

# Reworking the Relationship between Asylum and Employment

Penelope Mathew

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# Reworking the Relationship between Asylum and Employment

Touching on the laws and practices of a wide array of countries around the globe, this book examines the extent to which refugees' and asylum-seekers' right to work is protected by international human rights law. The book examines a number of key international treaties, national constitutions and some foundational cases from national courts in order to make the case that the practice of restricting refugees and asylum-seekers from access to the labour market is illegal. In so doing, the author examines some intricate legal questions, such as the interpretation of the Refugee Convention's provisions restricting rights to refugees 'lawfully staying', the application of racial discrimination law to citizenship distinctions and the ways in which limitations on human rights are applicable in this context. The book also looks at some broader philosophical questions, such as the meaning of equality and human dignity, as well as the legitimacy of the right to work. The book goes on to explore wider debates concerning migration and 'open borders' in order to unpack the fears that drive many countries' restrictive measures. Readers are invited to consider whether the world would be a better place with more freedom of movement. It is a unique stand-alone treatment of the subject and includes the Michigan Guidelines on the Right to Work.

*Reworking the Relationship between Asylum and Employment* is written in an accessible style that will appeal to academics, policy-makers, practitioners and students. It combines a strong black-letter approach with a law in context approach that explains why the law takes its current shape and questions current orthodoxy.

**Penelope Mathew** holds the Freilich Foundation Chair at the Australian National University. Her primary research interests are international law, human rights law, refugee law and feminist theory. She has published widely in the area of refugee law.

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My heartfelt thanks also go to the Freilichs – the late Dr Herbert Freilich and Mrs Valmae Freilich, who established the Freilich Foundation at the ANU and agreed to the inauguration of the Freilich Foundation chair, a position which I am very privileged to hold. My Dean at the College of Arts and Sciences, Toni Makkai, and my colleagues in the Research School of Humanities and the Arts, particularly Howard Morphy, Debjani Ganguly, Paul Pickering and Renata Grossi have been wonderful, stimulating colleagues during the writing of this book. I am also thankful to the administrative and library staff here at the ANU who, in the teeth of budget woes in the Australian university sector, try to ensure that academic work at the ANU can flourish; to Margaret Leary, Jocelyn Kennedy and other wonderful staff at the Michigan Law library; to Marni Rickelmann for stepping up to the plate at the last minute and running the colloquium so smoothly; and to Brenda Falkowski for assistance with everything else.

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Penelope Mathew  
Canberra, October 2011

# Contents

<i>Acknowledgements</i>	ix
<i>Introduction</i>	1
1 True refugee stories: getting out of danger, getting in to a place of safety and getting work	15
2 The development of legal protection for employment	49
3 Migration and the 'sovereign prerogative' over entry	61
4 The Refugee Convention: when do rights attach?	77
5 The Covenant's protection for the right to work: limited obligations?	103
6 Equality norms and the right to work: ICERD as a case study	125
7 Regional treaties protecting the right to work	139
8 Other relevant human rights: equality, dignity and interdependence	155
<i>Conclusions: the fulfilment of work</i>	179
<i>Appendix</i>	181
Fifth Colloquium on Challenges in International Refugee Law	
The Michigan Guidelines on the Right to Work	184



<i>Glossary</i>	197
<i>Bibliography</i>	199
<i>Index</i>	207

# Introduction

This book is about the right to work for a particular class of migrants – refugees. Refugees migrate in search of protection from persecution in their home country, and the protection they are owed by the countries to which they flee includes the right to work. The primary purpose of the book is to demonstrate the latter point by a thorough exploration of relevant treaty provisions, including some known to reflect customary international law, which binds all states, not just those which are party to particular treaties.

In pursuing this goal, the book acknowledges some of the difficulties that attend rights generally, and the right to work in particular. However, given the current dominance of markets, the book does not argue for a radical transformation of the economic system in which we live.<sup>1</sup> Rather, it presents an argument in favour of access to decent work for refugees and asylum-seekers, noting the ways in which governments must make the right to work meaningful for all of us.

The book is primarily concerned with a topic that is different and quite distinct from the question of whether there should be a right to migrate in search of work – so-called ‘economic migration’. However, migration for the purposes of work forms part of the context that shapes the practice of states with regard to the rights of refugees and asylum-seekers. In the same way that the right to work is implemented in the context of the capitalist system, international human rights law is superimposed upon and interrelated with the international state system and is in practice limited by border control. Thus in order to reach a proper understanding of the right to work for refugees, it is important to understand the broader debates concerning migration. It is vital to understand the extent to which people are free to migrate and the impact this has on the refugee who, in theory, is an exception to migration controls operating at states’ borders.

