.

It is worth noting that child care and elder care options have been available in Costa Rica for decades, but most of these services are offered by private institutions whose prices reflect each institution's quality of care and infrastructure. Meanwhile, state-provided care is provided mainly to families living in poverty and extreme poverty, which means that it is not available to many. Thus, the availability of caregiving services continues to be a barrier for women's integration into the labor market.

A woman's decision to join the labor force and leave household chores in the hands of another person is nothing new. Concepts such as "global care chains" and "transnational motherhood" have already

6 Interview, October 2020.

been studied at length (Baca et al. 2000). What is most concerning is that despite the decades-long consolidation of these market niches, women continue to confront obstacles in every one of the labor settings they occupy. Those who carry the strongest burden are migrant women, particularly those with irregular migration status, who must tackle additional barriers in order to achieve economic stability and a decent quality of life for themselves and their families.

With regard to migrant women who work as paid domestic workers, it is important to point out that despite encouraging legal reforms aimed at improving their working conditions, the path to progress is slowgoing. The absence of agile processes to hold employers accountable for protecting workers' rights, and the state's listless efforts to ensure that employer reports reflect the actual number of hours worked, means that half-hearted compliance is seen as sufficient. For example, in October 2020, the Directorate General for Migration and Foreigners launched an online portal for migration procedures—and while this has eased the process somewhat, the government has not adjusted the fees or the documents required by the General Immigration Law (Law 8764).

Moreover, although the country was already exhibiting signs of economic crisis prior to the arrival of COVID-19, the pandemic accelerated this trend while also proving that domestic workers' services are highly expendable. This reinforces the notion that domestic work "can be done by anyone." Further, as noted by Natalia Morales, paid domestic work has been one of the last sectors to be reactivated (Murillo 2020).

This situation is especially worrisome because it will encourage even more informality in the sector, with women workers discarding their rights just to be able to have a chance to earn a living. And being an irregular migrant on top of this makes it even easier to fall into a vicious cycle of abusive employment relationships from which it is difficult to escape.

One way that the state can afford greater protection to migrant women is by reforming Law 8764 in a way that simplifies the regularization process and reduces associated fees. While legislators are currently drafting a bill to modify several aspects of this law, the bill is not expected to be debated in Congress in the near future.

Civil society organizations have an important role to play in empowering women to know and exercise their labor rights. These rights are inalienable and can be claimed at the institutional level through the Ministry of Labor and Social Security, even in cases where the woman is an irregular migrant.

In conclusion, migrant domestic workers have often lived in Costa Rica for decades, and some even have Costa Rican children. Therefore, the state owes it to these women—who have shown dedication and honesty in caring for Costa Rican households—to allow them the opportunity to live a dignified and secure life. Academia should do its part to raise its voice and push for change.

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# The Long Road toward the Labor Inclusion of Venezuelan Migrants in Colombia

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## Introduction

Colombia is Latin America's main receiving country for Venezuelan migrants. According to the Regional Inter-Agency Coordination Platform for Refugees and Migrants from Venezuela, nearly 1.8 million Venezuelans had arrived to Colombia by October 2021 (Plataforma de Coordinación Interagencial para Refugiados y Migrantes de Venezuela 2021). This phenomenon has posed critical challenges for a country that has historically lacked the experience and infrastructure necessary to meet the needs of this population, especially those facing socioeconomic marginalization.

To address these challenges, the Colombian government, international development agencies, and civil society organizations have taken a variety of measures—from humanitarian assistance to the creation of special permits—to facilitate the regularization process for Venezuelan migrants. Initially, the Colombian government's response was a short-term, humanitarian-focused approach. But the reality over the past six years has revealed the need to develop a comprehensive, rights-based migration policy that focuses on achieving the socioeconomic integration of this population. Such a policy should incorporate measures for protecting the civil and political rights, as well as economic, social, and cultural rights, of refugees, migrants, and stateless persons (Dejusticia 2020).

One critical element for ensuring the integration of this population is labor inclusion, defined as the policies, programs, and processes put forth by the state and the business sector to connect vulnerable segments of society to the formal labor market (Weller 2001; Fundación ANDI et al. 2020). Labor inclusion is a multidimensional concept that goes beyond access to employment to encompass the guarantee of adequate working conditions and social benefits established by law (Weller 2001).

Importantly, migrants' labor inclusion supports other outcomes related to social integration, such as education, family reunification, political participation, and regularization (International Organization for Migration 2019). It also allows migrants to enjoy better living conditions, to contribute to the host community's development, to build relationships with the local population, and to access rights such as the rights to health and social security. In other words, in addition to having individual effects, migrants' labor market inclusion has the potential to contribute to a country's economic growth, especially when the migrants in question are high-skilled workers (Borjas 2019).

The concept of decent work, coined by the International Labour Organization in 2004, refers to

> work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men. (International Labour Organization 2021).

Promoting decent work means promoting opportunities for employment and income, guaranteeing workers' access to social protection, protecting labor rights, and fostering social dialogue among the state, employers, and workers (Centro Regional de Empresas y Emprendimientos Responsables 2021).

The creation of a "temporary protection status" for Venezuelan migrants—the Colombian government's most recent measure to respond to the migration situation—marks an important step forward in supporting this population's labor integration. This new status dismantles one of the most difficult barriers to employment for Venezuelans: irregular migration status. Nonetheless, there are other hurdles—including economic, social, and cultural barriers—that continue to negatively impact Venezuelans' access to stable employment and which require analysis and documentation.

This chapter seeks to explore the Colombian state's response to the need to foster Venezuelan migrants' labor market integration. To that end, the chapter is divided into three sections. In the first section, we describe the regularization mechanisms that the state has created for Venezuelans and the impact that these mechanisms have had on access to employment, recognizing that prior to the rollout of the temporary protection status, Venezuelan migrants' main barrier to employment was irregular migration status. In the second section, we explore other types of barriers—namely social and cultural ones—that migrants face

in accessing stable employment, and we describe some of the measures that the state has taken to address them. In the last section, we reflect on the importance of labor inclusion as a mechanism for integration, explore why policies to this end should embrace a human rights focus, and offer several recommendations concerning how Colombia can move in this direction.

## Regularization Pathways and Access to Employment for Venezuelan Migrants

In order for a migrant in Colombia to be able to work, they must have a regular migration status.[1] The absence of such status is thus a key barrier to migrants' insertion into the formal labor market. Historically, foreigners wishing to work in Colombia had to apply for a work visa[2] before the Ministry of Foreign Affairs. However, with the massive arrival of Venezuelans beginning in 2015, in which the majority of these migrants intended to remain in the country (Unidad Nacional para la Gestión del Riesgo de Desastres 2018) but lacked the resources and documentation needed to obtain such a visa,[3] the Colombian government acknowledged the need to create additional mechanisms to facilitate migrants' access to regular status and, as a result, to employment.





1 "Migration status, granted by a country's authorities, is an authorization that allows a foreigner to enter and remain in the national territory. There are different types of authorization, depending on the activity that the person wishes to perform. In Colombia, the institutions charged with processing migratory statuses are the Ministry of Foreign Affairs (also known as the Chancellery), and Migración Colombia" (Dejusticia and Proyecto Migración Venezuela 2021, 8).

2 Currently, Ministry of Foreign Affairs Resolution 6045 of 2017, which regulates the types of visas available, has reduced the number of visa categories to three: visitor visa (type V), migrant visa (type M), and resident visa (type R). Depending on the activity in which the person intends to engage in Colombia, they may or may not be authorized to work.

3 The main requirement for requesting a Colombian visa is a passport. However, the process for obtaining a passport in Venezuela is extremely expensive—approximately forty-two times the country's minimum monthly wage. Moreover, it can take months due to bureaucratic delays (Ruiz Mancera et al. 2020, 96). According to Colombia's National Administrative Department of Statistics, a mere 28% of Venezuelans in Colombia have a passport—and for 69% of these individuals, their passport is expired (Departamento Administrativo Nacional de Estadísticas 2021a). In addition to needing a passport, one must also have entered Colombia legally, obtain apostilles for certain documents (a process that it is nearly impossible to complete in Venezuela), and have the money to pay for the visa application (Ruiz Mancera et al. 2020). For example, the application fee for an M visa costs US$52, while the visa issuance fee for that same visa is US$230 (Ministerio de Relaciones Exteriores 2021). Such costs can often be prohibitive for people who arrive to Colombia with serious financial difficulties.

In 2017, the government began rolling out a series of special permits allowing migrants to regularize their status and thus overcome this legal barrier to accessing formal employment. In this section, we explore the various permits that were established between 2017 and 2021, when the government rolled out the temporary protection status, one of the most important measures for responding to migration from Venezuela. We also analyze the benefits and drawbacks of these measures, as well as how they have helped Venezuelans access the Colombian labor market.

### Special Stay Permits (2017 to 2021)



The government's first attempt to make regularization easier for Venezuelans unable to apply for a work visa was the creation of the special stay permit, or PEP, in 2017.[4] This permit authorized the holder to remain in the national territory for up to two years, exercise any legal activity or occupation, and access the health, education, and financial systems. To obtain a PEP, the applicant had to (i) have entered the country via an immigration checkpoint, where Migración Colombia (the country's border control agency) should have provided a stamp authorizing entry into the country;[5] and (ii) have entered Colombia prior to the date established in the regulation, as explained below.

Due to the fact that Venezuelans were continuously arriving to the country and the stipulated time frames for requesting a PEP were very limited, the Ministry of Foreign Affairs extended the application deadline on four different occasions,[6] as outlined in figure 1.

In 2018, the government extended PEP benefits to Venezuelans belonging to three specific groups in order to allow them to more easily regularize their status. The first group consisted of those who had registered in the Administrative Registry of Venezuelan Migrants, a registry created by the government to identify migrants who had arrived to Colombia as of June 2018, regardless of their mode of entry. In total, 442,462 Venezuelans identified in the registry (Unidad Nacional para la Gestión del Riesgo de Desastres 2018) were subsequently extended

4 Resolution 5797 of 2017 issued by the Ministry of Foreign Affairs.

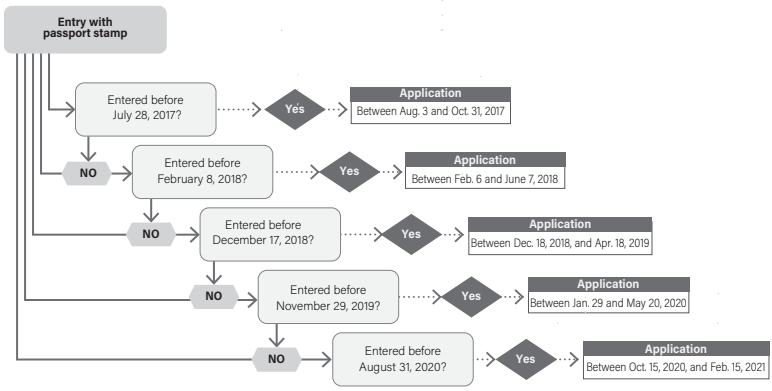
5 Venezuelan citizens do not need a visa to enter Colombia (Ministry of Foreign Affairs Resolution 1128 of 2018), meaning that they can enter the country simply by showing their passport, after which point immigration officials will stamp their passport with an entrance and permanence permit, which allows them to undertake activities related to tourism, medical treatment, journalism, events and conferences, and travel to a third country, among other things (Migración Colombia Resolution 3167 of 2019).

6 Resolution 0740 of 2018, 10677 of 2018, 0240 of 2020, and 2052 of 2020 issued by the Ministry of Foreign Affairs.

PEP benefits via Decree 1288 of 2018 issued by the Presidency of the Republic. This marked the first time that the government allowed people who had entered Colombia irregularly to regularize their migration status.

**FIGURE 1**

**Deadlines for requesting a special stay permit, or PEP**




Source: Prepared by the authors based on an analysis of resolutions issued by the Ministry of Foreign Affairs

The second group consisted of members of the Venezuelan armed forces and police who voluntarily and temporarily left their posts in Venezuela, who surrendered their weapons and uniforms, and who entered Colombia prior to May 13, 2019 (Ministry of Foreign Affairs Resolution 2540 of 2019). This decision was made in the wake of the events of February 23, 2019, on the Simón Bolívar bridge at the Colombia-Venezuela border, where there were skirmishes over an attempt by Venezuela's opposition to import foreign aid (Casey et al. 2019).

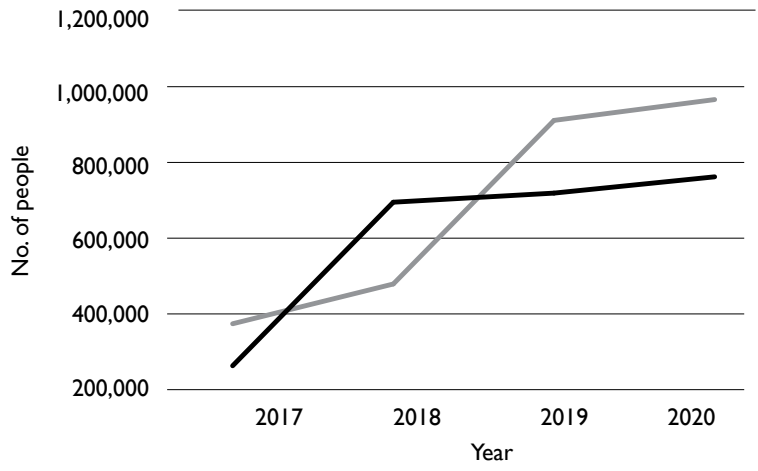
The last group consisted of people who had applied for refugee status between August 19, 2015, and December 31, 2018, but whose applications were rejected and who did not have another permit or were in the process of applying for one. This measure[7] sought to cover an important group of people who were ineligible for refugee status and who had been unable to access the PEP because they had entered Colombia irregularly or because they had not considered it an option upon settling in the country.

7 Although this measure offered the same benefits as the PEP, it was given a different name—the complementary special stay permit, or PECP. This permit was created via Resolution 3548 of 2019 issued by the Ministry of Foreign Affairs.

Despite these efforts by the government, the barriers to obtaining a passport in Venezuela and the limited time frames for requesting a PEP meant that many Venezuelans continued to enter the country irregularly and were thus unable to regularize their status. As shown in figure 2, despite the PEP's rollout, since 2017 the number of irregular migrants has continuously surpassed the number of regular migrants. The only exception is 2018, when PEP benefits were extended to individuals registered in the Administrative Registry of Venezuelan Migrants, as discussed above.

**FIGURE 2**

**Migration status of Venezuelans in Colombia**




| | | | | |
|---|---|---|---|---|
| People with regular migration status | 263,331 | 695,496 | 719,189 | 762,823 |
| People with irregular migration status | 374,000 | 479,247 | 911,714 | 966,714 |

Note: The cut-off date for data from 2019 is October 31 because that was the latest date available for 2019 data.

Source: Prepared by the authors based on data from Migración Colombia

In light of the difficulties faced by many migrants in regularizing their status, and as a first step toward recognition of the need to create mechanisms facilitating migrants' access to employment, the government created an updated version of the PEP in January 2020: the special stay permit for the promotion of formalization, or PEPFF.[8] This permit was aimed at Venezuelan migrants who had received formal job offers.

8 Decree 117 of 2020 issued by the Ministry of Labor.

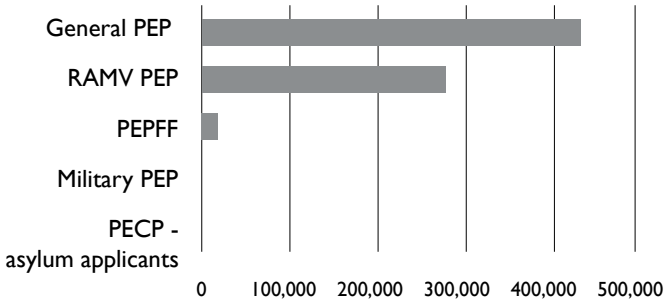
In order for a person to obtain a PEPFF, the potential employer first had to file a request before the Ministry of Labor; then, once this request was approved, the worker had to complete the process before Migración Colombia. Although the PEPFF allowed irregular migrants to regularize their status, the fact that the process required action by a third party (employers) limited its effectiveness. Further, this mechanism was available only to individuals whose labor contracts were for a period lasting between two months and two years. If the person changed jobs, they had to redo the entire process with their new employer. Only 19,436 permits have been issued since the PEPFF's rollout. That said, it is important to keep in mind that the hiring of migrants could have been affected by the COVID-19 pandemic.





**FIGURE 3**

**Number of PEP holders, by permit type**




| | PECP - asylum applicants | PEPFF | Military PEP | RAMV PEP | General PEP |
|---|---|---|---|---|---|
| Beneficiaries | 5 | 792 | 19,436 | 281,778 | 435,367 |

RAMV = Administrative Registry of Venezuelan Migrants; PEPFF = special stay permit for the promotion of formalization; PECP = complementary special stay permit

Source: Prepared by the authors based on data from Migración Colombia

According to Migración Colombia, between July 2017 (when the PEP was introduced) and October 31, 2021, the government issued 737,378 PEPs in their different formats. As shown in figure 3, most people who received this permit did so through its general modality, which, as described above, requires that the person have entered Colombia via an immigration checkpoint and received a stamp in their passport. Those who were able to regularize their status this way represent 41% of PEP holders but just 16.3% of the total Venezuelan

population in Colombia as of August 31, 2021 (Unidad Administrativa Especial Migración Colombia 2021a).

By the end of 2020, 56% of Venezuelan migrants in Colombia were in an irregular situation (Unidad Administrativa Especial Migración Colombia 2021b), pointing to the shortcomings of the PEP program: the permit's requirements were difficult to meet, it was of a short-term nature, and it could not be extended to members of one's family nucleus. In addition to requiring the applicant to have entered the country legally, the PEP was valid for only two years; and even though this duration was subsequently lengthened, Colombian institutions involved in the labor market had a difficult time implementing the structural changes needed to cater to such permit holders.





For example, according to an employment expert interviewed for this chapter, many banks refused to accept the PEP as a valid form of identification when migrants wished to open a bank account, as did many health care providers and pension funds, among others, when migrants sought to register for their services. Further, the inability to extend the permit to one's family members meant that there were many families with mixed migration statuses, preventing family members from accessing rights under equal conditions.

The shortcomings of the regularization programs implemented up until 2020 revealed the need for the government to embrace a long-term approach toward migration—one going beyond a humanitarian focus to instead promote migrants' integration, especially in terms of access to employment. As a result, and thanks to the efforts of a range of actors, the government subsequently created the temporary protection status for Venezuelan migrants.

## The Temporary Protection Status for Venezuelan Migrants (2021–2031) and the Comprehensive Migration Policy

Decree 216 of 2021, issued by the Ministry of Foreign Affairs, created the temporary protection status for Venezuelan migrants, or ETPMV, with two objectives in mind: (i) identify and describe the Venezuelan migrant population in Colombia and (ii) regularize their migration status.

One of the reasons for creating this new status, as stated in the decree, was to facilitate migrants' labor inclusion and economic integration, thus allowing them to generate "for themselves and their families dignified living conditions and important contributions toward the country's economic growth and development." The decree justifies

this measure on the basis of international treaties and the Colombian Constitution, which establish that everyone has the right to work under dignified and equitable conditions (article 25 of the Constitution) and that state parties must work to "curb illegality in the employment of workers in irregular situations, as well as adopt measures to ensure that such irregular situations do not persist."

To achieve these aims, the decree established the Single Registry of Venezuelan Migrants, which collects the personal and socioeconomic data of those who choose to register and which is overseen by Migración Colombia. It also created the temporary protection permit, or PPT, an identity document that authorizes its holder to remain in the country for up to ten years, to work, and to access the health, retirement, education, and financial systems.

To apply for temporary protection status, the person must meet one of the following criteria: (i) have a regular migration status; (ii) have applied for asylum but not received a response; (iii) have been in Colombia irregularly prior to January 31, 2021; or (iv) have entered the country legally between May 29, 2021, and May 28, 2023. As of October 31, 2021, a total of 1,430,732 people had completed their virtual application, and 497,227 had initiated the biometric registration phase (Unidad Administrativa Especial Migración Colombia 2021c). On October 13, 2021, the government issued the first PPT, and it was expecting to issue more than 800,000 by the end of the year (Unidad Administrativa Especial Migración Colombia 2021d).

Parallel to the rollout of the ETPMV, Colombia's Congress was debating the country's first comprehensive immigration policy, which it enacted on August 4, 2021, via Law 2136. This law sets forth a general framework for responding to the needs of three different migratory groups: (i) Colombian citizens abroad; (ii) Colombian returnees; and (iii) foreigners in Colombia. Despite its sweeping focus and lack of depth, Law 2136 states that one of the aims of the immigration policy is to "promote socioeconomic and cultural integration, sustainable development, prosperity, and integration in science, technology, and innovation through the contributions of migrants" (art. 2.2). It also contains a chapter on socioeconomic and productive integration that outlines measures to promote the employment of the migrant population, support for their business endeavors, and migrants' financial inclusion.

Both the ETPMV and Law 2136 will set the stage for the government's response over the coming decade to migrants in Colombia, particularly Venezuelan migrants. The ETPMV has been hailed by international agencies as one of Latin America's most ambitious initiatives for responding to migration (United Nations High Commissioner

for Refugees 2021). That said, numerous civil society organizations have called attention to the policy's shortcomings, including the broad powers granted to the Ministry of Foreign Affairs and Migración Colombia, limitations on the right to due process, a weakening of the shelter system, risks to the right to privacy and protection of personal data (Dejusticia 2021), and the failure to regularize those who entered the country irregularly after January 31, 2021.

Despite these weaknesses, the ETPMV is a key step forward for addressing one of the leading barriers to migrants' labor market inclusion—namely, the lack of a regular migration status. According to Migración Colombia, as of August 31, 2021, 17% of all Venezuelans in Colombia (315,643 of 1,842,390 people) had an irregular status, and 64% (1,182,059) of Venezuelans were in the process of regularizing their status, suggesting a nearly 40% reduction in irregularity compared to 2020 (Unidad Administrativa Especial Migración Colombia 2021a). And although having a regular migration status is essential for being able to access formal employment and better working conditions, other types of barriers also stand in the way of migrants' labor market inclusion, as discussed in the next section.



## Barriers to Accessing Stable Employment

The lack of a regular migration status is the main obstacle impeding migrants' access to the labor market (Pan American Development Foundation 2019). Nonetheless, a range of other economic, social, and cultural barriers hinder this population's access to and permanence in the labor market, push them toward informality, and expose them to precarious and sometimes exploitative working conditions. This section explores some of the most common structural barriers faced by Venezuelan migrants in this regard.

### Barriers Linked to the Colombian Labor Market

Certain aspects of the Colombian labor market affect the right to work of all workers but can have a disproportionate impact on migrants who are socioeconomically marginalized. Some of these obstacles stem from structural issues, such as the high rate of informal employment in Colombia, and others are related to the rigorous requirements for good jobs, such as needing to have a tertiary diploma and to certify one's professional experience.

Informality[9] has been a defining aspect of Colombia's labor market for decades (Rodríguez and James 2017). In the absence of opportunities in the formal market, informal jobs have become a natural alternative for many people wishing to earn a living. However, such jobs generally are of low quality, pay low wages, and are highly unstable (Quejada Pérez et al. 2014). As noted by the Organisation for Economic Co-operation and Development, this places workers

> in a vicious cycle, where they not only have lower or inadequate access to social protection but also their unstable income prevents them from investing in human capital and moving to higher productivity jobs, which traps them in a vulnerable state. Most of those who work informally are insufficiently protected from the various risks to which they are exposed: job loss, health problems, unsafe working conditions, less protection of their labour rights, associated for instance with working hours or safety regulations. (Organisation for Economic Co-operation and Development 2020, 1)

According to data published by the National Administrative Department of Statistics (DANE according to its Spanish initials),[10] 48% of respondents from the Large Integrated Household Survey[11] were working informally between June and August 2021. During the same period, the proportion of men working in informal jobs was 45.4%, while the proportion of women was 47.6% (Departamento Administrativo Nacional de Estadísticas 2021c).





9 As described by the DANE, the informal sector "consists of units engaged in the production of goods or services with the primary objective of generating employment and incomes to the persons concerned. These units typically operate at a low level of organization, with little or no division between labour and capital as factors of production and on a small scale. Consequently, informal employment refers to all economic activities that operate on the basis of household resources but which do not establish themselves as enterprises with a legal personality independent of those households" (Departamento Administrativo Nacional de Estadísticas 2009, 6).

10 This entity is responsible for gathering, processing, analyzing, and disseminating official statistics in Colombia (Departamento Administrativo Nacional de Estadísticas 2021b).

11 The Large Integrated Household Survey "collects information on people's employment conditions (whether they work, what they do, how much they earn, whether they have health care, or whether they are seeking employment), in addition to the general characteristics of the population, such as sex, age, marital status, and educational level . . . The [survey] provides the country with information on the national, *cabecera-resto* [an urban-rural measure], regional, and departmental levels, as well as for each of the departmental capitals" (Departamento Administrativo Nacional de Estadísticas 2021f).

Against this backdrop, and in light of the obstacles faced by migrants in accessing formal employment (which will be discussed below), migrants' main option for earning income tends to be informal work, and this population is at greater risk than the general population of abusive and exploitative working conditions. In an analysis of migrants' situation in this regard, the DANE found that between July and August 2021, 58.5% of migrants had worked in the previous week, 12.2% were seeking employment, and 21.1% were dedicated to housework (Departamento Administrativo Nacional de Estadísticas 2021a). Although these figures on their face seem encouraging in terms of migrants' labor inclusion, when analyzed alongside other data, they point to the difficulties faced by migrants in terms of accessing formal jobs with better working conditions. To take an example, 66% of those surveyed lacked health care coverage (ibid.).