1 Cf Risse, who argues that labour rights ensure that everyone benefits from the existing global order in some way. Mathias Risse ‘A Right to Work? A Right to Leisure? Labor Rights as Human Rights’ (2009) 3 *L & Ethics of Human Rts* 33.

## Migration and its impact

Migration has been an important part of human life for millennia and has significant benefits to migrants and host societies. Economic evidence from developed countries which are major destinations for migrants tells us that immigration has a small but positive impact on the economy and does not depress the wages of nationals.<sup>2</sup> Evidence from some developing countries tells a similar story. For example, the International Labour Organization reports that in Thailand, undocumented workers prop up some key industries.<sup>3</sup> Globally, it has been argued that more international migration is generally positive for the world economy. In their book, *Global Migration and the World Economy: Two Centuries of Policy and Performance*, Timothy Hatton and Jeffrey Williamson conclude that:

[t]here is not now, nor was there ever, too much global migration. The world would clearly be better with more migration. The problem is therefore not that there is too much global migration, but rather that we do not yet have effective ways whereby the gainers from global migration can compensate the losers. The problem is not global migration. The problem is a lack of political will.<sup>4</sup>

Socially, too, migration has positive effects. According to the policies of multiculturalism adopted by some governments (such as the Canadian and Australian Governments), immigration enriches the host society culturally.<sup>5</sup> Yet immigration is sometimes resisted as an unwelcome and destabilising feature of life. The resistance will often come from those persons who are least secure.<sup>6</sup> As Stephen Castles and Mark Miller explain:

- 2 For the view that there is a marginal positive impact on the economy, see Francesc Orgeta and Giovanni Peri 'The Causes and Effects of International Mobility: Evidence from OECD Countries 1980–2005' (2009) [http://hdr.undp.org/en/reports/global/hdr2009/papers/HDRP\\_2009\\_06.pdf](http://hdr.undp.org/en/reports/global/hdr2009/papers/HDRP_2009_06.pdf) (accessed 15 October 2011). For the view that positive and negative economic impacts cancel each other out, see Gordon H Hanson *The Economic Logic of Illegal Immigration* (Council on Foreign Relations New York 2007) CSR No 26, 24. There are, however, some who say the impact is negative. See Robert Rowthorn 'The Economic Impact of Immigration. A Civitas Online Report' (2004) [http://www.civitas.org.uk/pdf/Rowthorn\\_Immigration.pdf](http://www.civitas.org.uk/pdf/Rowthorn_Immigration.pdf) (accessed 11 October 2011).
- 3 Human Rights Watch 'From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand' (2010) 20 (citing Elaine Pearson *The Mekong Challenge – Underpaid, Overworked, and Overlooked: The Realities of Young Migrant Workers in Thailand vol 1*) (Int'l Labour Office Bangkok 2006) 26.
- 4 Timothy J Hatton and Jeffrey G Williamson *Global Migration and the World Economy: Two Centuries of Policy and Performance* (MIT Press Boston 2005) 391.
- 5 Commonwealth of Australia 'The People of Australia: Australia's Multicultural Policy' [http://www.immi.gov.au/media/publications/multicultural/pdf\\_doc/people-of-australia-multicultural-policy-booklet.pdf](http://www.immi.gov.au/media/publications/multicultural/pdf_doc/people-of-australia-multicultural-policy-booklet.pdf) (accessed 14 October 2011).
- 6 The Scanlon Foundation's survey on social cohesion indicates that negative views of immigration are more likely to be held by persons over 65 years old, people without university

Immigration often takes place at the same time as economic restructuring and far-reaching social change. People whose conditions of life are already changing in an unpredictable way often see the newcomers as the cause of insecurity. One of the dominant images today is that of masses of people flowing in from the poor South and the turbulent East, taking away jobs, pushing up housing prices and overloading social services. Similarly, in immigration countries of the South, such as Malaysia and South Africa, immigrants are blamed for crime, disease and unemployment. Extreme-right parties have grown and flourished through anti-immigrant campaigns.<sup>7</sup>

Reactions to refugees (persons who cannot return home because of a well founded fear of persecution) and asylum-seekers (persons seeking recognition as a refugee or similar protection) may be informed by this resistance to immigration. To compound the problem, there is often little understanding of the difference between a refugee and other migrants, let alone the situation in the countries of origin of many refugees. There may be fears that the asylum process is abused by 'economic migrants', while even those acknowledged to be refugees may be viewed as competitors for jobs, housing and other goods to which citizens feel they have first claim. As Peter Mares explains: '[c]itizens pay taxes and are therefore entitled to government services. Non-citizens have no such entitlements and are seen as competitors for scarce public goods such as health and education'.<sup>8</sup>