As observed by the DANE, "migrants' limited access to the health system can be explained by their lack of regularization, as well as the fact that their labor insertion is primarily through informal employment" (Departamento Administrativo Nacional de Estadísticas 2021d, 16). Moreover, 98% of those surveyed reported that their jobs involved providing services to clients and receiving payment through a mobile app or website. Of these individuals, 52% worked with Rappi and 21% with i-food (Departamento Administrativo Nacional de Estadísticas 2021a), apps that customers use to order food, which is delivered largely by migrants. According to the Labor Observatory of the University of Rosario, in 2019, 57% of Rappi delivery people were Venezuelans ("Rappitenderos" 2019). In addition, 59% expressed their intention to look for a different job. Of these, 87% expressed wanting to earn more money, and 30% wished to work formally (Departamento Administrativo Nacional de Estadísticas 2021a). These figures reveal that a significant number of migrants are working in the informal sector, a common trait of the Colombian labor market that has been further intensified by the COVID-19 pandemic.

Moreover, the DANE notes that there are nearly three million unemployed people in Colombia, most of whom are women (56%) (Departamento Administrativo Nacional de Estadísticas 2021e). This same trend can be seen among recently arrived migrants (those who were living in Venezuela twelve months ago), where unemployed women (31.3%) considerably outnumber unemployed men (17.4%). Although the unemployment rate is lower among migrants who have resided in Colombia for at least five years—24.5% among women and 8.6% among men—the difference between sexes is still significant.

These data suggest that it is not enough to dismantle the legal barriers impeding migrants' access to employment; it is also necessary to analyze the capacity of Colombia's labor market to absorb the labor supply of migrants and to identify business sectors that have a greater demand for labor and that could facilitate the labor market inclusion of this population. It is also critical to implement structural changes that address informality, which would benefit not only migrants but also workers in general.

### *Requirements concerning the Recognition of Degrees Obtained Abroad*

The validation[12] of university degrees is another barrier faced by Venezuelans wishing to practice their profession in Colombia. This requirement particularly affects those who wish to work in the fields of health, law, engineering, and public accounting, among others, which require practitioners to hold a professional license. According to a survey conducted by the DANE, 93% of Venezuelan migrants with a professional degree earned in Venezuela have not obtained official recognition of that degree in Colombia. Among the reasons for this are a lack of required documentation (40%), unfamiliarity with the process (24%), and a lack of money (23%) (Departamento Administrativo Nacional de Estadísticas 2021a).

With regard to the required documentation, the main bottleneck is having to obtain an apostille[13] for one's diploma in the country of origin. This process is increasingly difficult to complete in Venezuela due to delays in securing appointments and steep fees (which require paying not just the cost of the procedure but also third-party agents to expedite the process), as well as the fact that it can take months or even years (Pan American Development Foundation 2019).

Once the person manages to secure an apostille for their diploma, they must seek official validation of the document by the Colombian Ministry of Education. To do so, the applicant must have a regular migration status, as well as the time and funds needed to carry out the



12 "The validation of a degree is an official recognition awarded by the Ministry of Education regarding a tertiary diploma issued by a legally authorized institution in the country of origin. This recognition allows the degree holder to access the same academic and legal benefits in Colombia that are available for degrees issued by Colombian institutions of higher education" (Ministerio de Educación 2021a).

13 An apostille is a government-issued certificate that allows a document issued in one country to be legally recognized by another country.

process, which takes approximately six months and costs COP665,900, or 73% of the minimum monthly wage (Ministerio de Educación 2021b).

### *Certification of Work Experience*

In Colombia, two common items required by employers during the hiring process are professional references and the certification of work experience. These requirements can be challenging for Venezuelans to fulfill, because former employers and colleagues who can speak to the applicant's work experience might no longer be in Venezuela or because the applicant might not have a letter verifying former employment. For example, due to Venezuela's economic crisis, many companies in the country have had to shut down.

To address this situation, the National Learning Service—a public institution charged with providing free technical, technological, and complementary training in Colombia—has developed evaluation and certification programs that allow Venezuelan migrants to register their professional profiles and "demonstrate that they are qualified to work in the job they have been performing or in the job they wish to perform" (Servicio Nacional de Aprendizaje 2021a). As noted on the entity's website, approximately 7,500 people are expected to benefit from this program in 2021 (Servicio Nacional de Aprendizaje 2021a, 2021b); however, individuals must have a regular migration status to be able to participate.

### *Barriers Imposed by Entities in the Labor Ecosystem*

Receiving an offer of employment is not a guarantee that a migrant will actually be able to access the job, for there are other barriers that discourage employers from proceeding with the hiring process. According to the employment expert cited earlier in this chapter, these barriers include the financial system, health insurance companies, pension funds, and occupational risk insurers.

With regard to the financial system, many banks refuse to allow Venezuelan migrants to open bank accounts—even when requested by employers—because they require that account holders have a regular migration status and a valid passport. This requirement is nearly impossible for Venezuelan migrants to meet in light of the widespread difficulties in obtaining and renewing passports in Venezuela—so much so that Colombia's Ministry of Foreign Affairs issued Resolution 2231 of 2021 recognizing the validity of Venezuelan passports up to ten years after their expiration date.

Similarly, Colombia's Financial Superintendence—the agency charged with overseeing actors in the country's financial system—issued

Circular 82 of 2019 stating that expired passports and special stay permits are valid forms of identification and should therefore "be accepted as autonomous and sufficient documents that allow Venezuelan nationals to contract financial services or open financial products offered by supervised entities in Colombia." Despite these measures, as noted by a report on financial inclusion published by this same agency (Superintendencia Financiera de Colombia 2021), between January 1, 2017, and December 31, 2020, only 242,601 Venezuelans had successfully accessed the Colombian financial system, representing just 18.5% of all Venezuelans aged eighteen to sixty-nine who were in Colombia at that time.

Meanwhile, there are also barriers stemming from health insurance companies, pension funds, and occupational risk insurers—entities with which all employees and self-employed workers should be registered—that have not adapted their systems to accept the identity documents held by Venezuelan migrants, such as the PEP. As described above, this phenomenon may be due to the temporary nature of this permit, and it is hoped that things will be different for the PPT, which is designed for a duration of ten years.



## Social and Cultural Barriers

This section describes some of the social and cultural barriers that Venezuelan migrants face in accessing the labor market, including xenophobic attitudes among host communities and a lack of knowledge about their rights, which can lead to exploitative working situations.

### *Lack of Information among Workers and Employers*

When migrants arrive to Colombia, they are often unfamiliar with the nature of the local labor market and with the rules that regulate it, which means that they do not have a clear idea of where to seek employment, of the different types of labor contracts that exist, and of their rights and duties. This lack of awareness of their rights places them at risk of labor exploitation, as will be explained below. According to data published by the DANE, 91% of Venezuelans had no information about specific job opportunities before arriving to Colombia, and 10% do not know where to search for employment (Departamento Administrativo Nacional de Estadísticas 2021a).

Similarly, employers lack information on migration-related legislation, on when they may or may not hire a Venezuelan migrant, and on the legal requirements in cases where they do wish to hire such a person. According to a virtual survey of 118 businesspeople conducted

by the Proyecto Migración Venezuela and Fundación Ideas para la Paz (2021), 20% of respondents felt that the law was unclear and were thus afraid to hire migrants, and 16% felt that it was very difficult to comply with the legal requirements for hiring members of this population.

### *Xenophobia*

Xenophobia is "any type of exclusion on account of ... ethnic or national origin. As a consequence, it affects conditions of equality, human rights, and people's political, social, cultural, and economic spheres. Xenophobia manifests itself through discriminatory or hostile actions of hatred toward foreigners, ranging from rejection to various types of aggression that can result in death" (Bedoya Horta et al. 2021, 8).



Xenophobia is based on the fear of migrants, whose arrival to a given country is deemed responsible for that country's problems regarding unemployment, insecurity, and so forth. Numerous studies have shown that there is no direct link between migration and insecurity or between migration and unemployment. Nonetheless, these ideas are reproduced on a daily basis and have grave repercussions for migrants' socioeconomic inclusion, including "social and labor exclusion and even physical and psychological violence" (Ramírez Bolívar and Arroyave Velásquez 2021, 7).

According to an opinion poll conducted by Invamer (2021), 61% of respondents disagreed with the government's decision to welcome Venezuelan migrants, and 65% had an unfavorable opinion of this population. These negative perceptions of Venezuelan migrants are transferred to the labor market, where they negatively impact not only hiring processes but also working relationships once a migrant has managed to get hired. For example, in the aforementioned survey conducted by Proyecto Migración Venezuela and Fundación Ideas para la Paz (2021), 23% of the businesspeople surveyed reported having little or no trust toward Venezuelan migrants, and 44% stated that this population generated neither trust nor distrust.

One example of how xenophobia affects migrants' labor inclusion can be seen in the barriers erected by professional associations; in many fields, such as health, it is not enough for job applicants to validate their foreign diplomas—they must also have a professional license. According to a lawyer specializing in the validation process whom we interviewed for this chapter, many of his clients are able to validate their diplomas with the Ministry of Education but then face difficulties when dealing with the relevant professional associations, which impose additional obstacles—devoid of any legal basis—concerning the issuance of professional licenses.

In early 2020, there was a public discussion about rolling out an expedited validation process for migrant physicians' medical degrees in order to help Colombia address the health worker shortage during the COVID-19 pandemic. But when the government expressed its intention to ease requirements for the validation process, Colombian medical associations voiced their opposition, arguing that there was no shortage of health workers in the country ("Fuerte rechazo de médicos a convalidación exprés de títulos" 2020). The inability of migrants to practice their professions hinders the migrant population's capacity to contribute to the country's labor market and overall development.

### *Labor Exploitation*





People with irregular migration status are at greater risk of labor exploitation (Piper 2005). One reason for this heightened vulnerability is the fact that the vast majority of irregular migrants work in the informal economy, where they lack the protection (whether entirely or in part) of the host country's labor laws and social security and welfare measures (International Labour Organization 2008).

The International Labour Organization (2008) has identified at least five indicators of exploitation against migrant workers: (i) nonpayment or withholding of wages; (ii) retention of identity documents; (iii) excessive daily shifts (between twelve and sixteen hours a day) or work weeks without a day of rest; (iv) violations of physical integrity (physical punishment, intimidation, ridicule, and sexual exploitation); and (v) poor living conditions, including inadequate food, water, and lodging.

According to a study conducted by the Pan American Development Foundation (2019), labor exploitation is one barrier faced by Venezuelan migrants in Colombia that makes it difficult to secure stable employment. Those interviewed for the study reported being victims of a variety of labor abuses, including excessive working hours, less than minimum wage, mistreatment, and changes in the conditions of employment after commencing a job.

In terms of hours worked, a study by the Universidad Externado de Colombia covering the period 2014–2019 found that Venezuelan migrants worked an average of fifty hours a week, six hours more than their Colombian counterparts (Farné and Sanín 2020). However, they are employed for less time—about ten months a year, which is one month less than Colombians. With regard to wages, Venezuelans

> earn less than Colombians, even though they work more hours. They earn 12% less if they are self-employed—626,000 pesos versus 710,000 pesos a month—and approximately 10% less if they are salaried work-

ers—1,270,000 pesos versus 1,390,000 pesos a month. In contrast, there are no significant differences in the case of domestic workers. (ibid., 22)

According to an interview with a local public official, one of the difficulties in dealing with cases of labor exploitation is victims' reluctance to file complaints with authorities out of fear of losing their jobs. It is thus critical to develop and conduct awareness-raising campaigns aimed at the migrant population, employers, and local authorities concerning migrants' labor rights and how to prevent and punish labor exploitation.



## The Path Forward: Migrants' Socioeconomic Integration and Their Enjoyment of the Right to Decent Work

The socioeconomic integration of migrants and refugees requires the involvement of all levels of the host society. The task goes beyond the design and implementation of public policies—it requires an active synergy between the public sector, private sector, and society in general in order to be effective.

Migration poses a variety of challenges for receiving countries. However, studies show that migrants' labor inclusion can have a positive impact on national economies and development. According to one study, migrants contributed 9.4% of the global GDP in 2015, and they had the potential to add another trillion dollars to the global economy annually if they enjoyed greater integration (International Organization for Migration 2019). In addition, "the increased availability of skills provided by migrant workers helps to boost gross domestic product (GDP), stimulate business development and job creation, enhance performance of national social security systems and foster innovation" (Inter-Parliamentary Union et al. 2015, 22).

As noted earlier, migrants' labor inclusion has a positive effect on other indicators related to socioeconomic integration, including education level, family reunification, political participation, and regularization (International Organization for Migration 2019). It also allows migrants to live in better conditions, contribute to the community's development, build relationships with the local population, and enjoy the rights to health and social security. Conversely, some studies have shown that restricting migrants' and refugees' access to work considerably slows their economic integration and reduces their motivation to integrate (Marbach et al. 2018).

That said, the collective benefits of labor inclusion should not eclipse the need to ensure that the jobs obtained by migrant workers meet the standards of decent work. The recognition of decent work as a human right means that states may not pursue economic growth at the expense of the exploitation of migrants and refugees, but instead must seek to ensure opportunities and prosperity for all.

In order to guarantee the right to work for Venezuelan migrants in Colombia, we offer the following recommendations for the Colombian government:

- Design and implement public policies aimed at formalizing employment and ensuring respect for the human rights of all workers in Colombia, including migrant workers.
- Broaden the scope of social policy programs to include migrants so that this population is better equipped to overcome socioeconomic marginalization and can more easily access labor inclusion programs.
- Fund studies on Colombia's supply of and demand for labor. This information can contribute to a deeper understanding of the sectors with labor demand and how this demand can tap into the labor supply of migrants, refugees, and other vulnerable populations. One important step that the government has already taken in this regard is the rollout of "Employment Mission," a nationwide initiative supported by international development agencies whose aim is to "design viable strategies and policy instruments to improve labor market performance" (Misión de Empleo 2021). It is hoped that the mission's report will be published soon.
- Conduct awareness-raising campaigns among the migrant population and employers on the temporary protection status for Venezuelan migrants and other regularization pathways, as well as on Colombia's labor and immigration laws.
- Soften the apostille requirement for diplomas obtained outside of Colombia and reduce the costs of validating such diplomas so that migrant professionals can exercise their occupations in Colombia.
- Strengthen and provide funding for labor intermediation programs, such as the National Employment Service, as well as the National Learning Service's skills assessment and certification programs.
- Provide training for public officials tasked with identifying and sanctioning labor exploitation, with the aim of empowering them to take exemplary measures and prevent future abuses.
- Design local plans aimed at strengthening host communities' ability to foster migrants' integration into society, solidarity and mu-

tual respect among communities and migrants, and conflict resolution by peaceful means (Ramírez Bolívar and Arroyave Velásquez 2021).

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# Adrift: Venezuelan Refugees and Migrants in Peru and Their Right to Work during the COVID-19 Pandemic and Subsequent Economic Recovery

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* We are grateful to Xenia Mejía, research assistant at Equilibrium CenDE, for her collaboration.

## Introduction

As a result of the COVID-19 pandemic, the world is facing one of the most complex global challenges of our times. People's health is at risk, economies are in decline, and people's ability to sustain themselves economically is diminishing. Further, as is often the case, certain groups of people are being affected in specific ways due to their preexisting vulnerability.

Migrants and refugees, especially those coming from crisis contexts and who have begun their journeys with little advance planning or resources, face a series of challenges to accessing opportunities in their host countries. Starting with the right to identity and legal recognition, the rights of these persons are often violated. The same goes for their right to work.

For migrants and refugees from Venezuela, the situation is even more dire. Most of these individuals have migrated to countries in Latin America and the Caribbean and face the challenges just mentioned. But in addition, they are confronting a context in which regional mobility for Venezuelan migrants and refugees is being increasingly restricted by the migration and refugee policies of some countries.

Toward the beginning of 2017, when Venezuelans began arriving to Peru in large numbers, the Kuczynski administration adopted short-term measures that seemed to support the regularization of these migrants and refugees, especially with regard to their access to the labor market. However, as time went on, these policies changed, and today we find a migrant population that faces extreme barriers to regularization and that works largely in precarious informal jobs.

Against this backdrop, the arrival of the COVID-19 pandemic has had a considerable impact on this population's ability to earn a living. Their vulnerability, which was already concerning, has surged: two weeks after the nationwide lockdown went into effect, three out of four Venezuelan households were unable to meet their basic needs

(Equilibrium CenDE 2020a); by April 2020, 95% lacked the means to purchase basic products (Equilibrium CenDE 2020b). In the absence of their inclusion in government measures to support vulnerable populations during this period, migrants and refugees were left adrift.

As we were writing this chapter, Peru's economy was slowly being reactivated and we found ourselves in what is known as the "new normal." In this context, migrants and refugees have opted largely for self-employment and alternative ways of earning income. Further, the failings of our country's systems and institutions during the pandemic have revealed the need for structural change. So we ask ourselves, might this moment bring new opportunities for integrating the migrant population and thus guaranteeing their right to decent work?

The first two sections of this chapter describe the Venezuelan migrant and refugee population in Peru, as well as the country's migration policies and their relationship with the right to work. The third and fourth sections analyze the Peruvian labor market and the impacts it has suffered as a result of the COVID-19 pandemic. We conclude the chapter by exploring the current status of migrants' right to work in Peru, as well as the challenges and opportunities embedded in this "new normal."

## Venezuelan Migrants in Peru

Venezuela is experiencing a severe economic, political, social, and humanitarian crisis that has forced more than 5.2 million people to leave the country in search of better living conditions and international protection (Plataforma de Coordinación para Refugiados y Migrantes de Venezuela 2020). According to the 2019–2020 National Survey of Living Conditions (Universidad Católica Andrés Bello et al. 2020), the main reason behind this emigration from Venezuela is economic necessity (82.3%). Family reunification has gained greater importance (5.8%), while violence and insecurity, along with political reasons, have taken third place.

The search for work would seem to fit within the popular notion of "economic migrant." However, research on Venezuelan migrants shows that social, economic, and cultural rights are not guaranteed in host countries and that violations of these rights are "systematic and generalized" (Berganza, et al. 2020, 403).

During 2019–2020, 96% of households in Venezuela were living in poverty, of which 79% were living in severe poverty, meaning that they did not earn enough money to acquire the basic food basket. With regard to food insecurity, 30% of children under five

in Venezuela are chronically malnourished, and 74% of households experience moderate to severe food insecurity (Universidad Católica Andrés Bello et al. 2020).

This combination of factors suggests that emigration from Venezuela has gone from being "planned" migration to a "massive" and forced exodus (Herrera and Cabezas 2019, 127). It can thus be considered a refugee crisis.

The vast majority of Venezuela's migrant population (80%) migrates to countries in Latin America and the Caribbean, constituting the "largest exodus in the region's recent history and one of the biggest displacement crises in the world" (United Nations High Commissioner for Refugees 2020, 10). Peru is home to the world's second-highest number of Venezuelan refugees and migrants—1,043,460 as of August 31, 2020 (Plataforma de Coordinación para Refugiados y Migrantes de Venezuela 2020)—and is the largest recipient of asylum-seeker claims from Venezuela worldwide. By the end of June 2020, Peru had received a total of 496,095 claims, more than half of which were submitted in 2019 (ibid.).

On average, Venezuelan migrants in Peru have higher levels of educational attainment than those of Peruvians (Asencios and Castellares 2020). According to a survey conducted by Equilibrium CenDE in June 2020, 47.5% of Venezuelan migrants have tertiary degrees (university, vocational, or master's). Further, more women have such degrees than men (50% versus 46% of those surveyed) (Equilibrium CenDE 2020c).

This population is also characterized by being young and of working age: 61.4% are between the ages of eighteen and thirty-four, although adults over sixty are increasingly arriving to Peru (International Organization for Migration 2020). Since 2018, there has been a feminization of migratory flow from Venezuela, with women entering Peru in greater numbers than men: the percentage of women appearing in the International Organization for Migration's data-collection rounds increased from 37.4% in September–October 2017 to 55.2% in September–December 2019 (International Organization for Migration 2017, 2020). In addition, people who are married or in a relationship predominate (52%), as do those who are traveling with their family unit (60.6%) (International Organization for Migration 2020).

Over the past two years, Peru has cemented its status as a host country: of the refugees and migrants who arrived during the last quarter of 2019, 92.6% identified Peru as their main destination, compared to just 65% of those who arrived in 2017 (International Organization for Migration 2017, 2020). The vast majority arrive by land—mainly in bus (85%)—and increasingly rely on their Venezuelan identity card

(64.5%) as a form of identification due to the difficulties in obtaining a passport in Venezuela (Instituto Nacional de Estadística e Informática 2018; International Organization for Migration 2019).

Nonetheless, the migration policies of many Latin American and Caribbean countries have provided a breeding ground for illegal human traffickers: 44.7% of Venezuelans report having received offers by third parties willing to help them enter Peru through illegally (International Organization for Migration 2020). Despite the growing precarity of persons displaced from Venezuela, this migration phenomenon represents an opportunity for Peru if the government adopts policies promoting the labor inclusion of this population.



## Peruvian Migration Policy and Its Relationship with Refugees' and Migrants' Right to Work

Peru boasts a supportive and innovative legal framework on migration. The most recent development in this regard is the Migration Law, enacted through Legislative Decree 1350 of 2017 and regulated through Supreme Decree 007 of 2017. This law recognizes migrants' access to work under "equal conditions as nationals" and notes that a person's irregular migratory status shall not affect the exercise of their labor rights. Moreover, policies such as the 2017–2025 National Migration Policy[1] embrace a focus on "equity and equality of opportunities and rights."

In early 2018, Peru was the first country in the region to establish a specific regularization mechanism for Venezuelans—the temporary stay permit, or PTP—to allow Venezuelans temporary residence and to facilitate their access to work. The PTP system underwent three phases of implementation, with a total of 437,624 permits granted[2] between the start of the program and its termination on October 31, 2018.[3]

However, the PTP was not a migratory status in itself; Venezuelans who obtained the permit did not get a *carnet de extranjería*, the Peruvian identity card for foreign residents, and they did not have the same rights as foreign residents (Acosta et al. 2019). This caused confusion

1 Approved via Supreme Decree 015 of 2017.

2 Data as of June 5, 2020, from the National Superintendency of Migration.

3 There were four supreme decrees regulating the PTP: 002 and 023 of 2017, and 001 and 007 of 2018. Supreme Decree 001 of 2018 stated that any Venezuelan who entered the country legally during 2018 could request a PTP until June 30, 2019. However, these dates were modified through Supreme Decree 007 of 2018, which limited PTP applications to those who entered prior to October 31, 2018, and filed their applications before December 31, 2018 (Berganza and Solórzano 2019).

among the population and resulted in employers refusing to accept the PTP as valid documentation for employment, as well as in difficulties in opening bank accounts and the inability to sign up for the public health insurance scheme, Seguro Integral de Salud. Further, since the wait times to obtain the PTP sometimes exceeded six months, the government offered the "extraordinary temporary work permit" to all individuals awaiting a PTP so they could work, though their employment contracts could not exceed the period of validity of this extraordinary permit (sixty days) (Blouin 2019).

However, over the past two years, the government's initial openness toward immigration has taken a more restrictive and securitized approach. Not only has it stopped issuing PTPs, but in January 2019 it began requiring Venezuelans to show a passport in order to enter the country[4] and, in June 2019, began requiring a "humanitarian" visa, with some exceptions, under the pretext of promoting safe and orderly migration and acknowledging Venezuela's humanitarian crisis.[5] Those entering Peru with this visa can apply free of charge for the *carnet de extranjería*, which is valid for 183 days.

The lack of regularization mechanisms, particularly after the disappearance of the PTP, has led to a substantial increase in asylum applications. In terms of international protection, Refugee Law No. 27891 of 2002[6] reflects the traditional definition from the 1951 Refugee Convention and the broader definition from the 1984 Cartagena Declaration on Refugees, though Peruvian law excludes the concept of "generalized violence."[7]

Asylum seekers also receive a temporary document (*carnet*) that explains their condition—this document is valid for sixty business days, after which point it can be renewed—and a work authorization

4 Through Resolution 000270 of 2018, Peru's immigration authority, Migraciones, held that as of August 25, 2018, Venezuelans entering the country would be required to present a valid passport. The Fifth Criminal Court of Lima, in October of that year, issued a ruling that quashed the resolution, responding to a lawsuit filed by the National Coordinator for Human Rights. Nonetheless, the policy was back in effect in January 2019 following an appeal filed by Migraciones and the Ministry of the Interior (Freier and Castillo Jara 2020).

5 Via Resolution 177 of 2019.

6 Its regulations are outlined in Supreme Decree 119 of 2003.

7 As this chapter was being finalized, Peru changed its policy regarding asylum seekers. In early July 2021, the Ministry of Foreign Affairs issued Ministerial Resolution 0207 establishing guidelines for the humanitarian migration visa (*calidad migratoria humanitaria*), a complementary protection outlined in the Migration Law, for individuals who are in Peruvian territory as asylum seekers or who do not meet the requirements for refugee status but who are in a situation of extreme vulnerability or danger.

letter. However, this letter is not a legally recognized document and does not suffice for securing the national labor authority's approval of an employment contract (Encuentros-Servicio Jesuita de la Solidaridad et al. 2018). Since Peru does not apply the broad definition of refugee provided in the Cartagena Declaration to Venezuelan migrants, the protection system has been overwhelmed, resulting in delays in the issuing of these temporary documents, which has left nearly 400,000 applicants without their *carnet* and thus without assurances for regularizing their status[8] (Briceño et al. 2020).

The difficulties of regularization have meant the violation of Venezuelan migrants' labor rights. The limited duration and the multiplicity of migration statuses—each with their own requirements and legal effects—as well as the waiting times for obtaining documents granting the right to work, create a sense of insecurity among the migrant population and among employers, who have the discretion to request certain documentation in the absence of standardized criteria (Blouin and Freier 2019, 168).