This line of reasoning fails to recognise that refugees are human beings and are therefore entitled to human rights, and that refugees have not migrated *in order* to work, but need and have the right to work once they have reached safety. Furthermore, contrary to the popular discourses about refugees and competition for jobs, refugees, with their particular mix of resilience (they have survived and escaped a persecutory place) and vulnerability (they are now in unfamiliar territory and face many barriers to participation in the host society), may be at a disadvantage in securing work during the early stages of their settlement, even when there are no legal barriers to them working.<sup>9</sup> They may indeed require 'welfare' in the initial stages of their settlement. However, their contributions to economic growth once they have settled are often outstanding.<sup>10</sup>

qualifications and those who, when asked about their present financial circumstances, indicate that they are 'struggling to pay bills' or as 'poor'. Andrew Markus *Mapping Social Cohesion: the Scanlon Foundation Survey's Summary Report* (2010) 22.

7 Stephen Castles and Mark J Miller *The Age of Migration* (3rd edn Palgrave-Macmillan and Guilford Books Basingstoke and New York 2003) 15.

8 Peter Mares 'Distance makes the heart grow fonder: Media images of refugees and asylum seekers' in Edward Newman and Joanne van Selms (eds) *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (UNU Press Tokyo 2003) 330, 338.

9 Graeme Hugo *Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants* Final report to Department of Immigration and Citizenship (2011) 121–44.

10 *ibid.* Hugo puts the case that, in general, humanitarian entrants to Australia make significant economic, social and civic contributions.

#### 4 *Reworking the Relationship between Asylum and Employment*

In the face of this evidence, it is clear that what passes for 'debate' on refugee rights is often nothing but rumour-mongering. Michael Gordon gives some extreme examples of the seemingly wilful misunderstanding of refugees' plight, following Australian Prime Minister Julia Gillard's announcement of the Australian Labor Party's plans for offshore processing of refugee applications in the lead up to Australia's 2010 election:<sup>11</sup>

... Pauline Hanson [former leader of the anti-immigration political party 'One Nation'] ... asserted (on the basis of information from someone who worked at a hospital) that asylum-seekers were getting preferential medical treatment. There was also this 'rumour going around that they get about \$1800 a month', she reported.<sup>12</sup>

It is therefore important to outline what the distinction between a refugee and other migrants is and to explain that no matter what general stance a country takes towards immigration, the refugee is a moral and legal exception to immigration control.

#### **No return: refugees compared with other migrants**

A refugee is a 'forced' migrant – a person who has no meaningful choice but to stay away from the country of origin or suffer persecution, perhaps even torture or death. The particular circumstances in which international law recognises the forced nature of flight are closely circumscribed. The key United Nations treaties governing the treatment of refugees are the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.<sup>13</sup> Together, these treaties define a refugee as a person who is outside the country of origin 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' and is unable or unwilling, because of this fear, to return or to avail themselves of their country's protection.<sup>14</sup>

When unpacking that definition, several elements stand out. First, a person can only be a refugee once they have already left their country. It is generally not possible to apply for refugee status from within one's own country. This is important to bear in mind when people start talking about a 'queue' for

11 Julia Gillard 'Respecting fears, moving forward with the facts' speech to the Lowy Institute (6 July 2010) <http://www.smh.com.au/opinion/politics/respecting-fears-moving-forward-with-the-facts-20100706-zyce.html> (accessed 28 September 2010).

12 Michael Gordon 'Where Angels Fear' *The Age* (Melbourne 6 July 2010) <http://www.theage.com.au/national/where-angels-fear-20100706-zxrq.html> (accessed 6 July 2010).

13 1951 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), as modified by the 1967 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

14 Refugee Convention art 1A(2) as modified by the Refugee Protocol.

refugees.<sup>15</sup> There is no queue, and refugees have to get out and get to safety by whatever means they can.