Although these documents recognize the right to work, their utility in practice lies in demonstrating that the person holds a legal migratory status: "One of the most important barriers is the scarce recognition in practice of the asylum-seeker *carnet* and their work authorization ... which has negative impacts on employability" (Luzes et al. 2021, 63–64). This points to the need to see Venezuelan immigration as a long-term phenomenon, to consider issuing the *carnet de extranjería* to Venezuelan migrants (given that it guarantees comprehensive access to fundamental rights), and to prioritize this document over other migration documents (Briceño et al. 2020).

After holding a PTP for one year, Venezuelans can obtain the *carnet de extranjería* through a temporary "special" residence status. However, the cost of the paperwork (approximately US$76), added to the cost of fines in cases where the applicant's PTP has expired (US$1.20 per day), prevents many Venezuelans—who rely on limited income for their survival and for sending remittances back home—from seeking this status. This increases their risk of losing their legal immigration status.

A few months ago, Peru's immigration authority, Migraciones, announced the rollout of a new temporary permit, the temporary residence permit, or CPP,[9] with the aim of regularizing foreigners with

8 Persons who have been unable to formally file their asylum application are given a form certifying their intention to apply for refugee status.

9 Via Supreme Decree 010 of 2020.

irregular status. This measure, like others, has a short-term and exceptional approach, which is problematic given the aforementioned challenges faced in the PTP's implementation.

Added to the problematic state of migration documents is a labor system that encourages differential treatment toward foreigners in Peru. According to article 1 of the 1991 Foreign Workers Law, "employers ... shall give preference to the hiring of national workers." Under this law, foreign employees must not exceed 20% of a company's personnel, and their salaries shall not exceed to 30% of the company's total wages and payroll,[10] while the 2004 Income Tax Law stipulates a 30% tax rate for foreign workers during their initial six to eighteen months in the country.[11]

Migrants and refugees also need to secure official recognition of any degrees obtained aboard in order to certify their academic knowledge. Moreover, Peruvian professional societies are responsible for establishing the procedures and granting authorization for professional registration and licensing. These procedures are designed in a way that ignores the reality of Venezuelan professionals and inhibits their integration into the labor market (Castro et al. 2021).

The upshot of the aforementioned challenges is a state of migratory, employment, and economic instability that violates the labor rights of Venezuelan migrants and refugees. This population is thus compelled to engage largely in precarious work, which in turn restricts their ability to contribute to the country's development and growth.

## The Peruvian Labor Market and the Impact of COVID-19

The Peruvian labor market consists largely of informal work: nearly three out of four people in the country are employed informally (Instituto Nacional de Estadística e Informática 2021). Informal employment not only tends to mean low-quality jobs and unstable working conditions but also means fewer tax contributions for employees, which reduces their ability to receive an adequate pension upon retirement (Loayza 2007).

10 Article 4 of Legislative Decree 689 of 1991 and its regulations through Supreme Decree 914 of 1992.

11 Applicable to non-residents via Supreme Decree 179 of 2005. Foreigners are considered non-residents when they do not have a permanent residence in Peru or when they do have such a residence but are absent for more than 183 days during a twelve-month period. For independent workers and those who earn self-employment income, the tax is applied to their net income. For those who are on a company's payroll, the tax is deducted from their paycheck.

Women are affected more by this problem than men, for their rate of informality is 76.1%, compared to 69.8% among men (Instituto Nacional de Estadística e Informática 2019). There is a gender pay gap: on average, women earn 28.5% less than their male counterparts for performing the same work; in other words, women earn 0.72 soles for every 1 sol earned by men (ibid.)

There is also a skills gap, understood as the discrepancy between the skills sought by employers and those held by workers and jobseekers. According to a study conducted by the Inter-American Development Bank, 47% of the companies in Peru that have vacancies have a hard time finding employees with the required skills, a gap that is especially large in sectors such as health (71% of companies) (Novella et al. 2019). This is concerning because it affects the productivity of Peruvian companies due to delays in the development of products and services.



The COVID-19 crisis, the government's lockdown measures, and the global economic slowdown due to the pandemic have had a heavy impact on Peru's economy and thus its labor market. With regard to impacts on the economy, in the second quarter of 2020, the World Bank (2020b) forecasted that Peru's gross domestic product would fall 12% by the end of the year, meaning that Peru would be the region's second-worst-performing country in 2020.

According to a study by the Institute of Peruvian Studies, in April 2020, just 10% of the country's population was working from home; in other words, telecommuting applied to only a small minority (Instituto Peruano de Economía 2020). Moreover, 31% of residents reported being out of work due to the COVID-19 crisis, but this percentage rose to 59% among lower socioeconomic groups. However, June 2020 saw an improvement in the overall picture thanks to the economic rebound, with fewer Peruvians reporting being unemployed (27% among the general population and 34% among lower socioeconomic groups).

In light of this situation, the Peruvian government has rolled out a series of social protection mechanisms to counteract the pandemic's negative effects on the population. It has provided humanitarian aid, such as the delivery of food baskets to vulnerable groups, as well as cash payments to a variety of population groups, including rural families, people living in poverty, informal workers, and those whose work contracts were temporarily suspended[12] and who were earning

12 The *suspensión perfecta de labores* is a temporary suspension of a worker's obligation to provide a service to their employer and of the employer's obligation to pay the worker's salary, but without terminating the employment contract. It can be applied to one or more employees.

up to 2,400 soles (about US$597) a month. However, these measures have been aimed solely at the Peruvian population, overlooking migrants and refugees even though they also constitute an especially vulnerable group.

This situation is worrisome given that Venezuelan migrants work largely in the restaurant and retail sectors (Equilibrium CenDE 2020c), two of the sectors hardest hit by the pandemic. The World Bank (2020a) has projected that this situation will have significant impacts on the poverty levels of migrants and refugees: a loss of two weeks' work among informal workers will increase their rate of monetary poverty from 18% to 59%, moderate poverty from 14% to 39%, and extreme poverty from 4% to 20.5%.

## The Current Employment Context for Migrants and Refugees in Peru

Compared with the host population, rates of informality are even higher among Venezuelan migrants. In 2018, 88.5% of Venezuelan migrants working in Peru did not have a formal labor contract—a rate that has improved little since. Venezuelans in Peru work more hours on average than the host population: sixty-three hours a week for men and fifty-six for women. But despite working more hours, they earn less than their Peruvian counterparts: men earn an average of 1,183 soles (US$296) per month and women 1,026 soles (US$257) (Instituto Nacional de Estadística e Informática 2018).

Complicating matters, the Venezuelan population in Peru must deal with discrimination when seeking employment: 41% report experiencing discrimination on the basis of their nationality, 18% report having experienced workplace abuse, and 7% of women report feeling stigmatized or discriminated against on account of their gender. In addition, the difficulties in obtaining migration documents and official recognition of their educational degrees present an important barrier: 33% consider the lack of a work permit as one of their main obstacles, and 14% see their inability to obtain official recognition of their professional degrees as their main challenge (Equilibrium CenDE 2020c).

The employment instability faced by migrants, together with the type of work that they tend to perform, makes them one of Peru's most disproportionately affected groups in light of the national state of emergency and lockdown measures applied during the COVID-19 pandemic. The main economic activities in which Venezuelans are currently engaged are street vending (37%), retail (9%), and restaurants (5%, with 3% working as cooks and 2% as waiters). For women, the

main sources of employment are street vending (39%) and retail (10%); but unlike men, they also work in traditionally feminized sectors, such as domestic employment and cleaning services (14%) and hairdressing and beauty services (9%) (ibid.).

At the beginning of Peru's lockdown in March 2020, 33% of Venezuelan migrants reported being unemployed, and 50% reported being at home and unable to work but retaining their jobs (Equilibrium CenDE 2020a). In addition, 7% reported being homemakers, students, or retired persons, and only 9% reported actively working: 4% telecommuting, 3% authorized to leave home to work, and 2% leaving home to work without being authorized to do so. In June 2020, as certain sectors of the economy began opening up, the proportion of migrants (nearly 20%) who began working because they were authorized to do so increased (Equilibrium CenDE 2020c). Meanwhile, 43% of Venezuelan migrants reported being unemployed as a result of the lockdown, in addition to the 9% who were already unemployed (see table 1). Thanks to the opening of the economy in recent months, the vast majority of those who were at home and unable to work have returned to their jobs.



**TABLE 1**

**Employment situation among Venezuelan migrants and refugees during the COVID-19 pandemic**

| Which of the following options best describes your current situation? | March 2020 | % change (March to June 2020) | June 2020 | % change (June to October 2020) | October 2020 |
|---|---|---|---|---|---|
| Not specified | 1% | +1% | 2% | -1% | 1% |
| I'm working because I need to, even though I am not legally authorized to do so | 2% | +10% | 12% | N/A | N/A |
| I'm working because I'm part of a group of people authorized by the government to work | 3% | +17% | 20% | +23% | 43% |
| I am telecommuting | 4% | -2% | 2% | +4% | 6% |
| I am a homemaker, student, retired person, or occasional worker | 7% | +4% | 11% | -1% | 10% |
| I am unemployed | 33% | +19% | 52% | -12% | 40% |
| I am at home and unable to go to work, but I remain employed | 50% | -49% | 1% | N/A | N/A |

Source: Equilibrium CenDE (2020a, 2020c, 2020d)

Among migrants, women have been the most affected. According to a study by Vásquez, Castro, and Licheri (2020), migrant women are 48% less likely than migrant men to have maintained their earning capacity during lockdown. In June 2020, of the Venezuelan women surveyed, 21% reported having a job and going out to work, compared to 43% of their male counterparts.[13] The burdens of housework and family responsibilities multiplied during lockdown, falling primarily on women and adolescent girls. These conditions, added to the difficulties faced by women in general in Peru's labor market, has placed Venezuelan women at a disadvantage in their ability to earn a living.

Peru's economic paralysis and the blow to the employment situation as a result of the pandemic did not differentiate between regular- and irregular-status migrant workers. Even though migration documents are a requisite for being able to sign an employment contract, they are not sufficient for obtaining work, particularly in a labor context characterized by high levels of informality. Nonetheless, not having valid migration papers for formalizing a job offer decreases one's chances of securing a work contract by 15% (Vásquez et al. 2020).

## Challenges and Opportunities for Employment under the New Normal

The impact of COVID-19 and the measures taken by the government to contain the pandemic have not only short-term repercussions on the economy but also medium- and long-term ones. The labor market is now exhibiting changes that are here to stay. Employers are seeking more flexibility vis-à-vis their employees, from their hiring model to employees' working arrangements. Peru is known for its rigid labor practices (Jaramillo and Ñopo 2020) that make it difficult for employees to switch jobs within the formal labor market. In terms of working arrangements, those jobs that can accommodate telecommuting will shift to remote working arrangements, whether completely or at least partially.

Given the decreasing need for employees' physical presence in the workplace, work is now frequently measured by results achieved instead of hours worked. These trends lean in favor of self-employment and contract-based work instead of employment on a company payroll, which could open the door for interesting possibilities for migrants. Furthermore, migrants could complement the local labor

13 Data disaggregated by gender and other variables—such as age, educational attainment, and time living in the country—are available upon request from Equilibrium CenDE.

market with their training and help close the skills gap that currently exists in the country.

Due to companies' lack of demand for personnel and the resulting high levels of unemployment, many people in Peru prefer to earn a living through entrepreneurship and self-employment. That said, the sectors with the highest barriers to entry for starting a business are those that have been most impacted by the pandemic: services that require physical presence, such as gastronomy, street vending, retail, and beauty and hairdressing, among others. The job opportunities that are on the rise are those that require digital skills (McKinsey Global Institute 2020). Operations, marketing and publicity, sales, and, to the extent possible, products and services, are becoming increasingly digital. While this presents an interesting opportunity for increasing efficiency in the marketplace, those individuals who lack the skills to do this type of work will be increasingly at a disadvantage. This includes migrants, of whom a mere 4% reported telecommuting at the beginning of the pandemic (Equilibrium CenDE 2020a).



The new labor market reality offers challenges but also opportunities for the reinvention of employees, employers, and decision-makers involved in designing employment policies. Venezuelan migrants can play a fundamental role in this process. In order to take advantage of this human capital and turn it into a benefit for the national economy, it is imperative that Peru implement structural changes that support migrants' labor market integration. This could be done by, for example, creating better migration regularization mechanisms, making the country's tax law more flexible for migrants, eliminating caps on the number of foreign employees that a company can hire, creating a supportive environment for migrant entrepreneurship, and including the migrant population in policymaking at the national and local levels.

## Conclusion and Recommendations

Although Peru's migration policy appears to promote openness and integration, and although the government adopted a few encouraging short-term measures at the start of the Venezuelan migration influx, the country's reception process in practice has been mired by inefficiency, unreliability, and inconsistency. This has played an important role in the violation of the right to work of migrants and refugees, most of whom have been forced to rely on the informal economy for work that does not allow them to fully exercise their skills and abilities. This inefficient process for labor market integration has given rise not only to the underutilization of the human capital of migrants but also, in

conjunction with certain political and media narratives, to an increase in the host population's rejection of migrants.

Considering the general lack of support networks available to Venezuelan migrants, their limited access to financial products and social services, and the high level of vulnerability in which most of them began their migration journey, Peru's flawed labor integration approach has placed Venezuelans in a worrying situation against the backdrop of the COVID-19 pandemic. Among the migrants who are most affected from a labor perspective are women.

With the exception of the *carnet de extranjería* (the identity card for foreigner residents), migration documents in Peru are inadequate and do not guarantee access to rights in practice. This is evidenced by the fact that Venezuelan migrants and refugees—who are particularly vulnerable—have not been effectively included in the social assistance policies rolled out by the government during the pandemic, since the national identity card is required to access financial assistance programs. Moreover, the high levels of informality and limited migration records have meant that the efforts of civil society organizations and the international community have not always reached this population. As a result, most migrants and refugees are currently relying on informal self-employment, as well as their own ingenuity, to make a living and support their families.

That said, the "new normal" presents a variety of opportunities. For one, we find an evolving marketplace and a significant number of medium and large companies that are struggling to adapt, which could mean an opportunity for migrant entrepreneurs and self-employed migrants to get a foot in the door. Second, the need for qualified staff in certain sectors could allow certain migrants to exercise their professions; this is particularly the case for the health sector. But even more importantly, the pandemic has exposed the weaknesses of our systems and institutions, sending an important message about the need for structural change. Such change could foster the development of policies encouraging migrants' integration into the Peruvian labor market and respect for their right to work.

Several basic steps are needed to make this happen: (i) a regularization program that takes a long-term approach by waiving fines for missed deadlines and by opening up channels for individuals with an irregular migration status; (ii) the elimination of caps on the number of foreign employees that a company can hire and of the higher income tax for foreign employees; (iii) more systematic recognition of migrants' professional degrees and skills; (iv) efforts to fight xenophobia; and (v) greater alignment within migration policy at all levels of

government in order to streamline the migration process and eliminate inconsistencies.

While these are changes that must be made at a structural level, the only way to make them happen is through an active and united civil society in the face of the transformative processes that our countries will face. Further, this civil society needs to be organized and coordinated not only throughout the national level but throughout the regional level, because we cannot forget that this particular migration phenomenon is indeed a regional challenge; in fact, it is among the most formidable that we have faced in recent years.



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# Catch-22: The Labor Market for Senegalese Migrants in Argentina

*María Luz Espiro and Bernarda Zubrzycki*

## Introduction

As in many other Latin American countries, irregularity in the labor market in Argentina is a structural problem that limits Argentineans' and foreign residents' chances of securing formal employment. Street vending, an occupation that is accessible with little capital and little command of the local language, is one of the most dynamic sectors of the informal economy and is the occupation that many migrants hold, regardless of their legal status. Among these migrants are Africans, especially persons from Senegal.

According to a recent report on migration regularization in South America, "the most selective and difficult-to-access migration categories are those linked to work" (Centro de Estudios Legales y Sociales and Comisión Argentina para los Refugiados y Migrantes 2020, 26). To take an example, Argentina's immigration law—Law 25871 of 2004—treats migration as a human right and grants social rights to migrants regardless of their legal status, but prohibits "irregular" migrants from obtaining formal employment and makes regularization difficult for non-Mercosur migrants who enter through illegal means.

This is partly what we mean by the title of this chapter, "Catch-22." Under Argentina's immigration law, one of the criteria that allows an irregular migrant to secure residency is the possession of a formal labor contract—but, as we will see below, they must have a regular migration status in order to secure such a contract. In other words, they face an impossible situation under the law: as irregular migrants, they need formal work in order to be regularized, but they cannot access formal work due to their irregular status.

In this regard, our chapter has two aims. First, we analyze the labor market integration of Senegalese migrants in Argentina and the phenomenon of labor (in)formality in the country. Second, we explore the racist practices that are employed against these migrants in the context

of hypervisibilization by government authorities, which in turn has an effect on the world of work.

The first Senegalese migrants arrived to Argentina in the late the 1990s as a result, in part, of high levels of unemployment in Senegal and a global reshaping of migration. The securitization and outsourcing of border control in the European Union, together with the anti-immigration policies adopted in the United States after 2001, led to a diversification of destination countries in which Argentina and Brazil were added to the list.

It is thus unsurprising that significant numbers of Senegalese migrants[1] began arriving to Argentina after 2001 and again after the global economic crisis of 2008. At the time, Argentina had a progressive immigration law and strong migration networks, as well as lax border control and abundant access to informal work. From that point forward, the presence of Senegalese migrants grew more visible, particularly considering that they often worked as street vendors in the major cities of a country whose identity was built on the notion of a white, European, modern, and Catholic society, with a racial classification system that made its Afro-descendants invisible on a daily basis (Morales 2010).



This chapter is organized as follows. After this introduction, we offer a theoretical groundwork for understanding Argentina's migration policy and its effects on Senegalese migrants. We then describe the reasons behind the unequal opportunities facing migrants who seek to access better jobs and the labor market in general. Next, we look at the characteristics of Argentina's labor market, drawing on a recent study by the International Organization for Migration (IOM), in addition to presenting our own brief profile of Senegalese migrants based on original research. Then we briefly examine a neglected aspect of labor inequality that is ubiquitous throughout Latin America. In the following section, we offer some ethnographic cases for readers. We end the chapter by outlining a set of conclusions and recommendations.

1 Although Senegalese women also migrate to Argentina, the country's Senegalese migrant population is overwhelmingly male. There are no exact figures on the size of the Senegalese population in Argentina, and official numbers are underestimates. According to the Association of Senegalese Residents in Argentina, there are 5,000 such migrants; of these, fewer than 100 are women, as noted by the president of a Senegalese women's association, and it is difficult to identify a precise number due to this population's high mobility.

## "Regimes of Mobility" and Argentina's Immigration Law

There is now widespread consensus within the literature on migration that migration seldom involves an exact plan and a single decision-making event; more often than not, migrants face a variety of mobility options as they pass through different circumstances over time. However, these options are constrained by several factors, including a person's membership in social networks, their amount of savings, and, above all, the surrounding "regimes of mobility" (Glick Schiller and Salazar 2013; Shamir 2005), which include mechanisms for the management, control, and criminalization of migrants, as well as the securitization of national borders. But at the same time, a perspective focused on regimes of mobility "allows us to capture the agency of migrants, who respond to, evade, and avoid controls, thereby overcoming perceptions that see them as mere victims" (Gil Araujo and Santi 2019, 4).

According to Domenech (2017), some analyses on South America suggest that migration policies in the region have overcome a security- and control-based paradigm in favor of one based on human rights, and that only in the wake of "progressive governments" have securitization- and criminalization-based approaches emerged. But as he rightly points out, South American countries have adopted a number of migration control and surveillance practices that warrant critical study. Among the most notorious of these practices, without a doubt, is the conceptualization of migration in terms of legality/illegality and regularity/irregularity.

Domenech argues that these two approaches—the governance-based one and the securitization-based one—are actually complementary to each other within the current global regime of migration control, particularly the framework that he denotes as "control policies with a human face." In other words, under the human rights discourse, migration control displaces—but does not eliminate—restrictive and coercive measures. The purpose is thus not to fulfill the human rights of migrants but to achieve better results in the administration of migratory flow.

Argentina is no exception to this characterization. The governance-based perspective is the one embraced by the state in its immigration law, Law 25871, which was passed in 2004 and whose regulations were issued in 2010. The idea behind this approach is to turn migration into an orderly, predictable, and manageable process in a way that is worthwhile for all involved—hence the importance of controlling irregular migration (Courtis and Pacecca 2007; Domenech 2011, 2013).

Acosta Arcarazo and Freier (2015) note that Argentina, by passing this law, became a regional pioneer in adopting progressive migration policies and embracing an ideological shift toward the fundamental right to migrate.

Indeed, the law stipulates that migrants are entitled to certain social rights beyond those concerning their migration status, such as access to health and public education, although it prohibits irregular migrants from accessing "formal" employment. Put another way, the immigration law impedes irregularly situated migrants from accessing work, whether such work be through self-employment or employment by another party (art. 53), and it also prohibits anyone from providing paid work, with or without an employment relationship, to a foreigner residing irregularly in Argentina (art. 55). While the law includes regularization mechanisms for migrants,[2] it excludes from this process anyone who has entered the country illegally and who lacks proof of entry on their passport.





This is the case for most Senegalese migrants, who also need a visa in order to enter the country legally. Even the small minority of Senegalese migrants who enter on tourist visas struggle to regularize their status once their visa expires, because—on account of being self-employed (in other words, street vendors)—they lack a formal employment contract.

In 2013, after years of advocacy by human rights and migrant rights organizations, the government introduced a regulatory program for Senegalese persons who had entered the country prior to January of that year. Nearly 1,700 people were able to regularize their status and obtain temporary residency, which they could then convert into permanent residency two years later (Zubrzycki 2018). That said, those who arrived after 2013 continue to face the aforementioned barriers to regularization.

According to a recent study evaluating the effects of this regulatory program on Senegalese migrants' labor market integration and objective working conditions, regularization had no significant impact on migrants' inclusion in the formal economy, at least not in the short term (Freier and Zubrzycki 2019). The respondents who had regularized their status continued to work as street vendors and experienced little improvement in their objective working conditions.[3] However,

2 The law outlines several criteria for being able to apply for residency. The broadest among them—the nationality criterion—is applicable only to migrants hailing from Mercosur member states and associated states.

3 Herrera and Cabezas (2019, 148) observed a similar situation concerning the regularization of Venezuelan migrants in Ecuador: "having documents

regularization did allow them to register with and contribute to the national tax authority—the Administración Federal de Ingresos Públicos—as monotax contributors (*monotributistas*), meaning that they paid one tax consisting of a social security component (retirement and social security contributions) and a taxation component.

At the same time, the authors' study shed light on the impacts on these migrants' subjective working conditions and their overall social inclusion. Regularization improved their perceived working conditions because it offered them peace of mind in cases of, for example, potential deportation as a result of recent migration policy reform.

Since late 2015, when the Cambiemos coalition came into power, a noticeable shift has occurred in Argentina's migration policy[4]: there has been a conspicuous increase in restrictions on street vending, police brutality, evictions of street vendors, the criminalization of migration, and stigmatizing media coverage of street vendors, in addition to the reemergence of a debate in media outlets about whether to charge migrants fees for access to education and health. Senegalese migrants have been among those most affected by these xenophobic acts and discourses.[5]



## Inequality in the Job Market and Precarious Work for Migrants

In today's interconnected and interdependent global hierarchy, the movement of people, capital, and ideas is occurring not just from the periphery to the center but also among peripheries and toward new centers. In addition, informal economies are proliferating, along with new migration patterns (Sassen 2007; Castles 2017).

To understand the reasons behind today's unequal access to "good" jobs with greater pay, stability, and opportunities for growth and training (Bertranou and Casanova 2013), we must consider several dimensions, from structural aspects of the labor market to the sociodemographic characteristics of migrants. This means recognizing that "a person's chances of obtaining employment depend not only on their class but also on their gender, nationality, ethnicity, legal status, age,

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does not give them any advantage in labor market integration due to the type of work they generally perform and the functioning of the labor market."

4 For a deeper look at the specific changes that have occurred since the 2015 change in administration, see Canelo et al. (2018); Domenech (2020); Jaramillo et al. (2020); Penchaszadeh and García (2018).

5 In December 2019, the opposition coalition Frente de Todos assumed power following the general elections.

location, and other non-economic criteria" (Magliano 2015, 338) such as race and origin (Castles 2017). In addition to looking at these sociodemographic characteristics of migrants, to understand their relationship with the labor market we must look at the broader sociability network in which migrant workers are situated, including both fellow compatriots and state actors, trade unions, labor market actors, and other people and institutions with varying capacities to influence their work experience (Farace 2017).

For "irregular" migrants, the chances of finding work are limited largely to the informal sector. This leads to what Ness (2005) calls "informalization"—in other words, a redistribution of work from the formal to the informal sector, which entails a horizontal restructuring of the economy in order to enhance flexibility and competitiveness in labor markets at various levels. What this means for migrant workers in the short term is the ability to access employment without being regularized; however, in the medium and long term, this puts them in a vulnerable position of superexploitation, from which it is difficult to escape. These "job markets for immigrants" are characterized by their informality, low pay, and precarious conditions. They tend to involve jobs in construction, agriculture, certain types of commerce, textile manufacturing, and care work, among others (Pizarro et al. 2016).

The 2008 global financial crisis sharpened this trend, leading to a restructuring of the labor market in a way that impacted migration patterns. As noted by Castles (2017, 172), "unemployment rates varied by area of origin, with Africans worst affected." New migration routes appeared as a result of unequal economic growth and the emergence of new migration poles, such as the Southern Cone.



## Migrant Participation in the Argentinean Labor Market

A recent study by the Argentina country office of the IOM (2020) looked at migrant participation in the country's job market.[6] The study found lower levels of unemployment among the migrant population compared to people born in Argentina.[7] However, migrants' working

6 It is worth noting that the report's study period was 2017–2019, prior to the COVID-19 pandemic but in the context of an increasing socioeconomic and institutional crisis in the country, especially in 2018.

7 "The labor force participation rate and the employment rate . . . measure the active workforce and employed population against the total population. In this case, the labor force participation rate is 47.4% for the total population, 46.9% for the population born in Argentina, and 55.8% for the migrant popula-

conditions are much more precarious. Of the estimated 2.2 million migrants in the country, 49% are engaged in unregistered employment, compared to just 33% among non-migrants (International Organization for Migration 2019, 2020).

Migrants' main occupations are in the areas of commerce, construction, and domestic work, which account for 53% of their jobs and which also pay the lowest wages. Moreover, compared to the host population, migrants in Argentina are more likely to be self-employed and to have lower levels of educational attainment. These factors are partly responsible for the greater precariousness of their work, which means that their work pays insufficient wages, lacks labor protections, and exposes workers to abuse by employers and institutions, with migrant women being in the most disadvantaged position.

The IOM study is based on data from the 2019 Permanent Household Survey, conducted by the National Institute of Statistics and Censuses; however, given our own extensive ethnographic work with Senegalese migrants, we know that this population is underrepresented in these statistics, for they are often not surveyed or counted due to their irregular status. Further, the IOM study is focused not on African migration but on Latin American and European migration.

One of our own studies, conducted in 2018 in the city of La Plata, sheds light on the Senegalese population in that city and shows us, on a smaller scale, the general characteristics of this population in Argentina.[8] Of the migrants we surveyed, 98% were men, reflecting a phenomenon that is also present at the national level: a miniscule proportion of Senegalese women. The most common age range is twenty to forty years. All of those surveyed reported being practicing Muslims, with a majority belonging to the Mouride brotherhood.

In terms of educational attainment, approximately 40% of our respondents received no formal schooling (consisting of education in French), 25% completed primary school, and 10% completed secondary school. Of those surveyed, 87% reported having attended Koranic school (religious education conducted in Wolof and Arabic). Only 7% had attended trade schools.

Thirty-eight percent worked as merchants before migrating, and 13% worked as drivers of public transportation. The following occupations were reported in smaller proportions: masonry, sewing,



tion. The employment rate is 42.7%, 42.2%, and 51.1%, respectively" (International Organization for Migration 2020, 19).

8 The data, based on a survey of 171 Senegalese migrants, are discussed in detail in Voscoboinik and Zubrzycki (2019).

agriculture, truck driving, mechanical work, metalworking, carpentry, fishing, baking, electricity, military service, and jewelry making. When asked about the first job they had obtained in Argentina, 97% of respondents said that it was working as a street vendor. At the time of the survey, 95% were working in commerce (whether as street vendors or in shops and fair stalls). Lastly, a bit more than 60% of those interviewed had spouses in Senegal, and almost half had children there.

## Racialization of Precarious Work




A seldom discussed but important aspect of Argentina's labor market is the racist mentality that pervades the country. This mentality shapes the structure of the labor market and perpetuates a racial hierarchy in which those workers who do not have white skin[9] are prevented from accessing better working conditions, regardless of other variables such as gender, age, and qualifications (Fernández Bravo 2020).

This is directly related to the differential status that migrants have occupied in the labor market since the creation of the Argentinean nation-state. Toward the end of the nineteenth century, the Argentine Confederation embarked on a Eurocentric state-building project through policies that encouraged immigration from Europe, particularly the north. The largest contingents of European immigrants crossed the Atlantic between the second decade of the nineteenth century and the mid-twentieth century (Devoto 2007), which helped solidify the imaginary of a civilized, white, and Catholic nation, and opened the way for a framework centered on ethnic difference. This model promoted a "national formation of otherness" (Segato 2007), organized through "whitening" (Frigerio 2006) and "ethnic terror" (Segato 2007). It helped establish the imaginary of a white Argentina and the creation of racial classifications that perpetuated the invisibilization and stigmatization of Africans in the country, both in everyday interactions and within the state's official history (ibid.).

From that point forward, this "colonial pigmentocratic order" (Fernández Bravo 2020, 47) defined the way that migrants would be integrated into the country's labor market, assigning skills and capacities according to race and ethno-national origin. Black migrants were thus

9 Skin color is one of many dimensions around which racism takes hold, especially in labor-related settings. But in Argentina, the state has sought since the nineteenth century to use this dimension to construct an imaginary of a homogenous white nation. This has contributed to the hypervisibilization of black Senegalese migrants, whose commercial activities in public spaces overemphasize their presence and their status as the "other," thus increasing their exposure to racist practices.

compelled to limit themselves to precarious jobs and were stigmatized for supposedly competing with the native population for work and government services.

## *In Situ:* Street Vending among Senegalese Migrants in Argentina

The city of La Plata, capital of the province of Buenos Aires and the location of most of our ethnographic work with Senegalese migrants, has become a "social and moral territory of police control" (Pita 2017, 147) due to it being a site of conflict and resistance around the rights to migrate and to work. Since 2012, we have observed and accompanied Senegalese migrants' labor activities and movements. This has allowed us to witness how agents of state control—namely police officers and urban control officials—place limits on migrants who carry out their work activities in public spaces, whether via arrests, arbitrary questioning, or confiscation of their merchandise. Specifically, 2012 was a problematic year for street vending in the city, where we witnessed a premeditated strategy of harassment of these individuals. The harassment was based on complicity between urban control authorities and the police, as well as racial profiling—in other words, an ideological screening of these migrants and their criminalization for being black. As one migrant, Billy, stated in a television interview that year:

> What I'm going to call it is racism: they take away your merchandise, they won't let you work if you stop for five minutes, you can't walk all day, of course you get tired ... It's just to get by, but with a little suitcase you can't have a big business. I've been working from this suitcase for five years—I can't make progress, I can't get ahead, but I would love to have a legal job, something in business. But no one will hire me because I don't have Argentinean papers.

The situation has been getting worse over the past decade—not just because of the measures targeting Senegalese street vendors but also because of institutional racism and institutional violence (Van Dijk 2006; Perelman and Tufró 2017). Authorities carry out arbitrary arrests, harass and discriminate against these migrants, and fail to ensure their right to due process, such as by filing erroneous reports at the time of confiscating their merchandise.

Things began growing especially bad after 2015, when a new administration with an explicitly anti-immigration agenda took the helm. Under the new administration's *modus operandi*, any encroachment of public space (which is the nature of street vending) could lead to "resisting authority" and thus to a criminal record sufficient for facilitating

their deportation, as stipulated in DNU 70/2017 (a decree modifying Law 25871). While there are no recorded cases of the deportation of Senegalese migrants from Argentina, this "regime of expulsion" (Sayad 2008) has had destabilizing effects on people's lives, especially if we consider the fact that the decree, despite being declared unconstitutional, remains in force[10] and represents a latent threat.

In this way, the "fight against illegal street vending" being waged by the city of La Plata and the police—and with the support of other sectors, such as media outlets (e.g., the local newspaper *El Día*) and business groups, such as the Argentine Confederation of Medium Enterprises (Confederación Argentina de la Mediana Empresa 2021)—is pursuing, in the words of the confederation, "the aim of banishing this scourge and restoring orderly commerce, as well as public spaces."



This problem extends to other major cities in Argentina, such as Córdoba and Buenos Aires (Rodríguez Rocha 2017; Pita and Pacecca 2017; Reiter 2017). The ongoing conflicts between street vendors and agents of state control reached a peak in 2017 in the country's capital, when a brutal crackdown was waged against street vendors in the Once neighborhood. Following two days of protests by the vendors, the parties to the conflict reached an agreement whereby the vendors would have access to a sales training course offered by the Argentine Confederation of Medium Enterprises and would receive a sum of money and a stand in an authorized street fair (Pita and Pacecca 2017). However, to be able to access this "solution," the migrant vendors needed to have a national identity card (known as the DNI), a requirement that left out a large number of Senegalese migrants who had arrived to Argentina after the 2013 regulatory program. As a result, many of these migrants chose to relocate to other areas, among which La Plata was a preferred destination due to its proximity just sixty kilometers south of Buenos Aires. This, in turn, led to increased competition for jobs at the local level.

In 2017, there was a spike in threats to evict street vendors, especially in the perimeter around the provincial legislature building, a high-traffic area for pedestrians and vehicles. Laye, a Senegalese migrant who arrived in 2013 and who had been selling his merchandise on the sidewalk there, stood up to local authorities when he refused to remove his street cart from the area he had been using as a worksite over the years. One sunny afternoon after a week of rain—during which time he had been unable to work—we were visiting him

10 The law's repeal must be carried out by the executive branch. However, this has not yet happened, even with the change in administration in 2019.

at his cart when a city vehicle parked in front of us and out climbed two urban control officials, who demanded that Laye leave. "Leave the perimeter of the legislature. You can't be in this area," they told him. Another afternoon, we passed by Laye's usual spot and he wasn't there. We found him around the block, selling his merchandise next to his friend Moustafa. A few days later, Laye appeared in the photo of a cover story in *El Día*, which reported on the city's "battle" against street vending. The article began by describing the eviction of street vending carts from the new sidewalk where Laye had been working.

In the words of a representative of the Association of Senegalese Residents in Argentina:

> As Senegalese in Argentina, we're facing a time when the government is hunting immigrants, because they're looking for you wherever you are. They're not just waiting for you until you go to another spot or whatever; it's like they're on the search. And any of the guys selling on the street knows it—when the police come, the first thing they do is try to file a case against you for resisting authorities, or for [violating] trademark law or whatever.[11]

As this representative notes, Senegalese migrants are the object of persecution by law enforcement authorities, who provoke the migrants in order to be able to file criminal charges and violate their rights even more.

On the "Day against the Criminalization of the Senegalese Community" in 2018, which was organized by several migrant rights organizations, universities, and other members of civil society, organizers introduced a bilingual protocol (in Spanish and Wolof) against the arbitrary detention of Senegalese workers. At the beginning of the event, with a microphone in hand, Billy addressed the audience:

> Ladies and gentlemen, good morning. We are grateful to those who are here to support us. My name is Billy, one of the many Senegalese who are here struggling to get by. We have rights, I think, to be able to work. We came to Argentina in search of a better life, and the Association of Senegalese in La Plata is this community here in front of us, and we are truly thankful for all of those who are supporting us. As I always tell the guys, "We must never give up—we must always look ahead, fighting until we achieve what we need."[12]

As Billy's words reveal, instead of adopting a passive attitude in the face of the state's hostility, the Senegalese community in La Plata is working to claim their right to work for a better life. However, despite

11 ARSA member, Buenos Aires, 2017.

12 Billy, La Plata, 2018.

these public statements, persecution and violence against this population continued during 2019, when authorities conducted numerous arrests and seizures of merchandise. In August of that year, the arbitrary detention of Cheikh—who was released later that day and who is a spokesperson for Senegalese street vendors—made headlines in the local media ("Cheikh Gueye: 'Usaron su poder para trasladarme hasta la comisaría, porque no había motivo'" n.d.).

By 2020, in the midst of the COVID-19 pandemic and the state-ordered lockdown, the situation had not changed. One of the most shocking actions, from June of that year, was the violent arrest of a young Senegalese man who had arrived earlier that year and who did not speak Spanish, whom authorities accused of "violating quarantine" by selling in the street ("La Plata: Liberaron al joven senegalés víctima de violencia policial" 2020). He later recalled, "I couldn't breathe"—a statement that, together with videos taken by eye witnesses, generated an outcry among local residents, who compared the event to the racist abuse and murder of George Floyd in the United States.



## Conclusion and Recommendations

In Latin American labor markets, and especially in racist and xenophobic contexts like the one described here, being a self-employed street vendor is one of the few options open to Senegalese migrants. This is even more true for those whose status is not regularized.

As observed by several of the authors cited in this chapter, non-Mercosur migrants in "irregular" situations face serious barriers to obtaining permanent residency. In the specific case of persons from Senegal, this is due to not having proof of entry in their passports. It is also because they tend to work independently in public spaces and to lack formal labor contracts. But even those who have been able to regularize their status have been unable to access better jobs.

This problem has structural roots tracing to various dimensions of social life in Argentina—such as education, work, citizenship, and diversity, among others—that require greater attention in order to ensure migrants' labor rights. Only in this way will the migrant population from Senegal be able to achieve a substantial improvement in their well-being.

It is thus critical that the Argentinean government implement comprehensive antiracist and educational awareness-raising campaigns that include the voices of affected populations in their design, execution, and evaluation. The pervasive racism and xenophobia that make their way into conventional wisdom can be addressed through an

inclusive sensitization effort that seeks to restore the dignified role of African populations in our society and the value of their sociocultural and economic contributions. This necessitates the participation of representatives from African and Afro-Argentinean communities in the effort's planning phase.

In line with this, we believe it is urgent that antiracist and rights-based trainings be provided to law enforcement officials at all levels, particularly the police force in the province of Buenos Aires, as well as various levels of civil servants.[13] These agents continue to use racial profiling in their work, which puts Senegalese street vendors at particular risk and makes them a prime target.

The legal status of this migrant population is another issue that needs to be resolved in the short term, ideally through a broadening of the regularization channels available to non-Mercosur migrants, such as those from Senegal, and the incorporation of these channels into the country's immigration law so that they become permanent tools available to these migrants. Such measures should include two key components: first, relaxed documentation requirements, and second, the inclusion of popular economy workers in the "worker" category outlined in Argentina's immigration law, which would facilitate the granting of residency permits.

While mistrust stemming from prejudice against the black population is one of the main barriers to securing formal employment in Argentina, without a DNI, these migrants' chances of accessing better labor opportunities are even scarcer. Many commentators have argued for the need to adopt exceptional measures for regularization, access to residency, and related arrangements (Espacio Agenda Migrante 2020), and the National Directorate for Migration has had much to say in this regard, especially about a forthcoming draft resolution of the Special Regime for the Senegalese Population, which has yet to be rolled out (Instituto de Justicia y Derechos Humanos Eduardo Luis Duhalde 2020). However, we owe it to ourselves to engage in a serious debate about whether this is the right mechanism for non-Mercosur migrants, because, as we saw in 2013, the special regulatory program implemented then was a far cry from a simplification of the process meant to ensure the protection of their rights (Zubrzycki 2018).



13 A first step in this regard should be the application of the ruling by the Inter-American Court of Human Rights issued on September 1, 2020, in a case centering on the arrest and search of two Afro-descendants based only on their appearance. The ruling recognizes the existence of structural racism in our country. *Case of Fernández Prieto and Tumbeiro v. Argentina*, available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_411_ing.pdf

In today's complex global crisis caused by the COVID-19 pandemic, which is exacerbating preexisting inequalities, the repercussions at the national level are even more profound and may only get worse.

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# The Pragmatics of Access to Work Rights for Refugees in Kenya

*Nyamori Victor and Charity Wangui Ndwiga*

## Introduction

Kenya's refugee experience dates to the early 1970s, when the country hosted many Ugandans displaced by the political coups of the time. At the time, even though Kenya had ratified the 1951 Refugee Convention and its 1967 Protocol, there was no domestic law or policy addressing refugee management, given that refugees were seen as temporary visitors. Persons who sought asylum in Kenya were free to move and even work because their stay was expected to be short.

However, the situation changed with the growing influx of refugees into Kenya in the early 1990s, triggered by conflict and insecurity in Somalia, Ethiopia, and the Great Lakes region. In light of this new reality, the government saw the need to adopt a law to regulate the numbers of refugees coming into the country, which also led to the encampment policy and the Refugee Act of 2006. The encampment policy essentially confines refugees and asylum seekers to designated camps, thereby limiting their freedom of movement. Meanwhile, the Refugee Act makes it a penal offense for a refugee to be found outside a designated area without authorization (with a penalty of US$200 or six months in prison). Thus, even though refugees are technically allowed to work, the policy framework makes it difficult to do so.

Furthermore, refugees in Kenya face several practical difficulties in obtaining the necessary work permits to allow them to work legally. They also face delays in refugee status determination (RSD), which means that they must remain asylum seekers for long periods; this not only places them at risk of arbitrary arrest and harassment but also inhibits them from being able to access a variety of services—including the National Health Insurance Fund, cell phone services, cash transfers via mobile phone, and financial services—that could bolster their economic empowerment and their effective participation in the economy.

Lastly, the protection of refugees is a mandate left exclusively to the national government. This poses a challenge in light of Kenya's

devolved system of government (as established in the Constitution) because it means that county governments have neither the authority nor the financial means to participate directly in refugee management. Thus, refugees experience challenges at the local level when it comes to their inclusion in services and resources that affect their livelihoods, living standards, and subjective well-being.

According to the United Nations High Commissioner for Refugees (UNHCR), there were 508,033 refugees in Kenya as of January 2021. Of these, almost half (44%) live in the Dadaab refugee camp, 40% live in the Kakuma refugee camp, and 16% live in urban areas, mainly Nairobi (UNHCR Kenya 2021a). Refugees' numbers will only continue to increase in the near future, considering the ongoing conflict in neighboring countries and the East African region. Finding solutions to the refugee situation in Kenya is therefore a pressing concern.



Allowing refugees to build a life in their new country through socioeconomic inclusion is important because it helps them feel like part of society and empowers them to participate in and contribute to the host country's development. Rauf Mazou, UNHCR's assistant high commissioner for operations, has posited that the socioeconomic inclusion of refugees is vital to the UNHCR's efforts to protect and assist refugees: "[the UNHCR's] response cannot just be food distribution every month; our response must also be to address people's hopes, their expectations and their willingness to be included in the society where they are" (Rummery 2019).

This chapter explores refugees' journey to economic inclusion in Kenya. It begins by providing an in-depth situational analysis of refugees in Kenya; moves on to discuss Kenya's legal framework concerning refugee protection; then explores the challenges faced by refugees in terms of achieving economic inclusion; and concludes with some thoughts about the way forward.

## Situational Analysis

### Encampment Policy

Kenya operates under an encampment policy and has two major refugee camps: Dadaab and Kakuma. In addition to these two camps, a new integrated settlement for the host community and refugees, known as Kalobeyei, was established in 2015.

The Dadaab refugee camp was established in 1992 and is located in northeastern Kenya, in Garissa County. This camp comprises four sections: Dagahaley, Hagadera, Ifo, and Ifo2. The camp is in a marginalized arid and semi-arid region where refugees are restricted from

moving or seeking a sustainable livelihood or subsistence activities and which is also further impacted by constant conflict and general impoverishment (Oka and Gengo 2020). According to Amnesty International (2016), the Dadaab refugee camp has faced some operational challenges, including a decision by the Kenyan government to close the camp and return its refugees to Somalia.[1]

Despite this fact, Dadaab has a thriving economy that has not been fully explored or exploited. In 2019, a market system analysis entitled *Doing Business in Dadaab* was conducted as part of an ongoing global collaboration between the International Labour Organization and the UNHCR on designing and implementing market-based approaches to refugee and host community livelihoods. According to this report, "market exchanges between refugees and host communities are common, and some refugees are informally employed by host community members to look after their livestock" (United Nations High Commissioner for Refugees and International Labour Organization 2019, vi). It also notes that there is a good social relationship between hosts and refugees, as they share a language and culture, which has led to intermarriages in the community.

According to the UNHCR and Kenyan news outlets, the European Union, which has been a major donor to refugee operations in Kenya, pledged in 2019 approximately €5 million toward the Garissa Integrated Socio-Economic Development Plan, a project aimed at enhancing livelihood opportunities among refugees and the host community in Garissa County.[2] However, the restricted movement in Dadaab has made refugees unable to take advantage of employment and livelihood opportunities outside the camp.

The second camp, Kakuma, was established in 1992 in northwestern Kenya, in Turkana County, with the aim of hosting refugees fleeing the Second Sudanese Civil War (1987–2005). The camp has grown since then and is now home to refugees from Burundi, the Democratic Republic of the Congo, Ethiopia, Somalia, South Sudan, and Sudan (International Finance Corporation 2018). According to data from the UNHCR and the government of Kenya (2021), Kakuma is currently hosting about 203,000 refugees, the majority of whom are from Somalia and South Sudan. Like Dadaab, Kakuma is also located in arid and



1 The Kenyan High Court subsequently ruled against the legality of this request, as the refugees were not consulted about their willingness to return (United Nations High Commissioner for Refugees and International Labour Organization 2019, 2).

2 On October 3, 2019, the UNHCR Kenya Facebook page acknowledged this pledge by the European Union. See https://bit.ly/3nGEnHm.

semi-arid lands and is facing challenges such as restricted movement and persistent conflict (Oka and Gengo 2020).

Kakuma has a vibrant informal economy, with many shops that serve the camp and the host community. Those refugees who have found work opportunities are employed largely in the informal sector; the few who are formally employed work with nongovernmental organizations operating in the camp. Refugees and members of the host community have been found to have micro, small, and medium-scale businesses, which constitute the largest enterprise in the county. These businesses in Kakuma are for refugees who are self-employed and operate informally, and they rarely employ more than one person (United Nations High Commissioner for Refugees 2018). According to a study by the International Finance Corporation (2018, 30), the economy of Kakuma camp and town is estimated at US$56 million per year, based on household consumption. This number would be higher if refugees enjoyed free mobility, as it would increase their chances of scaling existing businesses upward.



Lastly, the Kalobeyei integrated settlement—which is not considered a refugee camp because, unlike Dadaab and Kakuma, it is set up to allow refugees and the host community to live in one integrated settlement—was conceived as a joint initiative of the county government of Turkana and the UNHCR in 2015. According to the UNHCR (2020), the integrated settlement has a population of 96,666 registered refugees and asylum seekers. It was designed to transition refugees away from dependence on humanitarian aid and toward self-reliance. According to Alexander Betts et al. (2018), this model is hinged on the idea of promoting increased opportunities for interaction between refugees and the host community in and around where the camp is located.

To measure refugees' self-reliance in this regard, Betts et al. (2019) have identified the conditions, or enabling factors, that must be present. According to the authors, such enabling factors include the environment (e.g., regulations), access to public goods, access to markets, access to business networks, and assets (e.g., human capital). Unfortunately, the camp's strategy of self-reliance may remain a mirage in light of the restriction on movements within the area.

## Refugees in Urban Areas

Although Kenya operates an encampment policy,[3] some refugees have settled in urban areas. Data from the UNHCR show that there

3 In 2014, the government of Kenya adopted the Security Law Amendment Act, which made key amendments to the Refugees Act of 2006. This reform

are 80,750 refugees in urban areas across the country (UNHCR Kenya 2021b). Refugees move from the camps to urban areas for various reasons, including to be able to access education and specialized medical assistance; however, for the majority of these individuals, the main reason is to improve their quality of life. In the city, refugees and asylum seekers often find informal employment as guards, domestic workers, porters, shop attendants, and small-scale informal business owners. Their reliance on informal employment is due mainly to challenges with documentation, whether due to delayed RSD or the lack of documents as a result of legal and administrative bottlenecks.



## The Legal Framework

### International Law

Kenya is a party to both the 1951 Refugee Convention and its 1967 Protocol, as well as the International Covenant on Economic, Social and Cultural Rights, all of which recognize the right to work for everyone, including refugees. Importantly, the right to work has been recognized as essential to the realization of other rights and as "an inseparable and inherent part of human dignity" (United Nations Committee on Economic, Social and Cultural Rights 2006).

Article 17(1) of the 1951 Refugee Convention provides for wage-earning employment for refugees who are lawfully in their country of asylum.[4] This article must be read in light of article 6 of the convention;[5] collectively, these two provisions "require that refugees lawfully staying who are entitled to wage-earning employment must be exempt from any requirements to obtain work permits if they are unable to meet those requirements due to the hardship that resulted from their

made the encampment policy permanent, stating that every person who has applied for recognition of their status as a refugee and every member of their family shall remain in the designated refugee camp until the processing of their status is concluded. The amendment also solidified the fact that the 2006 act makes it illegal for refugees to leave the camp without the permission of the refugee camp officer.

4 The provision states, "The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment."

5 Article 6 states, "For the purposes of this Convention, the term 'in the same circumstances' implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling."

forced displacement" (Asylum Access and Refugee Work Rights Coalition 2014, 12). This is also further emphasized by article 17(3) of the convention.[6]

Meanwhile, article 6 of the International Covenant on Economic, Social and Cultural Rights explicitly enshrines the right to work for everyone and, more specifically, outlines states' responsibilities in ensuring that this right is realized. These responsibilities include "technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual." This, in essence, means that the country of asylum should ensure that these things are realized not only for citizens but for refugees as well.



## Domestic Law

The Kenyan Constitution does not include specific provisions with regard to refugees and asylum seekers,[7] but its progressive Bill of Rights provides a clear foundation for general rights to be enjoyed by all. Furthermore, Kenyan courts have stepped in to fill this gap by upholding refugees' rights as provided for in international and regional instruments. For example, in 2017, the High Court of Kenya upheld the country's refugee-related obligations under international law, reaffirming that any instrument regarding refugees that has been ratified by the government forms part of Kenyan law.[8]

The 2010 Constitution builds on and complements the specific provisions of the 2006 Refugees Act that outline the treatment of and procedures related to refugees and asylum seekers in Kenya. According to the Refugee Act, refugees are to be provided with an identity card and protected from arbitrary arrest, detention, and expulsion.

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6 Article 17(3) states, "The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes."

7 Article 2(6) of the Constitution 2010 provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. This provision makes the international conventions that Kenya has ratified legally binding one of which is the 1951 Convention and the protocol relating to the status of Refugees."

8 *Kenya National Commission on Human Rights and Another v. Attorney General and 3 Others*, 277 of 2016 (February 9, 2017).