Secondly, the threshold for refugee status is very high. In the absence of a definition of persecution in the Refugee Convention, national courts responsible for applying the treaty regularly define persecution as a 'sustained or systemic violation of basic human rights demonstrative of a failure in state protection'.<sup>16</sup> This is particularly true in common law countries, such as the United Kingdom, New Zealand, Canada and Australia. The violation of human rights also has to be connected to race, nationality, religion, membership of a particular social group or political opinion. The requirement of a link to one of these five grounds (the Convention grounds) shows that the person is being treated differently from others within the country of origin because of something about that person that he or she either cannot, or should not, be required to change.<sup>17</sup> In other words, the bonds between the citizen and state have broken down.<sup>18</sup> This is why the person has to make use of the surrogate protection of the international community.<sup>19</sup> As Emma Haddad writes: '[a] refugee is an individual who has been forced, in significant degree, outside the domestic political community indefinitely'.<sup>20</sup>

The constrained nature of the refugee definition is explained by its historical context. The 1951 definition of a refugee was adopted shortly after the Second World War and shaped by the experiences of refugee flows during that conflict and in its aftermath – the division of Europe into capitalist and communist spheres. Originally, the definition was very tightly constrained, being limited to refugees fleeing events 'before 1 January 1951'. Moreover, states parties to the Convention had the option of limiting their obligations to refugees fleeing events in Europe.<sup>21</sup> The Refugee Convention was viewed as a 'mopping up' exercise whereby those remaining in displaced persons camps would be treated humanely, and it was only in 1967, with the adoption of the Protocol relating

15 For discussion of the way in which the language of a queue was used after 1996 in Australia, see David Corlett 'Politics, Symbolism and the Asylum Seeker Issue' (2001) 23(3) *UNSW LJ* 13. For discussion of the use of the same language during the Vietnamese boat people crisis, see Nancy Viviani *The Long Journey: Vietnamese Migration and Settlement in Australia* (MUP Melbourne 1984) chs 4, 5.

16 The phrase is from James C Hathaway *The Law of Refugee Status* (Butterworths Toronto 1991) 101. For a discussion and justification of the 'human rights approach' to the definition of persecution, see Michelle Foster *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (CUP Cambridge 2007) ch 2.

17 In the course of expounding his theory of interpretation concerning 'membership in a particular social group', Hathaway has described the other four grounds, namely race, religion, nationality and political opinion, as encompassing either something immutable or something so fundamental to personality that a refugee should not be required to change the characteristic. Hathaway (n 16) 160–61.

18 Atle Grahl-Madsen *The Status of Refugees in International Law vol 1* (Sitjhoff Leiden 1966) 79.

19 Hathaway (n 16) 135.

20 Emma Haddad *The Refugee in International Society: Between Sovereigns* (CUP Cambridge 2008) 42.

21 Refugee Convention art 1B(1)(a).

to the Status of Refugees<sup>22</sup> that the international community recognised that refugee flows were an ongoing problem needing a permanent regulatory response.<sup>23</sup>

The cardinal obligation in the 1951 Convention is the obligation not to return a refugee, contained in Article 33 of the Convention and known by the French term *non-refoulement*. This obligation was first enshrined in the 1933 Convention Relating to the International Status of Refugees,<sup>24</sup> which confirmed and expanded various arrangements for refugees that had developed in response to refugee flows unleashed by the demise of various empires, including the Russian and Ottoman empires.<sup>25</sup>

It is no accident that *non-refoulement* emerged in the early 20th century. In the early phases of that century national immigration controls tightened significantly, making it more difficult for anyone to migrate and particularly so for those fleeing persecution. Prior to this tightening of immigration control, it is arguable that not only were people permitted freedom of movement in practice, but that the commonly asserted 'plenary power' of states to control immigration simply did not exist.<sup>26</sup> In addition, a right of 'asylum' – a right to receive protection by another state and indeed to settle in that other state – was asserted by some of the classical international jurists (such as Grotius)<sup>27</sup> and in many states' domestic laws. However, the meaning of this right has been contested, with controversy as to the subject of the right (is it a right on the part of states to grant asylum without being viewed as unfriendly, or a right of the individual to receive asylum?) and the related matter of the content of asylum (do individuals have a right to enter and reside in that state, or can the state determine the content of asylum?).<sup>28</sup> The Refugee Convention does not expressly grant a right to asylum, but a right not to be *refouled*, and then predicates certain rights, including the right to work, on *lawful* presence or stay within the state. Thus, the term asylum has been used in the title of this book as a convenient way of alluding to tensions that hover over the entitlement to, and content of, refugee protection.

22 Refugee Protocol (n 13).

23 UNHCR's mandate continued to be renewed every five years until the UN General Assembly decided in 2004 to remove the time limit on its mandate: UNGA Res 58/153 (24 February 2004) UN Doc A/RES/58/153.

24 Convention relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663.

25 Claudena M Skran *Refugees in Inter-War Europe: the Emergence of a Regime* (Clarendon Press Oxford 1995) ch 2.

26 James Nafziger 'The General Admission of Aliens Under International Law' (1983) 77 *AJIL* 804.

27 *Grotius on the Rights of War and Peace* Bk II ch II s XVI (abridged and trans by William Whewell, John W Parker London 1853) 75.