In Kenya, the right to work is provided under the Citizenship and Immigration Act of 2011[9] and not the Refugees Act of 2006. The Citizenship and Immigration Act is the same act that governs the issuance of work permits to foreigners. The act and its regulations provide that refugees and their spouses can apply for and obtain a class M work permit free of charge. It also mentions that asylum seekers are precluded from applying for class M work permits. Meanwhile, the Refugee Act states that for a refugee to be able to secure wage-earning employment, they must be subjected to the same restrictions as foreigners.

The above condition is what creates the primary barrier for a refugee to access wage-earning employment and, more specifically, the class M work permit. This is because the provisions do not consider the unique circumstances in which one becomes a refugee and how different they are from the circumstances of a foreigner.

In a nutshell, the application process for the class M work permit requires a refugee to file an application before the Department of Immigration and Registration of Persons. This is done via an online portal that is the standard for all work permit applications. Then, as accompanying documents, the applicant must present a detailed and signed cover letter from the employer/organization/self, addressed to the director-general of immigration services; copies of their recognition letters or conventional travel document; two recent passport-size colored photos; their immigration status in the country; a valid organization tax compliance certificate for new cases; and, most importantly, a recommendation letter from the Refugee Affairs Secretariat. All of this documentation is to be uploaded onto the e-citizen platform.

One of the questions asked as part of the application process is "What steps have you taken to confirm that the skills/qualifications sought are not available locally?" This question prejudices refugees because it suggests that refugees are not able to be issued work permits unless the skills or qualifications they have cannot be acquired from nationals in the country. The question also suggests that the refugee already has a job offer, which in most cases does not apply. This is because refugees are forced migrants and are not in the country of asylum for want of economic empowerment but because of their safety. Tying their access to the class M work permit to an employer with an available job opportunity locks out the majority of them.

9 Section 41(2) states, "Notwithstanding any other provision of this Act, and subject to the provisions of any other written law, a person to whom a work permit of class M is issued may engage in any occupation, trade, business or profession, and sections 34, 35, and 36 shall not apply to a child of that person."

## The Refugee Bill of 2019

In 2019, the government gazetted a Refugee Bill that would align the 2006 Refugee Act with the 2010 Constitution and also allow progressive provisions for enhancing refugee protection in Kenya. The 2006 Refugee Act, having been enacted prior to the 2010 Constitution, has many clauses aligned to old national administrative structures that were reshaped with the new Constitution. The bill has undergone several legislative development stages, including public participation. Clause 28 of the bill provides for a progressive provision that recognizes refugees' contributions to the national economy. It also states that "refugees shall be enabled to contribute to the economic and social development of Kenya by facilitating access to, and issuance of, the required documentation at both levels of government." Organizations lobbying for amendments to the bill have proposed explicit wording that recognizes refugees' right to employment in Kenya. As of February 2021, the bill had not become law.

## Recent Policy Developments on Access to Work for Refugees

To remain relevant in the international discourse on refugee protection and humanitarian work, Kenya has been an active player in different platforms that discuss progressive policies to enhance refugees' and asylum seekers' access to work and self-reliance. In September 2016, the United Nations General Assembly unanimously adopted the New York Declaration for Refugees and Migrants. Kenya was chosen to be one of the countries involved in the rollout and application of the declaration's Comprehensive Refugee Response Framework (CRRF). The four objectives of the CRRF include a call for enhanced refugee self-reliance.

Additionally, in 2018, the United Nations General Assembly affirmed the nonbinding Global Compact on Refugees, with strong participation and commitments from Kenya during its endorsement. However, the situation in the country in terms of forming a foundation for self-reliance still looks bleak, and not much has been done to anchor the compact's commitments within national policies (Nyamori 2018).

## Intergovernmental Authority on Development (IGAD) on Access to Work

To mask its dismal failure to incorporate global commitments into actionable national policies, Kenya has continued to participate in

regional forums to showcase its rhetoric on refugee self-reliance and access to work for refugees. For example, in 2017, Kenya hosted an IGAD summit in which member states adopted the Nairobi Declaration on Durable Solutions for Somali Refugees that advanced the inclusion of refugees. As part of its commitments under this declaration, Kenya pledged to allocate resources to expand economic opportunities and social services in refugee-hosting areas; undertake self-reliance and inclusion measures for refugees; and facilitate and expand business infrastructure and opportunities for sustainable livelihoods (Intergovernmental Authority on Development 2017).

Additionally, in March 2019, Kenya was among the IGAD member states that signed the Kampala Declaration on Jobs, Livelihoods, and Self-Reliance. This declaration aims to advance livelihood opportunities and economic inclusion for refugees by strengthening policies related to freedom of movement and access to the labor market and services in the IGAD region (Intergovernmental Authority on Development 2019).

To date, despite these commitments, little or no progress can be said to have been achieved. The so-called CRRF secretariat in Kenya, headed by the government department dealing with refugees, has held only one meeting since its inception. While some authors note that the 2019 Refugee Bill is a positive step forward in that it falls under the greater umbrella of the CRRF, the Global Compact on Refugees, and IGAD declarations (United Nations High Commissioner for Refugees and International Labour Organization 2019), there has been disquiet among legislators about having an explicit provision in the new law that grants refugees the right to work legally at the expense of nationals.



## Challenges to Refugees' Economic Inclusion in Kenya

As noted above, refugees are legally entitled to formal employment given that they are technically able to access work permits, to seek and gain employment, and to start a business (International Finance Corporation 2018). However, this possibility of economic inclusion is restricted by a number of concrete challenges, as outlined below.

### Restrictions on Movement

Freedom of movement is accorded to refugees under international and regional instruments to which Kenya is party. These include the 1951 Refugee Convention, whose article 26 specifically protects refugees'

freedom of movement. The convention allows refugees to choose their place of residence and to move freely within host-country territory, subject to any regulations applicable to people of similar circumstances.

However, Kenya has practiced a strict encampment policy—whereby refugees must remain in designated camps—for quite some time, a practice that is supported by the Refugee Act of 2006. This limits refugees' right to freely move around the country. The Refugee Act makes it a criminal offense to transit outside designated areas without a movement pass. The penalty for doing so is a US$200 fine or six months in prison (United Nations High Commissioner for Refugees and International Labour Organization 2019, 18).



According to Roger Zetter and Héloïse Ruaudel (2016, 13), these restrictions "compound the difficulty of access to employment by limiting the range of possible work opportunities or occupations" for refugees. Moreover, as noted by Naohiko Omata (2020), the limitation of movement adds to the already challenging situation faced by refugees trying to enjoy a decent livelihood. Kenya's law limiting the movement of refugees is in place even though IGAD member states—Kenya included—have resolved to take collective responsibility for creating jobs, improving livelihoods, and ensuring self-reliance for refugees. To this end, they have committed to ensuring that refugees enjoy freedom of movement (Intergovernmental Authority on Development 2019).

Despite Kenya's strict encampment policy, some refugees have mastered the art of living illegally in urban areas. However, they face constant harassment and arbitrary detention by security agencies under the pretext of verifying their identity.

### Delayed Refugee Status Determination Process

Caroline Nalule and Derya Ozkul (2020) posit that "the primary responsibility for refugees—and therefore for refugee status determination (RSD)—lies with states but UNHCR conducts RSD where states are unwilling or less able to do so." It is expected that once a refugee's status is determined, that person can begin to access other rights and obligations. In Kenya, however, the RSD process is mired with challenges that affect the timeliness of changing one's legal status from asylum seeker to refugee. According to the Norwegian Refugee Council (2017, 36), it can take anywhere from several months to several years—in other words, longer than the ninety days stipulated in the Refugee Act. Delayed documentation means that refugees cannot access employment, which is contingent on having the right document (Zetter and Ruaudel 2016). Making matters more complicated is the fact that

completing one's RSD does not automatically mean being able to access formal employment and seek equal pay—first the refugee must obtain a class M work permit.

While the Kenya Citizenship and Immigration Act lays out a clear legal path for foreigners wishing to access a work permit, as discussed in the previous section, the practice on the ground shows a worrying situation. Based on the experience of the authors, the government does not issue work permits to refugees, except in a few isolated cases. Applications through the government's online portal often remain pending for several years. According to a recent rejection letter seen by the authors and issued in August 2020, the director-general of immigration services responded to the applicant with a one-line response: "JOB CAN BE DONE BY KENYANS." This is evidence of the discrimination that refugees encounter in accessing work (Anonymous 2020).

As concluded by Zetter and Ruaudel (2016, 29), this restrictive situation reflects the government's mythical concern that granting refugees the right to employment would promote long-term residence and introduce competition with Kenyans in an already congested job market.



### Lack of Resources

Refugees generally have few personal assets of substantial material value. According to Betts et al. (2019), only 5% of refugee households in Kakuma and Kalobeyei have a radio, 1% have a television, and 0.6% have a computer, which limits their access to information and, in turn, their ability to seek job opportunities. The lack of such assets also reflects the fact that refugees do not have extra income to invest in appliances that could foster self-reliance. Further, their access to resources such as land, rivers, and forests is often constrained by informal regulations imposed by local host populations (Betts et al. 2019). As a result, raising capital to start and sustain a business can be extremely difficult.

The lack of business documentation (such as business permits) is another factor that restricts refugees' access to resources that can help them start, run, and expand business ventures. Most available financial opportunities (such as business loans) require that business ventures be registered and have a bank account. Refugee-run businesses are often not registered and lack proper documentation, which makes accessing such opportunities difficult.

### Host Community and Refugee Relationships

Although refugees and host community members sometimes share a common language, religion, and culture, this is not always the case

and can present problems. While in Dadaab conflicts between the host community and refugees have largely been resolved amicably due to cultural homogeneity, in Kakuma and Kalobeyei refugees and host communities have different cultures, which has resulted in conflicts between them and difficulty in finding solutions (Oka and Gengo 2020).

Furthermore, host communities sometimes hold a negative perception of refugees based on the assumption that refugees receive financial support from the UNHCR and nongovernmental organizations, which makes them wealthy but at the same time a liability to the economy. This perception has contributed to "Kenyans viewing refugees and asylum seekers with suspicion that [has], in turn, led to growing feelings of xenophobia towards refugees in the country" (Refugee Consortium of Kenya 2015, 1). Such perceptions pose a significant barrier to refugees' social integration and economic inclusion.



## Conclusion and Recommendations

As demonstrated by the contextual analysis of refugees' situation in Kenya, the road to self-reliance through economic inclusion is an uphill one. It could be as a result of host communities not understanding who a refugee is, the government neglecting its role in refugee protection, or the lack of a proper legislative and policy framework that fosters refugees' and asylum seekers' self-reliance and economic inclusion. Even though refugees have been in Kenya for some time, the government continues to ignore them and deny them access to basic rights that would ensure their active participation in the economy.

While raising awareness among the general public on the situation of refugees in the country may address part of the problem, this should be coupled with a vigorous advocacy and lobbying campaign targeting the government of Kenya and local authorities. This would help increase understanding and dismantle the discrimination and deprivations that leave refugees behind economically.

Legislation is the first step to improving the policy environment affecting refugees. The 2019 Refugee Bill offers an opportunity for Kenya to stand tall among its peers and enact a law that recognizes refugees' right to work and to be engaged in gainful activities. This law should outline clear procedures and timelines for refugees' access to work permits.

Allowing refugees freedom of movement is another key component to increasing inclusion and access to work opportunities. Through the Refugee Bill, the government of Kenya should ensure that the right to freedom of movement for refugees is protected and enhanced.

Access to proper documentation—including quick registration, RSD, and work permits—is another area that needs to change in order to allow asylum seekers and refugees a meaningful life of self-reliance. To start, the government should remove all bottlenecks involved in accessing class M work permits. Further, new legislation should allow asylum seekers and refugees to access wage-earning opportunities with only registration documents.

Lastly is the problem of refugee documentation, which is sometimes not recognized by local authorities as a valid form of ID. Appropriate steps should be taken to ensure that all Kenyan agencies and departments recognize refugee documentation as an acceptable form of ID that can be used to procure services in the social-economic sector, such as banking. The road to self-reliance may be murky—but these practical and gradual steps offer an opportunity to ensure that no one is left behind.



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# State-Sanctioned Shrinkage of Space: Analyzing the Trend of Limiting the Right to Legally Work in South Africa for Forced Migrants

*Sherylle Dass, Mandivavarira Mudarikwa, and Petra Marais*

## Introduction

The right to work is a critical right that the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees in articles 6–8. These guarantees include the right to work, rights at work, and the right to equality and nondiscrimination in accessing and enjoying these rights. The use of the words "everyone" in these entrenchments means that the right to work is afforded to all persons regardless of their nationality or national origin. Indeed, the Committee on Economic, Social and Cultural Rights, in its General Comment 18, has confirmed that the protection of equality and nondiscrimination "should apply in relation to employment opportunities for migrant workers and their families" (2006, para. 18).

According to the most recent data, South Africa is host to 78,395 recognized refugees (United Nations High Commissioner for Refugees 2020) and 188,296 asylum seekers (Minister of Home Affairs 2020). South Africa's progressive Constitution, urban refugee policy, and domestication of the 1951 Refugee Convention, its 1967 Protocol, and the Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa make it an appealing host country for forced migrants.

This chapter begins by exploring the legal context of the right to work for forced migrants in South Africa and the various social and legal constructs that impact this right. It then examines ongoing legislative efforts to intentionally limit forced migrants' ability to work in South Africa despite judicial pronouncements mandating the need to ensure that asylum seekers and refugees are able to work. The chapter concludes by offering recommendations on how South Africa can improve its legal and social context to ensure that forced migrants are able to work legally and safely.

## Forced Migration: Legislative Framework and Jurisprudence

South Africa has a comprehensive legal framework governing the rights of forced migrants and the right to work. In addition to primary legislation are several court judgments that give substance to the letter of the law. This section considers the most important legislation and judicial rulings shaping forced migrants' right to work in South Africa.

### The Constitution of the Republic South Africa

The Constitution is the supreme law of the country. All rights in the Constitution—except for the right to citizenship; political rights; the right to enter, reside, and remain in South Africa; and the right to freedom of trade, occupation, and profession—are guaranteed for *everyone*. The Constitution does not distinguish between refugees and asylum seekers in the entrenchments of rights. Accordingly, except for the rights listed above, forced migrants are entitled to have their rights protected and promoted within the limits set by the Constitution.

### The Refugees Act 130 of 1998 (as Amended by the Refugee Amendment Act 11 of 2017)

In South Africa, the adjudication and administration of refugee claims falls under the custodianship of the Department of Home Affairs (DHA) and is governed by the Refugees Act. The Refugees Act domesticates the United Nations' 1951 Convention relating to the Status of Refugees and the Organisation of African Unity's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa. In accordance with section 3 of the Refugees Act, a person qualifies for refugee status in South Africa if that person

> (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion, or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
>
> (b) owing to external aggression, occupation, foreign domination, or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependent of a person contemplated in paragraph (a) or (b).

The Refugees Act distinguishes between forced migrants who have applied for asylum and whose applications are still pending, and persons whose claims have been approved and are recognized refugees. An asylum seeker in South Africa is defined in section 1 of the Refugees Act as "a person who is seeking recognition as a refugee in the Republic," and a refugee is defined as "any person who has been granted asylum in terms of this Act." Refugee status is declaratory in nature. A person is a refugee as soon as they fulfill the criteria contained in the definition; recognition of their refugee status thus does not make them a refugee but merely declares them to be one (United Nations High Commissioner for Refugees 2019). An asylum seeker is a potential refugee awaiting recognition, and pending recognition is granted refugee protection. Consequently, in this chapter, we use the term "forced migrants" to refer to asylum seekers and refugees collectively.

When an asylum seeker flees their country of origin and enters South Africa, they must apply for refugee status at a Refugee Reception Office (RRO). After reporting to the RRO, the asylum seeker must complete the necessary documentation and undergo an interview process. Asylum seekers in South Africa receive a "section 22" asylum seeker visa. Before the amendment to the Refugees Act, discussed below, this permit granted the holder the automatic right to work and study.

Under the Refugees Act, the asylum seeker visa is intended to be a "temporary visa." However, it can take several years for an asylum seeker's claim to be adjudicated; indeed, a three-year sojourn on average can be expected while waiting for the adjudication.[1] This backlog in the status determination process means that the "asylum seeker" status is a longer-term status than that envisioned by the law. If an asylum claim is successful, the asylum seeker becomes a recognized refugee and receives a certificate of formal recognition in accordance with section 27(a) of the Refugees Act, valid for a period of four years unless refugee status is withdrawn or ceased. A refugee is also entitled to apply for an identity card in accordance with section 30 of the Refugees Act. Before the Refugee Amendment Act, refugee identity documents were different in color from those issued to citizens and permanent residents.

If the asylum seeker's claim is rejected, there is an internal appeal and review process available to them. This process can take several

1 *Somali Association of South Africa and Others v. Limpopo Department of Economic Development Environment and Tourism and Others*, 2015 (1) SA 151 (SCA), para. 44.

years, and during that time the asylum seeker's visa continues to be extended to enable them to legally sojourn in the country until a final decision is reached. If the internal appeal and review of the asylum seeker's claim is finally rejected, the asylum seeker can appeal the decision before the courts in accordance with the Promotion of Administrative Justice Act 3 of 2000.

Section 27 of the Refugees Act allows refugees to seek employment and the same basic health services and education as South African citizens, and it affords them all the rights contained in the Bill of Rights, except the rights specific to citizens. Asylum seekers are not automatically entitled to these rights. Because the Refugees Act does not prescribe the rights of asylum seekers, some of the rights that they currently enjoy have been developed and affirmed through litigation.



## The Right to Work in South Africa

Section 22 of the Constitution states that "every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law." The underlying value of section 22 is that the public has an interest in allowing individuals to earn their own living rather than be supported by public funds (Curry and De Waal 2013, 465). Occupational freedom and the right to earn a living are also pivotal elements for individual autonomy and establish a basis for the exercise of other rights and freedoms contained in the Bill of Rights (ibid.).

South Africa currently does not have a practice of confining asylum seekers to camps or centers and has what is known as an "urban asylum policy," where asylum seekers are free to move around the country (Kavuro 2015, 250). This, however, means that the right to earn a living is of critical importance to asylum seekers given that they are not confined to a facility that provides food, shelter, and other commodities. It is within this context that the right to work for forced migrants must be understood. For refugees, section 27(f) of the Refugees Act states that recognized refugees are entitled to seek employment. Asylum seekers have not always had this same automatic right, as explained below.

## The *Watchenuka* Decision: Breaking Barriers

Between April 1, 2000, when the old Refugees Act came into effect, and 2004, when the landmark *Minister of Home Affairs and Others v. Watchenuka and Others* decision was issued, asylum seekers did not have an automatic right to work in South Africa. The conditions to sojourn in

South Africa are prescribed on asylum seeker permits, and prior to the *Watchenuka* ruling, the prohibition of work and study in South Africa was a condition for all such permits.

The *Watchenuka* case centered on Muriel Millie Watchenuka, who fled Zimbabwe with her differently abled twenty-year-old son for fear that he would be forced to join militant supporters of the ruling political party in Zimbabwe. Shortly after applying for asylum in South Africa, she secured a place for her son to study. Watchenuka is a widow and a trained pharmacy technician—she argued before the court that her savings had been depleted and she urgently needed to secure employment. Due to the prohibition listed on their asylum seeker permits, Watchenuka was barred from seeking employment, and her son was unable to study in South Africa.



The lawsuit, filed by Watchenuka and others before the High Court of South Africa, succeeded in challenging the exclusion of the right to work and study. The High Court held that the Standing Committee for Refugee Affairs did not have the authority to prohibit employment in South Africa. The Minister of Home Affairs appealed the judgment to the Supreme Court of Appeal.

The Supreme Court of Appeal took a different approach than the High Court by considering the plight of asylum seekers in South Africa and held that the general prohibition on studying and working conflicts with the Bill of Rights. The court also stated that the right to work is closely related to human dignity and should thus be extended to include all asylum seekers in South Africa. The court specifically held that

> human dignity has no nationality. It is inherent in all people—citizens and non-citizens alike—simply because they are human. And while that person happens to be in this country—for whatever reasons—it must be respected, and is protected, by [section] 10 of the Bill of Rights.[2]

In discussing the nature of the limitation that can be placed on the right to work, the presiding officer, Judge Nugent, stated that "where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfillment, but a restriction upon his or her ability to live without positive humiliation and degradation."[3]

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2 *Minister of Home Affairs and Others v. Watchenuka and Others*, [2004] 1 All SA 21 (SCA), para. 25.

3 Ibid., para. 32.

The court's decision is in line with the ICESCR, to which South Africa is a signatory. General Comment 18, which outlines the normative framework of the right to work as enshrined in the ICESCR, emphasizes the critical value of the principle of nondiscrimination when it comes to employment for migrants (Committee on Economic, Social and Cultural Rights 2006, para. 18). The general comment also notes that the right to work is an inseparable and inherent part of human dignity and that "work" as specified in the ICESCR must be *decent* work (ibid., para. 7). The *Watchenuka* decision is also in line with the general principle that all international human rights entrenchments must be enjoyed by all people irrespective of citizenship or migration status.



## The *Watchenuka* Effect

After the *Watchenuka* decision, every asylum seeker with a section 22 permit was immediately entitled to seek employment and get an education in South Africa while waiting for their asylum claim to be adjudicated. Granting asylum seekers the ability to work was an important development given that South Africa, unlike many other countries, does not provide such individuals with financial assistance, social grants, or free social services such as housing while they are waiting for their application to be adjudicated. The right to earn a living and be able to take care of one's dependents is thus a pivotal part of survival for asylum seekers in South Africa (Kavuro 2015, 234).

The *Watchenuka* decision also enabled the further development of recognition of the right to work within the right to human dignity. In 2015, another judgment—*Somali Association of South Africa and Others v. Limpopo Department of Economic Development Environment and Tourism and Others*—was issued that reiterated the importance of the right to work in South Africa.[4] In this judgment, the Supreme Court of Appeal held that the right to dignity not only relates to the right to seek employment but also extends to a person sustaining themselves with trade. Importantly, the court stated that authorities should guard against actions that can fuel xenophobia and that over-regulating asylum seekers' right to work could be interpreted as a way of inducing destitute asylum seekers to leave South Africa.[5]

In yet another decision—*South African Informal Traders Forum and Others v. City of Johannesburg and Others*, relating to forced and mass evictions of informal traders from their trading stalls in the inner

4 *Somali Association of South Africa and Others v. Limpopo Department of Economic Development Environment and Tourism and Others*, 2015 (1) SA 151 (SCA).

5 Ibid., para. 44.

city—the Constitutional Court emphasized that the "ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced 'humiliation and degradation.'"[6] The court did not limit this holding to citizens, instead extending it to all informal traders affected by mass and forced evictions.

## Shrinking Space for the Right to Work Legally and Other Challenges

Thanks to the *Watchenuka* decision, the legal environment for the right to work for forced migrants in South Africa is progressive and accommodating. However, the reality is that the space to freely exercise and enjoy this right is shrinking. This section considers some of the root causes behind this phenomenon and highlights several social contexts that forced migrants must navigate. We do not purport that the issues identified here are the only relevant considerations—just some that we deem critical. These issues should therefore not be understood as an exhaustive list.



### South Africa as a Receiving Country for Forced Migrants

Migration patterns in Southern Africa are complex and motivated by a range of social, economic, political, and ecological factors (World Bank Group 2018, 7). South Africa is one of the world's top ten destinations for asylum seekers (Department of Home Affairs 2017). According to the DHA, the total number of asylum seekers in South Africa as of January 1, 2020, was 188,296 (Minister of Home Affairs 2020). Recent data from the United Nations High Commissioner for Refugees (UNHCR) suggest that South Africa is host to 78,395 recognized refugees (United Nations High Commissioner for Refugees 2020).

South Africa's Constitution and its fundamental protections make it an attractive country for seeking asylum—particularly for LGBTQI+ persons from nearby countries where legal protections do not extend to sexual and gender minorities (Heinrich Boll Stiftung 2018). From an economic perspective, before being overtaken by Nigeria in 2019, South Africa was home to Africa's largest economy (Naidoo 2020) and therefore a hub for economic migrants. The DHA contends that 90% of asylum seekers in South Africa are economic migrants and do not

6 *South African Informal Traders Forum and Others v. City of Johannesburg and Others*, 2014 (6) BCLR 726 (CC), para. 31.

qualify for refugee status (Department of Home Affairs 2017). Statements such as these incubate hostility toward asylum seekers because they suggest that such individuals are abusing the asylum process for their economic gain and are taking opportunities away from South African citizens.

### Inequality, Poverty, and Economic Inaccessibility

South Africa is one of the most unequal countries in the world, with 20% of the population holding over 68% of the income, and the bottom 40% of the population holding only 7% of the income (International Monetary Fund 2020). South Africa's unemployment rate reached 30.1% during the COVID-19 pandemic, and economists predict that the post-pandemic unemployment rate could climb as high as 50% ("South Africa's Unemployment Rate Climbs to 30.1%" 2020). Poverty is a consequence of racial inequality and South Africa's past discriminatory laws, policies, and practices. This inequality directly affects the right to work, for employment is a crucial mechanism for breaking the chain of generational poverty. Under the current dire economic circumstances and high unemployment rate, the hiring of migrants has been perceived as a limitation on citizens' access to employment (Human Rights Watch 2020).

### Xenophobia and Violence toward Migrants

South Africa has a long history of violence against black people, especially women, who are subject to discrimination, violence, marginalization, and economic exclusion. During apartheid, violence was utilized to control the movement of black persons and as a tool for continued oppression. Post-apartheid South Africa remains heavily violent, with one of the world's highest rates of gender-based murders (Reality Check 2019).

Victims of violence are often women, LGBTQI+ persons, migrants, and children. Violence targeted at marginalized people is frequently an expression of toxic masculinity and a sense of powerlessness. Violence is used as a means for people—usually men—to punch down on members of society who are weaker or who are perceived as weaker.[7] It is within this context that forced migrants find themselves—the societal perception that they should be at the bottom of the ladder, which means that they are constantly targeted for and subjected to violence.

7 *Tshabalala v. The State; Ntuli v. The State*, [2019] ZACC 48, para. 1.

Another iteration of the use of violence to solve problems or for people to feel powerful is the presence of xenophobia in South Africa (Human Rights Watch 2020). Xenophobia can be viewed as attitudes, prejudices, or behaviors that reject, exclude, and often vilify persons based on the perception that they are "foreigners" or outsiders to the community or society (Masenya 2017, 81). Xenophobic attacks in South Africa appear to be aimed exclusively at migrants from other African countries, and xenophobia is perhaps better described as Afrophobia (Mamabolo 2015, 144). The current xenophobia against black people from other African countries takes the same shape and color of South Africa's history of violence against its own black people (ibid., 145).



Over the last few years, attacks against migrants have manifested in physical violence, the looting of migrant-owned businesses, social media campaigns, and government officials implicitly or explicitly expressing xenophobic attitudes (Tella and Ogunnubi 2014, 146). The looting of businesses not only deprives migrants of income but creates a generally unsafe environment in which migrants can be forced to relocate to another part of South Africa. Xenophobic perspectives can prevent employers from hiring forced migrants merely because of their immigration status, and the threat of violence can drive migrants into the informal work sector, where they do not benefit from labor rights protections. While a detailed discussion of the number and extent of xenophobic attacks in South Africa goes beyond the ambit of this chapter, it is worth noting that physical attacks against migrants peaked in 2008, with more than sixty people being killed that year (Reality Check Team 2019); and for the period 1994–2018, 309 deaths and over 100,000 displacements were reported due to xenophobic violence (Xenowatch 2019).

More recently, in late 2019 and early 2020, hundreds of forced migrants protested against xenophobia during a five-month sit-in before the UNHCR office in Cape Town and the Cape Town Methodist Church (Oliver 2020). The protesters demanded resettlement from the UNHCR to a country where they can feel safe.

Lastly, the Human Science Research Council conducted a survey in 2018 and found that 31% of respondents believed that the best way to address xenophobia in South Africa is to expel immigrants (Coetzee 2019). This survey illustrates that many South Africans do not foresee an amicable solution with migrants in their country.

## Politicizing and Othering Forced Migrants

As discussed above, South Africa is perniciously torn by inequality, poverty, and unemployment. Migrants in South Africa, regardless of

their immigration status, are often blamed for unemployment (Kavuro 2015, 248). Employment opportunities in South Africa are often perceived by South Africans as being limited—and if migrants are employed, there are fewer employment opportunities available to citizens.

Migrants are frequently used as a scapegoat for the state's failure to address poverty, corruption, inequality, and the high level of unemployment (Tella and Ogunnubi 2014, 149). As with gender-based violence, Afrophobia is fueled by the same principle of punching down out of frustration and helplessness caused by power, racial, and economic imbalances (ibid.). When South Africans feel frustrated by institutional corruption, persistent inequality, and rising unemployment, they seek someone to blame and need to feel that they are taking action to alleviate their struggle. One of the targets available—and over whom they exert some power—are migrants.



### DHA Policies as a Contributory Factor

The inability of asylum seekers to access work has worsened due to the policies adopted by the DHA. For example, the DHA requires that asylum seekers renew their permits at the RRO where they submitted their application for asylum upon arrival in South Africa. This is problematic because many individuals relocate after applying for asylum in response to work opportunities, family members, church affiliations, and support structures. Further, the validity of asylum seeker permits varies in length, from four weeks to six months. Thus, if an asylum seeker settles in Cape Town, for instance, but applied for asylum in Musina, they must travel 1,920 kilometers to renew their permit every time it nears expiration. And given that RROs are often overburdened and under-resourced, individuals attempting to renew their permit might have to visit an RRO several times before finally being assisted—so if their permit is valid for only a month, they would have to repeatedly take time off from work to secure a renewal. Such policies make it even harder for asylum seekers to obtain and retain formal employment.

### Informal Work

Forced migrants experience numerous barriers to entering the formal job market, such as language barriers, a lack of meaningful skills as a result of the conditions in their countries of origin, competition with local jobseekers, and xenophobic attitudes.[8] Another barrier to formal

8 *Somali Association of South Africa and Others v. Limpopo Department of Eco-*

work is the inability of employers to distinguish between forced migrants and other migrants, which makes them reluctant to employ refugees and asylum seekers (Kavuro 2015, 248). Due to this restricted access to formal employment, forced migrants often seek work in the informal sector, which affords them fewer legal protections and makes them more vulnerable to economic abuse. The *South African Informal Traders Forum* decision, discussed above, is an example of the instability and abuse that informal workers generally live with. This case concerned the forced and mass eviction of informal traders from their trading stalls in Johannesburg, which left the traders with no source of income. Such instability and abuse are compounded when the workers are forced migrants or, worse yet, forced migrants who are women.



## Recent Negative Legislative Developments

This section explores three recent legal developments that have further frustrated the right to work for forced migrants in South Africa. It is important to note that this is not an exhaustive list and that there are several other legislative attempts to limit this right.

### The Refugees Amendment Act and Regulations

The new Refugees Amendment Act 11 of 2017 and Regulations to the Amendment Act came into force on January 1, 2020. The regulations in general seem to unduly curtail asylum seekers' rights. For example, regulation 5(3) stipulates that the Standing Committee for Refugee Affairs now has the authority to determine the "conditions under which qualifying asylum seekers can be employed or study" and the "sectors within which an asylum seeker is not permitted to work or study in the Republic whilst awaiting the outcome of his or her application for asylum." This removes asylum seekers' automatic right to work and study. Regulation 12(5) further provides that before an asylum seeker can receive permission to work in South Africa, an assessment will be conducted to determine their ability to sustain themselves and their dependents. It should be noted that under the old Refugees Act, the Standing Committee for Refugee Affairs has several legal obligations and is already inundated with administrative responsibilities—thus, we anticipate that asylum seekers applying for permission to work will be subjected to unreasonable delays in receiving such permission.

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*nomic Development Environment and Tourism and Others*, 2015 (1) SA 151 (SCA), para. 6.

Just a few months after the Amendment Act and accompanying regulations came into force, South Africa declared a national state of disaster to combat the spread of COVID-19. The RROs closed and, according to the latest directions issued by the DHA, will remain closed until September 30, 2021. All temporary visas expiring after the declaration of the national state of disaster will be extended by default. In this regard, we have not yet seen the practical effects of the Amendment Act and regulations.

## The White Paper on International Migration for South Africa



The White Paper on International Migration for South Africa, issued in July 2017, is a distorted policy tool. In South Africa, a white paper is a broad statement of government policy (Parliament of South Africa 2021). White papers have no legal authority; however, they can form the basis of new legislation being introduced to Parliament by the specific state department that drafted them. The White Paper on International Migration for South Africa was drafted by the DHA, and chapter 12 has specific application to the management of asylum seekers and refugees (Department of Home Affairs 2017). As explained above, South Africa currently follows an urban asylum policy, and the white paper proposes a shift toward a policy of "asylum seeker processing centers." The UNHCR's *Detention Guidelines* define detention as the deprivation of liberty of asylum seekers and specifically references holding centers and facilities (2012, para. 5). Therefore, even though processing centers sound less infringing than "camps," the terminology is synonymous. The white paper, which precedes the Amendment Act, suggests removing asylum seekers' automatic right to work and study in South Africa. The Amendment Act and regulations are ostensibly a first step toward the policy contained in the white paper.

## The Gauteng Township Economic Development Bill

The Gauteng Township Economic Development Bill was published for public comment in September 2020. The bill, if passed, would apply only to Gauteng Province. Section 3 of the draft legislation states that the purpose of the bill is, among others, "to designate business activities within the township areas that are reserved for the exclusive and sole use of citizens and persons who have permanent residency status in the Republic." This is achieved by section 7(2), which states that "business activities that are designated in column 3 of Table A of Schedule 2 are, in a designated township, exclusively and solely

reserved for ownership and operation by a citizen of, or a person who has permanent residency status in, the Republic." The table included in the bill, which should indicate the economic activities reserved for citizens and permanent residents, is currently blank, so it is unknown which economic activities are reserved for citizens and permanent residents. Section 7(2) does not differentiate between documented and undocumented migrants or even between economic migrants and forced migrants.

The Gauteng bill contends that its purpose is to promote economic prosperity for citizens by excluding migrants from participating in the economy in Gauteng townships. We agree with the position that "section 7(2) of the bill almost certainly discriminates unfairly against categories of non-citizens in a manner that reinforces societal prejudice. It is not possible to separate any worthy aim of the bill (if any) with its potentially catastrophic effect" and that the bill "is unlikely to pass constitutional muster" (de Vos 2020).



## Recommendations and Best Practices

The inability of forced migrants to seek employment that will enable them to be self-sufficient can lead to more reliance on social assistance provided by the state—whether it is structured social assistance or relief packages, such as COVID-19 social relief grants. This reliance can lead to more aggression against migrants in South Africa.

We welcome the efforts by the South African government—such as awareness-raising campaigns in informal settlements—calling on South Africans to stop the attacks against migrants. Unfortunately, these efforts on their own will not bring about any lasting change to ameliorate the plight of forced migrants. Indeed, thus far, these campaigns have had a negligible impact on attacks against foreign nationals (Mamabolo 2015, 144). Substantial strategies are urgently needed, including the ones outlined below.

*Recommendation 1: Undo restrictive legislative developments and adopt labor market policies that lead to more sustainable livelihoods and economic conditions for refugees (Zetter and Ruaudel 2016).*

This is consistent with the obligation to respect, promote, and fulfill constitutional rights and with international obligations that are binding on South Africa. Work can be used as a tool for integration into society and can prevent the "othering" of forced migrants.

*Recommendation 2: Adopt identification documents for forced migrants that do not render refugees as "other."*

As mentioned above, recognized refugees previously received an identity document that was different in color and presentation from the one issued to citizens and permanent residents. Citizens and permanent residents are now issued with a "smart identity card" instead of a booklet. The government should issue the same kind of card to recognized refugees. This card could also confirm the legal status of the refugee, as it currently does for permanent residents. The issuing of different identity cards for different groups of people confuses employers about which documents are valid identification documents. Having a standard-issue identity document that specifies one's legal status would close this gap.





*Recommendation 3: Revise policies relating to the length of asylum permits and the accessing of services at RROs.*

There are currently five RROs, located in Cape Town, Musina, Pretoria, Port Elizabeth, and Durban. Having to make frequent journeys to a specific RRO, due to asylum seeker permits being valid only for a maximum period of six months, causes instability and hinders employment prospects. Revising the DHA's policies concerning length of asylum permits, as well as which RRO they may visit, can increase forced migrants' long-term employability and promote their access to formal employment.

*Recommendation 4: Increase stakeholders' awareness of labor rights and the inclusion of forced migrants in the formal labor sector.*

South Africa should develop a guide on forced migrants' right to work and the legal documentation that enables them to do so (OECD and United Nations High Commissioner for Refugees 2018). Stakeholders should include employers, trade unions, state employees, and forced migrants.

*Recommendation 5: Research and better understand the ability of forced migrants to contribute positively to the economy (Asylum Access and the Refugee Works Rights Coalition 2014, 24–29).*

Understanding the positive contributions that forced migrants make to the economy can assist in combating misinformation regarding the "stealing of jobs" and promote an environment of positive coexistence.

*Recommendation 6: Ensure that the government adopts a clear anti-xenophobic position and leads by example.*

Currently, many political parties in South Africa use xenophobic language with impunity. A firm stance—including an unequivocal condemning of direct and indirect xenophobia—by state officials would send a clear message that xenophobia will not be tolerated. Further, the proper prosecution of agents promoting violence against migrants would act as a deterrent to further acts of violence.

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# Rethinking the Right to Work of Migrants, Asylum Seekers, and Refugees in the Turkish Asylum Context: Some Considerations on Its Effective Realization through International Cooperation

*Doğukan Sevinç*

## Introduction

The right to work is often difficult for states to fulfill in practice, particularly with respect to migrants, asylum seekers, and refugees. As an economic, social, and cultural right, its realization depends heavily on public policies, in which states enjoy a wide margin of discretion and which are often subject to limited judicial control compared to those concerning civil and political rights. For migrants, refugees, and asylum seekers, the exercise of the right to work is further conditioned by limitations that do not apply to nationals, and despite its vital importance for the enjoyment of other fundamental human rights, it remains largely inaccessible in reality.

This chapter aims to question the challenges posed by the traditional legal positioning of the right to work as an economic, social, and cultural right under international human rights law by evaluating the implementation of the right to work for migrants, asylum seekers, and refugees in Turkey. I argue that the manner in which the right work is framed, interpreted, and implemented remains inadequate for the true realization of this right, which poses major problems for the full enjoyment of other fundamental human rights, such as the realization of human dignity and humane living conditions.

The chapter begins by briefly outlining how the right to work is defined and understood in the international context, especially under the International Covenant on Economic, Social and Cultural Rights (ICESCR). This analysis centers on states' obligations to take steps with a view to progressively achieving the full realization of the right, conditioned on the availability of their resources, in order to discuss how this legal architecture poses problems for the full realization of the right to work in domestic contexts. Second, the chapter looks at Turkey's legislative framework regulating the right to work for migrants, asylum seekers, and refugees.

Turkey is currently home to the world's largest number of displaced persons, with over four million refugees and asylum seekers. The chapter draws on this context to demonstrate that the adoption of legislative measures per se is inadequate for the true realization of this right; indeed, despite the country's detailed legislative framework, the number of displaced persons who are legally employed corresponds to no more than 5% of the total migrant and refugee workforce. The chapter concludes by proposing that the international community reevaluate its understanding of the obligation to engage in interstate cooperation under international law and recommending that the principle of responsibility sharing be redefined in more robust terms given the magnitude of financial burdens related to mass displacement and the specific nature of the right to work, which is intrinsically tied to the economic realities of host countries.



## The Right to Work for Migrants, Asylum Seekers, and Refugees under International Law

James Nickel describes the right to work as "a right that has never really got off the ground whereas most of the other economic and social rights were flying high" (2015, 137). He also argues that the right to work is often seen as a goal rather than a right, pointing out that the United Nations' discourse has shifted away from the language of rights, for Sustainable Development Goal 8 refers to the *goal* of achieving "full and productive employment and decent work for all" to eradicate extreme poverty and hunger (Nickel 2015). Even though the right to work is recognized under sources of international law, such as customary rules[1] and numerous international treaties,[2] its scope is defined in vague terms, casting doubt on its practicality to solve the problems in securing the right. Given the sweeping coverage of the right to work in international human rights instruments, this chapter analyzes the right through two international treaties—the ICESCR and the 1951 Convention Relating to the Status of Refugee—that offer the most relevant normative content to delineate the scope of the right.

1 For example, article 23 of the Universal Declaration of Human Rights.

2 For example, article 6 of International Covenant on Economic, Social and Cultural Rights; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; article 11 of the Convention on the Elimination of All Forms of Discrimination against Women; article 27 of the Convention on the Rights of Persons with Disabilities; article 1 of the European Social Charter (Revised); article 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; and article 15 of the African Charter on Human and Peoples' Rights.

For terminological precision, I use the term "refugees" to refer to those persons who meet the eligibility criteria under the applicable refugee definition, and "asylum seekers" to refer to persons who seek international protection and whose refugee claims have not yet been decided on by the respective state. The term "migrants" will be relevant for the purposes of this chapter to the extent that they qualify as persons in need of international protection, since in reality, the situation of undocumented migrants and the very nature of irregular migration make it difficult to assess whether these persons have fled persecution.

Under article 1 of the 1951 Refugee Convention, "refugee" applies to

> any person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

While the 1951 Refugee Convention can be considered the *lex specialis*[3] applicable to refugees, the rights under the ICESCR "apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers … regardless of legal status and documentation" (United Nations Committee on Economic, Social and Cultural Rights 2009, para. 30). Therefore, the ICESCR not only serves as a tool to interpret the provisions of the 1951 Refugee Convention but also fills the gaps where the 1951 Refugee Convention remains silent or does not apply.

Article 6 of the ICESCR lays out both the positive and negative obligations for state parties with respect to the right to work, while General Comment 18 of the Committee on Economic, Social and Cultural Rights gives more detail on the normative content of the right. The general comment begins by emphasizing what the right does *not* include: "the right to work should not be understood as an absolute and unconditional right to obtain employment" (United Nations Committee on

3 Lex specialis (*generalia specialibus non derogant*) is a legal maxim that "if there is a conflict in a legal instrument between a general provision and a specific provision, the specific provision prevails" (Garner 2014). It is both a principle of legal interpretation and a method of resolving norm conflict. However, as stated in the report of the Study Group of the International Law Commission titled *Fragmentation of International Law*, the relationship between the general norm and the special rule should not necessarily be understood as the special rule overriding the general rule but rather as a case where the specific rule is read and understood against the background of the general standard (International Law Commission 2006).

Economic, Social and Cultural Rights 2006, para. 6). Rather, the right to work includes three interdependent and essential elements. First, states must have specialized services to enable individuals to identify and find employment (availability element). Second, states must prevent and eliminate employment-related discrimination, ensure physical accessibility of workplaces, and create the necessary conditions to seek, obtain, and impart information (accessibility element). Third, states are obligated to provide just and favorable conditions of work (acceptability and quality element). The principal obligation of state parties is to "ensure the progressive realization of the exercise" of this right by adopting measures to "achieve full employment" (ibid., para. 19). Therefore, even though the fulfillment of the right to work does not mean achieving a rate of zero employment—which would not only be unrealistic but also economically undesirable (Collins 2015)—at a minimum, it includes the core obligations to ensure nondiscrimination and equal protection in employment (United Nations Committee on Economic, Social and Cultural Rights 2006, para. 31).



As Colm O'Cinneide (2015, 107) notes, the adoption and implementation of a "sufficiently well-resourced national employment strategy developed through a participatory and transparent process which aims to stimulate economic growth, raise the standards of living and overcome unemployment and underemployment" forms the core of states' obligation to fulfill the right to work. States must also attempt to maximize the employment rate among disadvantaged and marginalized groups and implement specialized measures such as vocational training systems and employment services to reduce unemployment among these groups (United Nations Committee on Economic, Social and Cultural Rights 2006, paras. 31, 36).

The reference to "resource availability" under article 2(1) and the limitations clause included in article 2(3)[4] of the ICESCR further impact the scope of states' positive obligations with respect to the right to work. The resource availability constraint does not exempt states from fulfilling the right to work when state obligations of immediate effect are in question (United Nations Committee on Economic, Social and Cultural Rights 1990, para. 1). The two principal immediate obligations as outlined in article 2 of the ICESCR are to "undertake to guarantee

4 The wording of article 2(3) creates the impression that developing countries are free to tailor the extent of economic rights to non-nationals with due regard to human rights and their national economy. However, as the Limburg Principles on the Implementation of the ICESCR state, it should be interpreted narrowly, as its purpose was "to end the domination of certain economic groups of non-nationals during colonial times," a category that has no relevance for current refugees and asylum seekers.

that the [right to work] will be exercised without discrimination" and "to take steps … to achiev[e] progressively the full realization of [the right to work]." Thus, a state party that ensures the elimination of discrimination in the exercise of the right to work and adopts "all appropriate means, including particularly the adoption of legislative measures" in line with the core minimum obligations described above would be deemed to have discharged its immediate obligations. For all other obligations necessary for the full realization of the right, such as the maximization of employment opportunities and the implementation of concrete measures to create jobs, states may defer these obligations when they lack available resources.

Articles 17–19 of the 1951 Refugee Convention—on wage-earning employment, self-employment, and liberal professions, respectively—delineate states' obligations regarding the right to work for refugees. From an analysis of the international legal instruments relating to refugees, the determination of refugee status by the competent authorities can be of a declaratory nature only. Indeed, any person is a refugee within the framework of a given instrument if they meet the criteria of the refugee definition in that instrument, regardless of whether they are formally recognized as a refugee (United Nations High Commissioner for Refugees 1977). The scope of rights protection for refugees under the 1951 Refugee Convention is contingent upon two factors. First is the level of attachment of refugees to the country of asylum. Accordingly, there are three levels of attachment—namely, physical presence, lawful presence, and lawful stay. The second factor is the standard of protection that varies among the standard applicable to "aliens generally," "most-favored-foreigners," "nationals," or absolute protection.

The right to gainful employment is contingent in both ways (Mathew 2013). Accordingly, the right to wage-earning employment under article 17 requires refugees to be "lawfully staying" in the country of asylum and offers these persons the most favorable treatment accorded to nationals of a foreign country in the same circumstances. On the other hand, self-employment and liberal professions as set forth under articles 18 and 19 apply, respectively, to refugees "lawfully present" and "lawfully staying," offering them treatment "as favorable as possible which is not less favorable than that accorded to aliens generally in the same circumstances." Therefore, the lack of lawful presence or lawful stay may exclude the obligation to grant permission to work for refugees, depending on the type of profession they wish to perform.

The restrictions set forth under the 1951 Refugee Convention cannot be interpreted as constituting discriminatory exclusion from the

labor market; and unlike the ICESCR, they are obligations of immediate effect and are not subject to progressive realization (Saul, Kinley, and Mowbray 2014). However, as described in *The Michigan Guidelines on the Right to Work*,[5] this terminology is not to be interpreted solely under domestic law and refers "ultimately to international law and the factual realities of the particular refugee" (University of Michigan Law School 2010, para. 6). Lawful presence includes situations where a refugee's presence is tolerated by the state of asylum, "in the sense that the State is aware, or should be aware of the refugee's presence and the State is unable or unwilling to remove the refugee" (ibid., para. 7). In a similar vein, lawful stay includes "those recognized as refugees through individual refugee status determinations (RSD) or as *prima facie* refugees as well as asylum seekers in a State that fails to comply with an RSD system or where the procedure is unduly prolonged; and refugees waiting for resettlement in another State" (ibid., para. 8).

To conclude, the right to work is subject to various limitations under both the ICESCR and the 1951 Refugee Convention. While the ICESCR is the primary source under international law defining the scope of and the limitations to the right to work, the 1951 Refugee Convention delineates the right to work for those who fall within its definition of refugee. Even in the scenario where a refugee-hosting state fulfills its immediate obligations under the ICESCR and designs its legal framework in accordance with the permissible restrictions under the 1951 Refugee Convention, the major challenges facing the right to work may not be easily overcome.

## The Right to Work for Migrants, Asylum Seekers, and Refugees under Turkish Law

In order to adequately understand the applicable legal framework, it is necessary to lay out the different statuses of international protection that apply under Turkish law. There are two modes of recognition: the individualized international protection (IP) regime and the group-based temporary protection (TP) regime, which was adopted to respond to the mass influx of refugees following the Syrian civil war. The former offers protection for persons fleeing persecution under three categories: refugee status, conditional refugee status, and subsidiary protection. Moreover, those who apply for international protection

5 These guidelines reflect the consensus of all participants—including academics, advocates, judges, and international officials—from the 2009 "Colloquium on Challenges in International Refugee Law" convened by the University of Michigan Law School.

pending the outcome of their application are granted "IP applicant" status. The latest United Nations High Commissioner for Refugees (UNHCR) statistics show that as of December 31, 2020, Turkey hosted over 3.6 million Syrians under the TP regime and some 330,000 IP applicants (UNHCR Turkey 2020).

Under Turkish law, refugee status is defined in almost identical terms as in the 1951 Refugee Convention. However, since Turkey maintains its reservation to the 1967 Protocol relating to the Status of Refugees, the geographical limitation of the 1951 Refugee Convention remains in effect, as a result of which the legislature has introduced a legal concept known as "conditional refugee status." Accordingly, refugee status is granted only to persons who fall within the refugee definition of the 1951 Refugee Convention fleeing due to events occurring in European countries,[6] whereas those who fall within the same refugee definition but are fleeing persecution as a result of events occurring outside of European countries are granted conditional refugee status.[7] The set of rights and entitlements offered to conditional refugees are lesser than those granted to refugees; most importantly, conditional refugees lack the possibility of long-term integration in Turkey, as they are allowed to reside only temporarily until they are resettled to a third country[8] and are ineligible to apply for family reunification.[9]

Subsidiary protection, on the other hand, is accorded to foreigners or stateless persons who qualify neither as refugees nor as conditional refugees but who nonetheless cannot return to their country of origin because they would be sentenced to death or face the death penalty; would be subjected to torture or inhuman or degrading treatment or punishment; or would be at risk of indiscriminate violence due to situations of armed conflict.[10] Similar to refugees, subsidiary protection beneficiaries are granted family reunification rights in Turkey.[11] Finally, it must be noted that all individuals with these statuses are granted the right to remain in Turkey throughout the status determination procedure and shall not be returned to a place where they may be

6 Law on Foreigners and International Protection (2013), art. 61. Regarding the "geographical limitation" under the 1951 Refugee Convention, the government of Turkey considers "European countries" to be those that are member states of the Council of Europe.

7 Ibid., art. 62.

8 Ibid.

9 Ibid., art. 34.

10 Ibid., art. 63.

11 Ibid., art. 34.

persecuted, as the principle of non-refoulement is the cornerstone of the Turkish legal framework.[12]

Finally, the TP regime covers citizens of the Syrian Arab Republic, as well as stateless persons and refugees who have arrived at or crossed Turkish borders from the Syrian Arab Republic as part of a mass influx or individually due to the events that have taken place in the Syrian Arab Republic since April 28, 2011. The scope was later extended to include Syrians who had illegally crossed to the Greek islands after March 20, 2016, and who requested protection after being readmitted to Turkey.[13] For persons under TP, individual applications for international protection are not processed during the implementation of temporary protection. The non-refoulement principle is fully applicable to those under TP as well.[14]



Turkish domestic law establishes a comprehensive framework governing access to employment for migrants, asylum seekers, and refugees. However, the reality on the ground is far from ideal, and many challenges remain for the full realization of the right to work. Turkey is a signatory to the 1951 Refugee Convention and has ratified it without any reservation applicable to the provisions under chapter III on "gainful employment." Furthermore, article 90(4) of the Turkish Constitution provides an important safeguard by recognizing the supremacy of international law over domestic law. This means that in the case of a conflict concerning fundamental rights and freedoms between domestic law and an international agreement, the provisions of international agreements shall prevail. Accordingly, the normative provisions providing and protecting refugees' right to work within the 1951 Refugee Convention described above apply in their entirety.