28 Guy S Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd edn OUP Oxford 2006) 355–69.

The basic idea underlying the norm of *non-refoulement* is that to return a person to a place of persecution is to become complicit in the persecution. As stated by the Ad Hoc Committee on Refugees and Statelessness, which took responsibility for much of the drafting of the Convention prior to the Conference of Plenipotentiaries that finally adopted the Convention:

The turning back of a refugee to the frontiers of a country where his life or freedom would be threatened on account of his race, religion, nationality or political opinion would be tantamount to delivering him into the hands of his persecutors.<sup>29</sup>

It is vital that we do not lose sight of this basic point. That said, it may fairly be asked where does our responsibility really end – only with the persecuted; with others in dire need; or is a more radical rethink of sovereign boundaries and their impact on human fulfilment required?

### Humanity's challenge to the state-centric (dis)order: a case for more freedom of movement

There are now other situations that may call for a protective response and which are not encompassed by the fairly restrictive definition of a refugee. If we wish to avoid complicity in harm, why should we stop at persecution? In recognition of the fact that there may be other circumstances of forced flight that deserve refugee status or some close equivalent, the definition of a refugee has been expanded in some regions, such as Africa and the Americas.<sup>30</sup> Alternatively, 'complementary protection' – that is, protection which is complementary to the Refugee Convention – may be conferred, as in Europe.<sup>31</sup>

The development of expanded definitions of a refugee and the concept of complementary protection recognise that there are other situations in which the obligation of *non-refoulement* should be observed. These include situations of generalised violence where it may be said that the relationship between the state and citizens has broken down, although in a way peculiar to the state, rather than the individual. The state may be in a civil war or it may be a failed

29 ECOSOC, UN Ad Hoc Committee on Refugees and Stateless Persons *Report of the Ad Hoc Committee on Statelessness and Related Problems* (Lake Success New York 16 January–16 February 1950) (17 February 1950) UN Doc E/1618; UN Doc E/AC.35/5. For the view that the concept of necessity supplies an adequate underpinning for the *non-refoulement* principle, see Niraj Nathwani 'The Purpose of Asylum' (2000) 12 *Int'l J Refugee L* 354.

30 eg Convention governing the Specific Aspects of Refugee Problems in Africa art 1(2) (done 10 September 1969, entered into force 20 June 1974) 1011 UNTS 45.

31 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (30 September 2004) OJ L304/12 (Qualification Directive).



state as a result of this violence, in which case it cannot protect citizens from the harms inflicted by other individuals.

The international community has also expanded the norm of *non-refoulement* to cover serious human rights violations – including the prohibition on torture, the prohibition on enforced ‘disappearances’ and the right to life.<sup>32</sup> This aims to ensure that everyone is protected from such abuse without the need to demonstrate a connection with one of the five grounds of persecution contained in the Refugee Convention.

There are other forced migrants – for example, people forced to relocate as a result of environmental disasters, including those caused by climate change – who are not yet covered by an appropriate protective regime.<sup>33</sup> Those in refugee-like situations who have not crossed an international border are now called ‘internally displaced persons’ and there are a set of ‘guiding principles’ intended to give them some protection,<sup>34</sup> but of course it is very difficult to secure in-country protection. Commentators have also pointed out that in today’s world, the same forces may be responsible for producing both ‘economic migrants’ (although perhaps a better term to capture the forced nature of this migration is ‘survival migrants’)<sup>35</sup> and refugees. In other words, there is an ‘asylum-migration nexus’. As Castles and Miller explain:

... all population movements are symptomatic of modernization and globalization. Colonialism, industrialization and integration into the world economy destroy traditional forms of production and social relations, and lead to the reshaping of nations and states. Underdevelopment, impoverishment, poor governance, endemic conflict and human rights abuse are closely linked. These conditions lead both to economically-motivated migration and to politically-motivated flight.<sup>36</sup>

The international community is unlikely, at least in the foreseeable future, to recognise complete freedom of movement in order to attain a higher standard

32 eg Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3 (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (Convention against Torture).

33 Frank Biermann and Ingrid Boas ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10 *Global Env’t Politics* 60.

34 Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (1998). There is also a regional treaty devoted to the protection of Internally Displaced Persons: African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (adopted 26 October 2009, not yet in force) <http://www.au.int/en/content/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> (accessed 15 October 2011).

35 Eve Lester ‘Socio-economic rights, human security, and survival migrants: whose rights? whose security?’ in Alice Edwards and Carla Ferstman (eds) *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP Cambridge 2010) 314.

36 Castles and Miller (n 7) 32.