The right and procedures to apply for a work permit by beneficiaries of temporary and international protection are regulated by two different regulations.[15] Accordingly, those under both temporary protection and international protection have the right to apply for work permits, which is a legal requirement to engage in gainful employment in Turkey.

Conditions of access to legal employment vary according to the status of the person seeking protection. Those granted refugee or

12 Ibid., art. 4.

13 Temporary Protection Regulation (2014), provisional art. 1(6).

14 Ibid., art. 6.

15 Regulation on Work Permits of Foreigners under Temporary Protection (2016); Regulation on Work Permit of International Protection Applicants and International Protection Status Holders (2016).

subsidiary protection status may work dependently or independently. They do not need to apply separately for work permits because their identification documents as refugees or subsidiary protection status holders function as substitutes for work permits.[16] This is not time bound, and they retain their right to work unless they lose their status. On the other hand, IP applicants and conditional refugees—who make up the majority of asylum seekers in Turkey after persons under TP—need to apply for a work permit in order to work legally.[17] In this regard, there are important differences between refugee/subsidiary protection status holders and IP applicants/conditional refugees. First, the latter group may apply for a work permit only six months after the date of application for international protection; second, they can work only in the provinces where they are registered to reside; and third, their work permits are valid only for the specific job and workplace mentioned in the application.[18] The authority to grant work permits outside the designated provinces lies solely with the relevant ministries. This is a major obstacle for accessing the labor market since employment opportunities are limited outside major provinces and IP applicants and conditional refugees do not always get to decide in which province they will reside (as this is designated by the migration authority at the time of the IP application).

Regarding the application procedure for IP applicants and conditional refugees, work permits are issued for a finite duration, which is initially one year at most.[19] Once the initial year is over, permits up to three years can be granted in subsequent applications. Moreover, for certain occupations (seasonal agriculture work and husbandry), an application for an exemption from work permits may be lodged with the relevant authority,[20] making it easier for IP applicants and conditional refugees to be employed in these sectors.

Other important provisions are that IP applicants and conditional refugees cannot be paid less than the minimum wage;[21] that they benefit from the social security system as employees;[22] and that the granting of work permits may be subject to limitations in terms of permit

16 Regulation on Work Permit of International Protection Applicants and International Protection Status Holders (2016), art. 4.

17 Ibid., art. 5.

18 Ibid., arts. 6, 18.

19 Ibid., art. 15.

20 Ibid., art. 9.

21 Ibid., art. 17.

22 Ibid., art. 23.

type, duration, occupation, sector, and geographical area.[23] Here, it is important to note that these limitations do not apply to refugees and subsidiary protection status holders who have resided in Turkey for at least three years or are married to a Turkish citizen or have a Turkish citizen child, a provision that is in conformity with article 17(2) of the 1951 Refugee Convention. IP applicants and conditional refugees may also receive vocational training and on-the-job training at a workplace within the scope of courses and programs organized by the Turkish Labour Agency.[24] A positive outcome of this provision, which may facilitate employment opportunities, is that if these persons are to be employed at the same workplace at the end of the training period, the workplace employment quota[25]—under which one foreigner may be employed for every five Turkish citizens employed at a given workplace—may be applied less strictly or even waived. Finally, a specific provision sets forth that associations, foundations, and civil society organizations may apply to the relevant ministry with a view toward employing international protection applicants or status holders in humanitarian assistance activities.[26] This is especially important given the wide array of national and international civil society organizations carrying out protection activities in the field.



Similar to IP applicants and conditional refugees, persons under TP status cannot work or be employed in Turkey without a work permit.[27] The six-month waiting period also applies as of the date of the foreigner's TP registration.[28] During this waiting period, they have access to social benefits, including free health care, legal assistance, and financial and in-kind assistance. There is also the possibility of exemption from work permits in agriculture and husbandry, access to vocational training, a guaranteed minimum wage upon employment, access to social security, and the opportunity for employment in civil society organizations.[29] However, some detailed restrictions are spelled out for persons under TP. For example, they can apply for a work permit in provinces where they are permitted to reside, but due to consider-

23 Ibid., art. 18.

24 Ibid., art. 22.

25 Implementation Regulation of the Law on Foreigners' Work Permits (2003), art. 13; Ministry of Family, Labour and Social Services (2021a).

26 Regulation on Work Permit of International Protection Applicants and International Protection Status Holders (2016), art. 21.

27 Regulation on Work Permits of Foreigners under Temporary Protection (2016), art. 4.

28 Ibid., art. 5.

29 Ibid., arts. 5, 10, 11, 12, 13.

ations of public order, public security, and public health, the issuance of work permits in provinces can be ceased at the discretion of the relevant ministries.[30] In such cases, work permits issued in these provinces will not be extended. Employment quota limitations are also stricter, as the number of foreigners under TP at a given workplace cannot be more than 10% of the number of Turkish citizens working there.[31] However, the quota may be waived if the employer is able to document that within the four weeks prior to the work permit application date, there were no Turkish citizens available to undertake the same work.[32] Finally, a common restriction for all status holders is that certain professions are reserved exclusively for Turkish nationals,[33] meaning that work permit applications for these occupations will not be processed.[34]

As can be seen from the above, Turkey has a detailed legislative framework regulating access to employment for migrants, asylum seekers, and refugees under IP and TP statuses that, in general terms, is in line with international norms. By granting refugees and subsidiary protection status holders direct access to labor markets without the need to apply for work permits, Turkey complies with the most-favored-foreigner treatment standard under the 1951 Refugee Convention. Furthermore, the waiver of limitations in terms of permit type, duration, occupation, sector, and geographical area for refugees with deeper attachments respects the obligation to remove restrictions for the protection of the national labor market under article 17(2) of the 1951 Refugee Convention. When it comes to IP applicants, conditional refugee, and TP status holders—categories that do not qualify as refugees under the 1951 Refugee Convention—their situation must be assessed in light of other legal instruments enshrining the right to work, such as the ICESCR.



30 Ibid., art. 7. Also, as of 2018, the de facto suspension of registration by the Directorate General of Migration Management in major provinces hosting high number of refugees inevitably led to refugees' inability to access labor markets, since persons who cannot get registered have no prospect of formal employment in that province.

31 Ibid., art. 8.

32 Ibid.

33 These occupations are listed under various laws and include dentists, midwives, nurses, pharmacists, veterinarians, executive positions at public hospitals, lawyers, public notaries, private security officers, tour guides, and customs brokers. Moreover, public service is open only to Turkish nationals. For a descriptive list, see Ministry of Family, Labour and Social Services (2021b).

34 Regulation on Work Permits of Foreigners under Temporary Protection (2016), art. 6.

**TABLE 1**

**Overview of Turkish domestic legislation on work permits for persons under international and temporary protection regimes**

| | International protection | | | | Temporary protection |
|---|---|---|---|---|---|
| Status | Refugee | Conditional refugee | Subsidiary protection | IP applicant | TP status holder |
| Work permit required? | **No** *(status ID replaces work permit)* | **Yes†** | **No** *(status ID replaces work permit)* | **Yes†** | **Yes†** |
| Duration | **Indefinite** | **Definite** | **Indefinite** | **Definite** | **Definite°** |
| Restrictions<br>Temporal (**T**)<br>Geographical (**G**)<br>Occupational (**O**)<br>Specific job (**SJ**)<br>Other (**X, X‡, Xˆ**) | **O, X‡** | **T, G, O, X, SJ** | **O, X‡** | **T, G, O, X, SJ** | **T, G, O, X, Xˆ, SJ** |
| Workplace employment quota?<br>(# foreigners: # Turkish citizens) | **No** | **Yes~**<br>(1:5) | **No** | **Yes~**<br>(1:5) | **Yes~, Ÿ**<br>(1:10) |
| Minimum wage | ✓ | | | | |
| Social security | ✓ | | | | |

**Definite** 1 year in initial application and extension up to 3 years in subsequent applications

**Definite°** 1 year in initial application and extension of 1 year in subsequent applications

**G** Work permit valid only in province of registration

**I** Valid throughout status

**O** Occupations that can be performed exclusively by Turkish nationals

**SJ** Work permit valid for specific job and workplace mentioned in the application

**T** Application for a work permit can be lodged 6 months after the date of IP/TP application

**X** Further restrictions as to permit type, duration, occupation, sector, and geographical area may apply

**X‡** Further restrictions as to permit type, duration, occupation, sector, and geographical area may apply, *but not to* refugees or subsidiary protection status holders who have been residing for 3 years or are married to a Turkish citizen or have a Turkish citizen child

**Xˆ** Issuance of work permits may be ceased by ministerial discretion on grounds of public order, security, and health

**Ÿ** Employment quota may be waived in the absence of Turkish citizens to undertake same work

**~** Employment quota may be applied less strictly if employed following vocational training

**†** Exemption from work permit is possible in seasonal agricultural work and husbandry

Given that access to labor markets is permitted under domestic law, it would be hard to argue that Turkey is failing in its obligation to progressively achieve the right to work or in its immediate minimum core obligations, which are to be interpreted in light of resource constraints (United Nations Committee on Economic, Social and Cultural Rights 1990, para. 10). The law does not allow discrimination on impermissible grounds, and the limitations on the right to work can be deemed compatible with the ICESCR's article 4 on "promoting the general welfare in a democratic society." Given the protracted nature of mass displacement, these limitations likely comply with the legality, necessity, and proportionality requirements under this provision.

Immigration control linked with the protection of the labor market for nationals can be seen as legitimate objectives justifying temporal restriction, especially since domestic law requires that these persons' basic needs be met during the waiting period.[35] Furthermore, the six-month waiting period is even shorter than the period set forth under the European Union Reception Conditions Directive and is in line with the UNHCR's suggestion that access to the labor market not be denied for longer than six months (United Nations High Commissioner for Refugees 2007). Finally, in terms of a guaranteed minimum wage upon employment, the conditions of work and terms of employment, and access to the social security system, all status holders are given the same treatment as nationals.

However, the actual realization of the right to work is far from ideal. As of 2020, Turkey was home to the world's largest number of refugees, with over four million refugees and asylum seekers, including over 3.6 million displaced people having fled the war in Syria (UNHCR Turkey 2020). Yet the latest available statistics show that despite the detailed legislative framework regulating the right to work of refugees and asylum seekers, those who are granted work permits correspond to no more than 5% of the total refugee workforce. According to data from 2019, only 63,789 Syrians were granted work permits (Ministry of Family, Labour and Social Services 2019).

However, it is known that at least 1.2 million Syrian refugees are employed in Turkey, which shows that nearly 95% of Syrian refugees who are employed are employed informally (Erdogan 2019). This is a major challenge, as it often leads to migrants, asylum seekers, and refugees earning less than the minimum wage and engaging in hazardous activities where risks are severely increased given that informal employment does not grant access to the social security system. Under

35 Law on Foreigners and International Protection (2013), art. 89.

Turkish law, working without permission can also lead to deportation.[36] Child labor, even though banned, is another major concern, for children—who make up almost half of the total refugee population—are often employed in agriculture, textile, and service industries, leading to school desertion and thus hampering long-term social inclusion and integration. The inability to secure gainful employment is also a primary factor for refugees' irregular onward movement to Europe (Kale 2017). Thus, even though Turkey's legislative framework is to a certain extent in compliance with the country's international obligation to guarantee the right to work for migrants, asylum seekers, and refugees, it has been insufficient to overcome the obstacles for securing the right to work in reality.



## Improving the Realization of the Right to Work: Cooperation and Responsibility Sharing under International Refugee Law

The right to work is essential for realizing other human rights and is an inherent element of human dignity because it forms a bond between the individual and society. It is also of paramount importance for securing the social inclusion and integration of migrants, asylum seekers, and refugees in the receptor country. To alleviate the shortcomings posed by the current understanding of the right to work, I argue for the adoption of a binding international framework for international cooperation and responsibility sharing in the refugee context—because even if all appropriate measures are adopted, the socioeconomic burdens on receptor states can become insurmountable, especially in contexts of mass displacement.

As stated in the United Nations Secretary-General's report *In Safety and Dignity*, the economic and social burdens that large-scale movements of refugees and asylum seekers place on host countries and their communities are too great for host countries to address alone (United Nations General Assembly 2016, para. 76). Given the major economic constraints on national resources, particularly in long-standing refugee-hosting countries in the global South like Turkey, it is unrealistic to expect host states' resources alone to be sufficient to fully realize the right to work. However, if international cooperation and responsibility-sharing mechanisms, particularly with respect to admitting those fleeing persecution, were seen as legal obligations instead of voluntary efforts, host states could more adequately realize the right to work.

36 Law on Foreigners and International Protection (2013), art. 54.

Although there are no clear-cut definitions for these concepts, responsibility sharing can be understood as the global responsibility to protect refugees; it is a subcategory of international cooperation, as the latter encompasses additional forms of interstate cooperation and assistance, such as monitoring and managing migration, strengthening border protection, addressing mixed migration, and combatting human trafficking and smuggling (Dowd and McAdam 2017). While all forms of cooperation potentially help alleviate pressure on host countries, third countries agreeing to an increased admittance rate of refugees from host states would help reduce the challenges that these countries face when realizing the right to work. This is primarily because third countries with better-equipped economies can more easily absorb additional workers and offer more employment opportunities with prospects of long-term integration.

Responsibility sharing is not a legally binding concept. Rather, it stems from the international community's political will and ambition. In this regard, the most notable global initiatives are the New York Declaration for Refugees and Migrants, the Comprehensive Refugee Response Framework, and the Global Compact on Refugees. The New York Declaration for Refugees and Migrants, which was unanimously adopted by all 193 member states of the United Nations, includes robust commitments to achieve durable solutions for refugees by exploring additional avenues such as resettlement and alternative pathways for third countries to admit refugees. The Comprehensive Refugee Response Framework, which UNHCR developed at the request of states and in light of the New York Declaration, targets large refugee movements and has among its key objectives to ease pressure on host countries and to expand third-country solutions. Finally, the Global Compact on Refugees, which the United Nations General Assembly adopted with overwhelming support from member states, recognizes that a sustainable solution to refugee crises cannot be achieved without international cooperation and "emphasizes the need for robust, well-functioning, concrete arrangements and potential, complementary mechanisms for ensuring predictable, equitable, efficient and effective burden- and responsibility-sharing" (United Nations General Assembly 2019, para. 17). It further calls on states and other stakeholders that have not yet contributed to burden sharing and responsibility sharing to do so, with a view toward broadening the support base in a spirit of international solidarity and cooperation (ibid., para. 25).

Despite all of these recognitions and affirmations, the operationalization of responsibility sharing continues to depend largely on the

political will of states and occurs through voluntary undertakings.[37] As Lena Kainz et al. (2020, 10) state, "at the Global Refugee Forum, for example, almost half of the pledges received revolved around protection capacities and statelessness, while other focus areas, such as responsibility-sharing or jobs and livelihoods, have received fewer pledges to date." In practice, only a limited number of countries offer both resettlement and complementary pathways for third-country admission, and these remain the least popular options in responsibility sharing. In the Turkish context, even though the refugee situation receives significant financial and other forms of assistance (such as technical assistance, capacity building, and information sharing) from the international community, the relocation of refugees to third countries remains the least popular method among burden-sharing mechanisms. According to UNHCR statistics, in the last six years, only 68,057 individuals departed to resettlement countries.[38] Furthermore, as of 2021, the total number of Syrians resettled as per the EU-Turkey Statement of 2016 is only 27,751 (Ministry of Interior Directorate General of Migration Management 2021).



Given the excessive economic and social restraints imposed on refugee-hosting countries—which are often developing countries—it is crucial for the international community to consider responsibility sharing as a legally binding norm under international refugee law. United Nations member states' overwhelming support for the adoption of the abovementioned global initiatives may be an indication that responsibility sharing has the potential to become part of customary international law. Yet, in its current state, the general duty of cooperation—a well-established principle of international law—does not create direct obligations for states in the field of asylum. As Volker Türk and Madeline Garlick (2016) state, the precise form and content that such cooperation would take, as well as the respective contributions that states should make, is far from clear. In this regard, a more robust international framework is required to spell out how states' responsibilities can be measured.

Some commentators pertinently argue that refugee protection is a global public good and that non-respect for international

37 Among these fora, the Global Refugee Forum is a notable one for the arrangement of burden and responsibility sharing.

38 This figure is based on an analysis of yearly data (2014–2021) from the UNHCR website (see United Nations High Commissioner for Refugees 2021). The sixteen resettlement countries were Belgium, Bulgaria, Canada, Croatia, Estonia, Finland, France, Germany, Italy, the Netherlands, New Zealand, Portugal, Romania, Spain, Sweden, the United Kingdom, and the United States.

responsibility-sharing obligations results in collective action problems (Suhrke 1998, cited in Betts 2009). Refugee-hosting states are contributing to the public good, whereas states that do not participate in responsibility sharing engage in free riding. According to Alexander Betts (2017), the commitment of Northern states to alleviate the burden on Southern states depends on their acquiescence of the substantive relationship between refugee protection and their own interests, and pushing the natural limits of absorption capacity of host states can trigger major risks in the fields of security, immigration, and trade. Some commentators also add that overcoming these collective action problems depends not only on states' interests but also on the existence of norms and institutional frameworks applicable to responsibility sharing (Thielemann 2003 and Loescher et al. 2008, cited in Betts 2009). Betts and Jean-François Durieux (2007, as cited in Betts 2009) argue that the UNHCR plays a role in norm creation in this field, not only through legal frameworks (top-down model of norm creation) but also through the sharing of good practices (bottom-up model of norm creation).

Taking a step further, the adoption of an internationally binding legal framework that includes elements of both top-down and bottom-up approaches (as in various frameworks of international environmental law) can be promising for tackling collective action problems of responsibility sharing in international refugee law.[39] In particular, a system under which voluntary pledges in the form of physical relocation of refugees and asylum seekers are undertaken but which are subjected to a requirement of increased ambition—in the form of a progressive increase in the number of persons admitted—would not only be more effective but also be more likely attract political support given that it allows room for differentiation among states.

## Conclusion

There are several challenges posed by the current understanding of the right to work under international human rights law, which hampers accessibility for all, especially for refugees and asylum seekers whose enjoyment of the right to work is subject to additional legal and factual restrictions. Turkey's domestic legislation regulating the right to work of foreigners is an exemplary model that abides by international

39 The applicability of the concepts and principles of international environmental law in the refugee context is enlightening. The Global Compact on Refugees also begins by stating that the predicament of refugees is a "common concern of humankind." See Dowd and McAdam (2017) for an interesting discussion on the extent to which the principle of "common but differentiated responsibilities" might apply in the international refugee law context.

standards but is nevertheless inadequate for overcoming the problems surrounding the realization of this right. Given the magnitude and the complexity of refugee situations, particularly in mass displacement contexts, it is unrealistic to expect any state to carry the burden alone. At the international level, the development of an internationally binding framework comprising top-down and bottom-up cooperation models alike can alleviate the urgent need for an equitable and effective international responsibility-sharing obligation that could pave the way for the right's true realization.



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# Fundamental Right to Work as a Tool for Inclusion: Making the Case for Granting Refugees and Survival Migrants the Right to Work in India

*Tripti Poddar*

## Introduction

Migration, simply put, is the movement of people. India's partition in 1947 into two different countries—Pakistan and India—resulted in one of the largest movements of migrants and refugees across international borders. Families and friends were separated by a border, drawn arbitrarily overnight by one British man with no connection to the continent, sitting thousands of kilometers away.[1] In this case, as in most cases of partition, the decision of where to draw the border was based on religion. Panic and uncertainty led millions to leave behind the lives that they had known. As a result of this arbitrary border, the past century has seen increasing political extremism (Ali 2015) and large-scale displacements across the Indian subcontinent—more people are displaced now than after World War II (United Nations High Commissioner for Refugees 2015).

Human migration—which often involves uprooting one's life and leaving behind memories, property, and familiarity, and undertaking clandestine journeys to seek safety and security—is seldom a choice. Often, persecution or economic necessity, among other reasons, make the move imperative for survival. Systematic deprivation, violation of socioeconomic rights, and discrimination are sometimes the initial signs of persecution; the international refugee law framework, in ignoring this, fails to preempt persecution and continued deprivation. To address this lacunae, Alexander Betts, in 2013, coined the term "survival

1 "In July 1947, about five weeks before the British were scheduled to depart the Indian subcontinent, Sir Cyril Radcliffe, a British lawyer, was commissioned to draw the borders that would divide British India into two countries—Muslim-majority Pakistan and Hindu-majority India. This was Radcliffe's first-ever trip to India. He was asked to base his lines on the population of Muslims and Hindus, in addition to 'other factors'" (Asrar and Abazid 2017).

migrants"[2] to describe persons who are not covered within the existing international framework for refugees[3] but are forced to migrate.[4]

India also lacks a comprehensive legal framework for refugees and migrants. This, in turn, pushes those who are in the country to seek employment in the informal sector in order to earn a livelihood (Zetter, Ruaudel, and Schuett 2017, 9). Informal employment often involves exploitative working conditions, with women and children at risk of further marginalization. Meanwhile, the lack of legal recognition for refugees and survival migrants exacerbates their vulnerabilities because it means that they do not have access to law enforcement, the justice system, or socioeconomic rights such as the right to work.



Currently, the socioeconomic rights of refugees are drawn from the larger international human rights framework (Marouf and Deborah 2009, 784–96), and most international aid is focused on humanitarian relief. While relief is a necessity, it does not address the root cause of human mobility and therefore only means that refugees are in continuous need of more aid and assistance. Presently, 54% of the world's refugees have lived in host countries for more than five years—and the average length of stay is seventeen years (Betts 2016). Humanitarian aid perpetuates this cycle of dependence. The focus must shift to a more rights-based approach to help ensure the economic independence of refugees and survival migrants in host countries.

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2 According to Betts (2013, 23), "Survival migrants can be defined as 'persons who are outside their country of origin because of an existential threat for which they have no access to a domestic remedy or resolution.' … Second, they face 'an existential threat.' This need not be reduced to the literal right to life but includes the core elements of human dignity and could be grounded either ethically or legally."

3 The United Nations High Commissioner for Refugees (2021) defines a refugee as a person who has "fled war, violence, conflict or persecution and [has] crossed an international border to find safety in another country." This definition is severely limiting—conditions and reasons leading to the act of movement are seldom isolated from one another. There is an urgent need to recognize the rights of persons who face forced migration for reasons that do not fall within the definition of refugees under international law. These reasons include environmental causes, economic despair, and food insecurity, among others.

4 According to the United Nations High Commissioner for Refugees (2016b), "The term 'forced migration' is sometimes used by social scientists and others as a general, open-ended term that covers many kinds of displacement or involuntary movement—both across international borders and inside a single country. For example, the term has been used to refer to people who have been displaced by environmental disasters, conflict, famine, or large-scale development projects." In its current form, the concept of forced migration is vague and open ended.

This chapter illustrates the dangers of the lack of an adequate legal framework for refugees and survival migrants, making a case for ensuring the unqualified right to work for both groups. It outlines how India's existing legal framework can be relied on to demand the right to work for refugees and survival migrants until this right becomes a reality in the letter of the law.

## Legal Framework for Refugees in India

India does not have a comprehensive or even a uniform policy for refugees or survival migrants, and in fact penalizes the presence of migrants without travel documents, whom it refers to as an "illegal migrants." Ad hoc executive action is used to grant refugee status or residence permits to specific groups of persons[5] fleeing specific contexts, such as Tibetans and people from Afghanistan, most of whom are Hindus, Sikhs, or Christians (Saxena 2020). An amendment made in 2019 to the Citizenship Act of 1955 formalized this differential treatment, which is inherently arbitrary and discriminatory. Additionally, the Indian legal system, under both the Constitution and the Supreme Court, recognizes the persuasive value of international treaty obligations, and article 253 of the Constitution empowers the Parliament to implement treaty and other international obligations through legislation.



### India's International Obligations

India is not a state party to the 1951 Refugee Convention or its 1967 Protocol—treaties that, however inadequate, indicate *prima facie* state intent. It is, however, party to other international instruments that invoke state obligations toward refugees and displaced persons, including the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the United Nations Declaration on Territorial Asylum; and India's mandate for the office of the United Nations High Commissioner for Refugees (UNHCR) in India.

The UDHR, passed in the aftermath and devastation of World War II, recognizes the inherent dignity and equality of all of humankind, irrespective of physical borders. The rights enshrined in the declaration include the right to leave any country (art. 13(2)), the right to seek asylum (art. 14), and the right to work (art. 23). For its part, the

5 For information on refugees and other kinds of foreigners in India, see Ananthachari (2001).

International Covenant on Civil and Political Rights emphasizes the importance of curtailing liberty only after following a "procedure … established by law" (art. 9). The absence of a comprehensive refugee framework within India is in direct contravention of this obligation.[6]

India is a state party to the United Nations Declaration on Territorial Asylum of 1967, which expands on the principles laid down in articles 13 and 14 of the UDHR. However, article 3(2) of the declaration lays down two very broad exceptions to the above principles: national security and "to safeguard the population, as in the case of a mass influx of persons." While national security is a valid exception, the parameters need to be defined. "Safeguarding the population" is often used as an excuse by oppressive regimes to undertake arbitrary actions.[7]



The mandate of the UNHCR is one of the few existing standardized frameworks within India for recognizing and granting refugee status to persons fleeing persecution and entering India. However, the scope of the mandate is geographically limited to New Delhi and Chennai. The UNHCR, which has been operating in India since 1981, has the limited mandate of helping the Indian government support asylum seekers and refugees in accessing health, education, and legal aid services (Manuvie 2019).

### *Other International Instruments*

The 1951 Refugee Convention and its 1967 Protocol currently set the international framework for the rights of refugees, although India is not a party to either treaty. That said, the very manner in which refugees are defined under the Refugee Convention is limiting and inadequate for addressing the challenges of the twenty-first century. Despite its limitations, the convention provides for "gainful employment" (arts. 17–19). Article 17 adds to the inadequacies of the current international framework by relying on states' "sympathetic consideration"—and not a rights-based approach—toward refugees' access to employment.

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6 The Foreigners' Act of 1948 makes "illegal" entry into India a punishable offense, with imprisonment of up to five years. However, parts of the current process to determine the illegality of entry or presence in India are arbitrary and lack sufficient legislative backing.

7 In Assam, India, for example, there has been an ongoing exercise since 1997 that uses the justification of protection from external aggression to arbitrarily disenfranchise hundreds of thousands of people ("Assam NRC: What Next for 1.9 Million 'Stateless' Indians?" 2019). This strategy has found backing from the Supreme Court, including in the *Srabananda Sonowal* judgment (Writ Petition (Civil) No. 131/ 2000).

## Governing Statutory Provisions

India currently lacks a legislative framework laying down the process of formalization or recognition of the legal status of persons forced to migrate, including those who qualify as refugees within the scope of the 1951 Refugee Convention and its 1967 Protocol. The only recognition of such migrants is a few scattered mentions in various visa guidelines and other executive orders issued by the Ministry of Home Affairs (2018a, 2018b, 2020). The practical problems with this approach are that these guidelines can be unilaterally changed with no accountability mechanisms. Second, they are barely used or relied on because of gaps in implementation.

This section examines the different provisions under Indian law that could be deemed applicable to the recognition of refugee status in India and discusses their shortcomings.



### *Foreigners Act of 1946*

The Foreigners Act purports to "provide for the exercise by the Central Government of certain powers in respect of the entry of foreigners into [India], their presence therein and their departure therefrom." Section 14 of the act makes unauthorized entry into India a criminal offense punishable by up to five years in prison (Zetter and Ruaudel 2016). For persons fleeing persecution and making the decision to migrate to India, this makes them more vulnerable and puts them at further risk of being prosecuted within India upon arrival and during their presence on Indian soil.

### *Foreigners Order of 1948*

The Foreigners Order, which is an executive action, regulates foreigners' entry into, presence in, and exit from India. Article 10 of the order imposes "restrictions on employment" for all foreigners within India, failing to make any distinction between different categories of foreigners. Article 11 confers on the "civil authority" the "power to impose restrictions on movements etc.," which, among other things, causes severe impediment to an individual's ability and right to undertake necessary travel to access opportunities of gainful employment.

### *Citizenship Act of 1955*

The Citizenship Act has become increasingly regressive over time. A 1987 amendment to the act did away with *jus soli* citizenship, and the law was later amended to expressly deny citizenship to the children

of "illegal migrants," who, under the law, could also include refugees and forced migrants.

Most recently, in 2019, the law was amended to make religion a criterion for acquiring citizenship, thereby discriminating on religious grounds in the granting of Indian citizenship.

In addition to the above amendments, the specifically discriminatory and unconstitutional 2019 amendments to Citizenship Act and the National Register of Indian Citizens have put into place a systemic regime of disenfranchising millions of people. These instruments have the potential to be used as tools of abuse and graver marginalization of refugees and forced migrants based on religion. Figures 1 and 2 explain the dual impact of the two in disenfranchising millions of Indian citizens, based on an arbitrary procedure.



## The Constitution and the Supreme Court

The Constitution of India does not expressly recognize the right of refugees or asylum seekers to seek asylum, nor does it impose positive obligations of any kind on the state to implement procedures for recognizing refugees, with the exception of persons who migrated as a result of India's partition in 1947. However, the Constitution contains various provisions that confer fundamental rights to all persons within India, which would include refugees and displaced persons.

Courts in India, including the Supreme Court, have often interpreted statutes and policies to be in harmony with India's obligations under international law (Bakshi 2019). The Supreme Court of India, in the case of *National Human Rights Commission v. State of Arunachal Pradesh*, recognized that "the state government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the state without being inhibited by local politics."[8] These protections flow from the fundamental rights guaranteed under article 14 (equality before law) and article 21 (right to life) of the Constitution.

Article 51 of the Constitution, which is a directive principle of state policy (DPSP),[9] imposes an obligation to "promote international peace and security … [and] foster respect for international law and treaty obligations in the dealings of organized peoples with one another."

8 *National Human Rights Commission v. State of Arunachal Pradesh*, 1996 1 SCC 742, para. 20.

9 The DPSPs are non-enforceable provisions of the Constitution. They are meant to be "fundamental in the governance of the country" and applied by the state "in making laws."

**Figure 1. The National Register of Indian Citizens**

**What is the National Register of Citizens?** The National Register of Citizens (NRC) is a register containing the names of Indian citizens, as provided by the 1955 Citizenship Act (amended in 2003). The NRC is compiled from the National Population Register (NPR), after verification of citizenship status of the names included in the NPR.

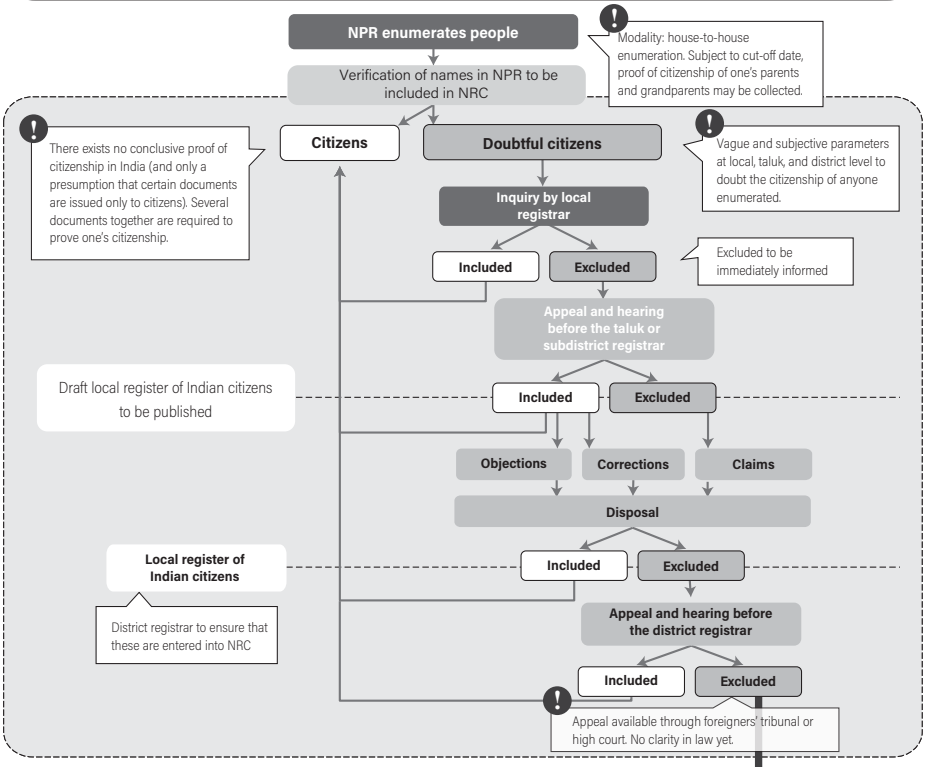
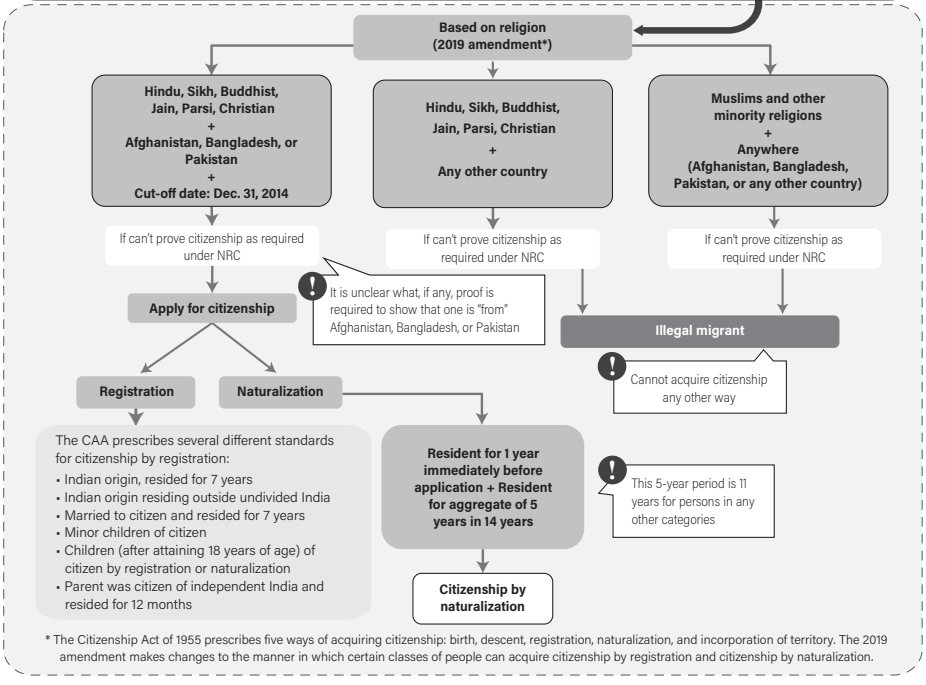



**Figure 2. The Citizenship Act**

**What is the Citizenship Act? How is it related to the National Register of Indian Citizens?** The Citizenship Act (CAA) works both independently and in conjunction with the NRC. While proving one's citizenship under the NRC, the CAA provides an alternate route of citizenship with a much lower burden of proof based on religion to people of Hindu, Sikh, Christian, Jain, Buddhist, or Parsi religions who are "from" Afghanistan, Bangladesh, or Pakistan—clearly excluding Muslims and other minority religions.




* The Citizenship Act of 1955 prescribes five ways of acquiring citizenship: birth, descent, registration, naturalization, and incorporation of territory. The 2019 amendment makes changes to the manner in which certain classes of people can acquire citizenship by registration and citizenship by naturalization.

Source: These figures were prepared by a collective of individuals, including the author. For further clarification, email citizenshipindia@protonmail.com

Article 51A delineates fundamental duties that every citizen must endeavor to fulfill, stating that "it shall be the duty of every citizen of India … to cherish and follow the noble ideas which inspired our national struggle for freedom." The duty of care owed to other humans is very much within the constitutional scheme. India's freedom struggle was one of seeking dignity and self-determination of a people; therefore, rendering an enabling environment and dignity to persons fleeing persecution and other types of duress must be read within this interpretation. While fundamental duties are not enforceable, they are promoted by constitutional methods and are used as a tool of statutory interpretation (Bakshi 2019).



## Granting Refugee Status in India

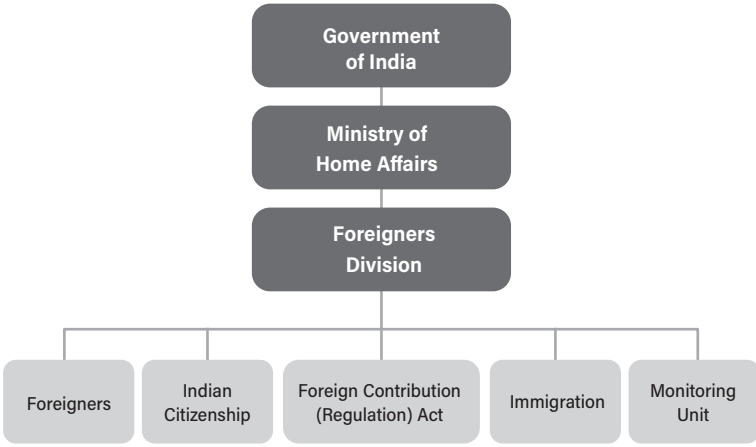
Though India is not a party to the 1951 Refugee Convention or the 1967 Protocol, certain administrative frameworks and judicial pronouncements recognize these obligations (Zetter and Ruaudel 2016). Broadly speaking, there are two processes for granting refugee status in India. The first is an ad hoc administrative process that the federal government undertakes and has deployed multiple times, such as in the case of Tamils from Sri Lanka and the Tibetan population (Kumar 2017), and the second is through the UNHCR. These processes are important because they either ease or further restrict an individual's enjoyment of the right to work.

### *Administrative Processes*

The executive branch in India has tremendous discretionary power in determining the treatment of refugees, making it amenable to arbitrary and subjective action. For example, Tibetan refugees arriving between 1959 and the 1970s were granted permits to live and work in India by way of executive policies introduced by the Ministry of Home Affairs. These permits required annual renewal and granted Tibetans a (limited) right to movement. However, Tibetan refugees arriving after 1979 faced greater difficulties in accessing these same rights. As noted by Claudia Artiles, "India's lack of legal obligation allows it to alter refugee policies at will, often to reflect its current political interests. The result is a rather unstable refugee policy" (2012, 5). The literature shows that this arbitrary freehand of the executive has become increasingly restrictive over time (Research Directorate, Immigration and Refugee Board of Canada 2009).

**FIGURE 3**

**Indian ministries and departments that interact with migrants and refugees**






The long-term visa guidelines issued by the Ministry of Home Affairs give the Foreigners Regional Registration Office discretionary power to grant long-term visas to "foreign nationals" who prove a "well-founded" fear of persecution. The guidelines also include a provision granting a month-long single-entry visa to stateless persons but do not permit the visa to be issued to persons of Afghani, Chinese, Taiwanese, Iranian, Pakistani, or Somalian origin. However, all of these processes are arduous, and the standard of proof is extremely difficult; in addition, the fact remains that a person becomes vulnerable to arrest immediately upon their arrival to India.

### *The UNHCR*

The UNHCR's mandate in India is limited and poses severe accessibility issues since the entity operates only out of two non-border cities. Most refugees therefore have to travel to New Delhi to seek UNHCR registration (United States Committee for Refugees and Immigrants 2009). There, the UNHCR conducts refugee status determination for "asylum-seekers from non-neighboring countries and Myanmar" (United Nations High Commissioner for Refugees 2011). "Smart cards," which must be renewed every three to five years, are issued to asylum seekers after intense verification (Morand and Crisp 2013).

The legal framework in India is thus restrictive by design to the presence and movement of refugees and asylum seekers. In addition to the dangerous journeys that these individuals undertake to escape

persecution and other extreme situations, a penalizing legal regime awaits them upon entry into India. The lack of access to pathways to regularize their migration status pushes them into the informal sector to earn a subsistence, leading to even further marginalization.

## Right to Work

The right to work as a legal safeguard is at the center of the rights to life and a life of dignity. This right is elaborated on and enumerated in various international treaties that India has signed or ratified. For example, the UDHR recognizes that the right to work includes the right to freely choose one's employment; the right "to just and favorable conditions of work," which ensures fair wages; "equal pay for equal work," without discrimination; and the right to rest, leisure, and reasonable limitations on working hours, with periodic holidays (arts. 23–24). Other international instruments that guarantee this right are the International Covenant on Economic, Social and Cultural Rights and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, though India is not a signatory to the latter.



Ad hoc policies for migrants in India have consistently imposed restrictions on their right to seek employment. Only in specific circumstances have exceptions been made, with the right to work being conferred on specific groups of refugees (Research Directorate, Immigration and Refugee Board of Canada 2009), such as Tibetans and Sri Lankan Tamils. However, a UNHCR registration or refugee registration by the government of India does not de facto guarantee the right to work. This right is also not extended to any kind of survival or forced migrants. In fact, India's long-term visa policy specifically prohibits the issuance of long-term visas to economic migrants.

### Right to Work under Indian Law

Article 21 of the Constitution guarantees every person the right to life and a life of dignity. This right brings with it the right to a decent standard of living. The Supreme Court, in the case of *Olga Tellis v. Bombay Municipal Corporation*, held that "an equally important facet of that right [the right to life] is the right to livelihood, because no person can live without the means of living, that is, the means of livelihood."[10] However, the court has been sparing in reading the right to work into

10 *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180, para. 32.

article 21, meaning that there currently exists a dichotomy within Indian jurisprudence between the right to livelihood and the right to work.[11]

The Calcutta High Court highlighted this distinction in the case of *Md. Farooque v. State of West Bengal*[12] when it stated that the right to life extends only so far as to require subsistence, the deprivation of which would be a threat to one's existence. However, the right cannot be read to extend to one's opulence (Basu 2008). That said, there is a great degree of content between these two categories.

Article 14 of the Constitution guarantees the right to equality for all before the law. But the ad hoc refugee policies currently in place in India treat different persons differently based on their country of origin and even religion. For example, they vest different rights (or fail to vest any rights) on different refugees based on factors such as religion and country of origin—thus, while a Tibetan refugee may be able to move freely throughout the country, a Rohingya refugee is susceptible to arrest at any point after entering Indian borders. This unfairly and illegally distinguishes between the same class of persons—refugees.

Finally, article 19(1)(g) of the Constitution confers on Indian citizens "the right to practice any profession, or to carry on any occupation, trade or business." Meanwhile, article 41, which features within the DPSPs, imposes a positive but non-justiciable obligation on the state to make "effective provisions" for securing the right to work and for providing public assistance in case of unemployment. This provision does not distinguish between citizens and non-citizens, and therefore article 41 read within the context of articles 36 and 37 imposes a non-justiciable obligation on the state to make laws ensuring employment for all. However, this is not a right but a guiding principle of state policy.



11 In the absence of a legislative or policy framework, the Indian Supreme Court has often granted relief in matters of securing socioeconomic rights; for example, the right to food was read into article 21 of the Constitution through various interim orders in *People's Union for Civil Liberties v. Union of India* (W.P. (C) 196 of 2001). This right was later enumerated in the National Food Security Act of 2013. The same was done in the case of *Vishakha v. State of Rajasthan* ((1997) 6 SCC 241), where the court filled the legislative lacunae to prevent the sexual harassment of women in the workplace. This has now been codified into the Sexual Harassment at the Workplace (Prevention, Prohibition and Redressal) Act of 2013. However, the Supreme Court has been sparing in reading the right to work, beyond the scope of the right to livelihood, within its article 21 jurisprudence.

12 *Md. Farooque v. State of West Bengal*, AIR 1995 Cal 98, p. 102.

## The Importance of the Right to Work

The right to work is essential for migrants and refugees to live a dignified life without having to rely on others for subsistence. In a transition that is uncertain in nature, it is imperative that guarantees of human rights and a decent standard of living be extended to migrants and refugees, as these individuals often end up living in mobility for protracted periods of time.

States may consider that granting refugees the right to work would be a pull factor for migration, attracting higher levels of migration that could burden their system. This perception is problematic because it leads states to justify migrants' economic exclusion. It also ignores the fact that many refugees lived dignified lives before leaving their country of origin and will want to return home as soon as the unstable condition that forced their exit subsides. States' focus must therefore shift beyond social protection to promote economic growth among both the migrating population and the "local population" in the regions hosting refugees (Verme 2016). There is overwhelming research that highlights several aspects in favor of at least formalizing work permits for refugees and asylum seekers.

Through the supply of labor, refugees contribute to the local economy, which also addresses concerns, however unfounded, that refugees are a drain on the local and national economy. Further, enabling refugees to undertake self-employment opportunities contributes to the local economy through job creation. Additionally, "when refugees can work formally, they have more productive work, and can make more money—which in turn means that refugees spend more money on local goods and services and generate more tax revenue" (Maltz and Huang 2018). This, in turn, increases the demand for goods and services in the host economy. Creating employment for refugees also ensures continuous skill development, which fosters access to opportunities and promotes refugees' ability to help rebuild the economies of their countries of origin upon return.

Labor market integration is thus a holistic solution to many of the issues that host countries regularly highlight when hosting refugees and persons forced to migrate. Additionally, international aid, which often centers around humanitarian relief and support, can be used to create employment opportunities for refugees, which can contribute to the overall economic growth of the host country and eventually reduce its reliance on aid.

The right to work cannot be enjoyed in isolation, and refugees must be able to access other rights in order to fully enjoy this right. In fact, the conferral of some other rights may ease refugees' ability to access work, even in cases where the right to work may not expressly be granted to them. This section discusses some of these other rights in the Indian context.

### *Registration and Housing*

Presently, refugees have no right to recognition or to being registered upon arrival in India. Registration itself is a critical determinant in facilitating access to legal rights and protections. Consequently, India has a much higher proportion of undocumented refugees than it does documented refugees (Zetter, Ruaudel, and Schuett 2017, 9). Refugees' undocumented status leads to residence in settlements or camps, which are often designed as temporary or transit shelters on the outskirts of cities and may lead to systemic abuse, discrimination, and violence against them.

A refugee's place of residence is also a determinant of the kind of employment and livelihood opportunities that they have access to. Further, being pushed to reside on the fringes of cities means that refugees have restricted access to essential services, including education and health care. Given that refugees tend to remain in India for many years, there is an urgent need for a centralized migration policy that complies with international standards and provides refugees with access to adequate housing and the provision of essential services—because temporary and transit camps should not be where an infant grows into an adult.

### *Other Rights*

Limitations on other fundamental rights play an important role in preventing migrants and refugees from being able to access fair and reasonable employment opportunities. Some of these limitations include the following:

- Restrictions on owning property.
- Restrictions on opening bank accounts (Zetter, Ruaudel, and Schuett 2017, 9), which impact the kinds of access that refugees and migrants have to the formal banking system. This restriction is also related to their ability to access valid identification.
- Restrictions on the freedom of movement, which prevent migrants and refugees from seeking employment. In India, since the very

presence of refugees is criminalized and subject to penal action, any movement within Indian territory can result in imprisonment.[13]

- The requirement of other forms of documentation to enter the formal labor market, including qualifications and other certifications that may not necessarily be standardized across countries and may not be available for families and persons fleeing persecution and other emergency situations.
- Fees, permits, and other requirements for starting an enterprise or venture.



### *Non-Policy Solutions for the Labor Market Integration of Refugees*

In addition to undertaking policy reforms that reduce the aforementioned restrictions on rights, other actions that the Indian government can take to support refugees' labor market integration are (i) increasing employer awareness, which would address, among other things, employer-driven discrimination against refugees; (ii) education and legal empowerment projects with refugees; (iii) support networks that can help refugees find work (Zetter, Ruaudel, and Schuett 2017, 9); and (iv) language training for refugees, as language often serves as a barrier to accessing employment. As Amina Alkorey (2004) from UNCHR Egypt aptly put it, "It is hard to think that these families will continue to live like this … Refugees did not leave their homes seeking better lives. They left because they had no choice. They had to leave or die." Therefore, the right to work for refugees is necessary to ensure their right to life.

## Conclusion

The current international framework governing the rights of refugees and corresponding state obligations is inadequate. It is important to extend protections under international law, including those that ensure a dignified standard of living for all groups of persons who are forced to migrate.

In the case of India, the first step is to formalize an accessible and efficient protection and registration framework for refugees and

13 Refugees in India often get arrested in transit during "routine inspection" by various police and enforcement agencies. They sometimes undertake these journeys to meet with family, and other times in search for a decent life. However, the lack of identification makes them vulnerable to arrest (see "Guwahati: Four Rohingyas Illegally Bound to Kashmir Arrested" 2020).

survival and forced migrants. The next step is to encourage self-reliance—which is key to ensuring a dignified standard of life—by granting these populations the right to work.

Indian's current legal framework and labor market research support a two-pronged argument in favor of granting this right. First, India's Constitution guarantees the right to a life of dignity and equality to every person. Second, there is ample evidence to demonstrate that migrants not only enrich their lives in the process of integration but also contribute greatly to the host economy. The failure to guarantee dignity through the right to work and to systematically recognize refugees and forced and survival migrants is a dereliction of India's constitutional promises and an insult to the history of India's freedom struggle.



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# Migration and Decent Work

## Challenges for the Global South

*Migration and Decent Work: Challenges for the Global South* takes a journey through nine countries in the global South—from Mexico to India to Argentina to Turkey—to explore the relationship between migration and work from a human rights perspective.

Labor insertion is one of the most effective forms of integration because it allows migrants and refugees to enjoy more dignified living conditions, to contribute to the development of host communities, and to build relationships with the local population. But ensuring the right to work is a challenge for countries in the global South that have weak or developing economies and problems with job creation, which can force many people—not just migrants—to engage in precarious work and put themselves at risk of labor exploitation.

Under these circumstances, advocating for migrants' and refugees' right to work is more urgent than ever. The recognition of decent work as a human right means that states may not pursue economic growth at the expense of the exploitation of migrants and refugees, but instead must seek to ensure opportunities and prosperity for all. In this regard, it is critical to foster discussions, such as the ones featured in this book, that facilitate the sharing of experiences and lessons learned on the labor conditions of migrants and refugees.

The authors of the nine chapters in *Migration and Decent Work* are activists, academics, and members of civil society who have worked on the issue of migration from different angles and who address the challenge of migrants' labor inclusion from an interdisciplinary and rights-based perspective. Their contributions offer an overview of migrants' and refugees' right to work in a range of countries in the global South based on an analysis of local contexts, public policies, and the everyday realities faced by these workers.

In addition to offering local and global recommendations for ensuring the right to decent work for migrants and refugees, this book seeks to strengthen the human rights movement through collaboration and the sharing of experiences. The diversity of voices featured here offers a look at migration based on and geared toward the global South.

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