Advancing the access of refugees and asylum seekers in Latin America to the labour market: building from the inter-american case-law

Promovendo o acesso de refugiados e solicitantes de refúgio da América Latina ao mercado de trabalho: construindo a partir da jurisprudência interamericana

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1. Introduction

Being able to work and guarantee the subsistence of oneself and one's family is a constant concern for refugees and asylum seekers[1] around the world. Despite the common reputation of Latin America[2] as a region where countries have a more accepting attitude towards non-nationals, refugees and asylum seekers still find significant challenges in securing work in the region.[3] A

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1 Although there is no binding legal definition of the term "asylum seekers", especially given the declaratory nature of refugee status, asylum seekers are understood throughout academic literature as individuals who seek refugee status but have not yet obtained formal recognition as such by the host State. In turn, the term "refugees" is usually reserved for those who have obtained such formal recognition. It is in this sense that these terms shall be used in this article.

2 For the purposes of this work and notwithstanding the discussions about how to define the Latin American region, Latin America is understood as comprising the countries in the American continent that have been previously colonized by Spain, Portugal, and France, namely: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Mexico, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

3 NORIEGA RAMÍREZ, 2021; FLACSO, 2011, pp. 36-41.

survey carried out by the International Organization for Migration and the Migration Policy Institute in 2019 regarding the situation of Venezuelan migrants and refugees in the region observed that, in the majority of the surveyed countries, over 50% of these individuals either worked in informal sectors of the economy or were unemployed.[4] Similar situations are reported in relation to other groups of refugees and asylum seekers.[5]

The difficulties these individuals face in accessing the labour market result from a plethora of factors. On a more formal note, some Latin American countries' domestic normative framework is not clear in ensuring the right to work to refugees and, even more frequently, to asylum seekers, leading State authorities not to issue the necessary documentation for them to access job opportunities. In other countries, even though these groups' right to work is formally recognised, material obstacles related to racism, xenophobia, and lack of personal connections, knowledge of the local language, or information all operate to the detriment of refugees' and asylum seekers' inclusion in the labour market.[6]

While there are many calls for States to improve this situation, often pointing to the economic benefits of having refugees and asylum seekers engaged in productive work, the matter is often treated as one over which States have significant discretion. Indeed, neither existing international human rights treaties nor the 1951 Convention relating to the Status of Refugees[7] (Refugee Convention) establish an absolute right of refugees and asylum seekers to access work opportunities on the same footing as the host State's nationals. Rather, it is generally acknowledged that States are not legally required to grant foreigners the same conditions as nationals in accessing the labour market[8] and restrictions to this access continue to be the common practice among States.[9] The crux of the matter is then the extent to which such restrictions are lawful.

To date, discussions concerning the scope of States' obligations in

4 CHAVES-GONZÁLES & ECHEVERRÍA-ESTRADA, 2020, pp. 13-16.

5 LIMIA, 2017; GUGLIELMELLI WHITE, 2012, pp. 13, 17, 24.

6 GRUPO ARTICULADOR REGIONAL DEL PLAN DE ACCIÓN BRASIL 2017, 2018, p. 24; COSTA, 2006, p. 56-57.

7 BRAZIL, 1961.

8 CRAVEN, 1995, p. 174.

9 SAUL, KINLEY & MOWBRAY, 2014, p. 17.

realising the refugees' and asylum seekers' right to work have focused on examining the frameworks of the International Covenant on Economic, Social and Cultural Rights[10] (ICESCR) and of the Refugee Convention,[11] treaties to which all Latin American States, except for Cuba, are parties. However, little attention has been paid to another international treaty applicable to Latin American States:[12] the American Convention on Human Rights[13] (ACHR). The potential of the ACHR for grounding calls for greater access of refugees and asylum seekers to the labour market and transforming restrictive migratory policies has thus been mostly overlooked.

This article will seek to address this problem by showing that the ways in which the ACHR has been interpreted and applied by the Inter-American Commission on Human Rights (IACommHR) and the Inter-American Court of Human Rights (IACtHR) offer clearer and more protective standards for the promotion of refugees' and asylum seekers' right to work than those advanced under the ICESCR and the Refugee Convention to date. This can be seen especially in the Inter-American bodies' pronouncements concerning the right to work, the principle of non-discrimination, and the right to equal protection of the law. In this endeavour, this piece aims to call attention to the possibility of further relying on the pronouncements of the Inter-American human rights bodies in advocating for refugees' and asylum seekers' access to work not only as a desirable policy, but as an international legal obligation. The article will not, however, seek to analyse specific obstacles to the right to work in Latin America, which depend on particularities in the context of different countries, and will refer to common general problems identified in other analyses.

The article will be divided into three parts. The first section will examine the extent to which the right to work is protected under the Refugee Convention, drawing from its provisions, *travaux préparatoires*, and guidance from the United Nations High Commissioner for Refugees. The

10 BRAZIL, Decreto Nº 591, 1992.

11 See notably: MATHEW, 2012; BHATTACHARJEE, 2013; HATHAWAY, 2021. This trend is also noticeable in Latin American scholarship, notably: COUTO & PEREIRA, 2023; ARAÚJO & VEIGA, 2021.

12 With Cuba again as the exception. Venezuela denounced the ACHR in 2012, but the Guaidó representation, recognized by the Organization of American States as the legitimate government of Venezuela, deposited a new ratification instrument on 31 July 2019. The validity of this latter act is still controversial and, as of the date of writing, the IACtHR has not pronounced on the issue.

13 BRAZIL, Decreto Nº 678, 1992.

second section will undertake a similar analysis under the ICESCR, considering the way in which its relevant provisions have been interpreted by the Committee on Economic, Social and Cultural Rights (CESCR). As both sections will show, the abstract standards laid down in these treaties regarding access to the labour market, coupled with the lack clear guidance from monitoring bodies, limits the protective potential of these instruments. In the third section, the case-law of the IACommHR and the IACtHR will be explored, discussing the standards these bodies have established for assessing States' compliance with the principle of non-discrimination, the right to equal protection of the law, and the right to work. It will be argued that these standards are especially valuable in limiting States' discretion to restrict the access of refugees and asylum seekers to the labour market and in delineating States' positive obligations to ensure equality of opportunities regarding marginalised groups' access to work. The article concludes that the pronouncements of the Inter-American human rights bodies offer important tools to require Latin American States to improve refugees' and asylum seekers' inclusion in the labour market as a legal obligation and thus should be further used to this end.

2. The right to work under the Refugee Convention: incomplete protection

When the Refugee Convention was drafted, the international human rights framework was still in its early stages of development. Accordingly, the Convention's provisions on refugees' entitlements in the State of asylum were conceived not as a comprehensive list of the rights these persons hold under international law, but rather as a guide for the minimum standards of treatment States should adopt in ensuring refugees' access to different kinds of benefits and services.

Drawing largely from concepts found in norms regulating the treatment of aliens abroad,[14] the Refugee Convention structured the rights of refugees in the host State in the following way: first, by defining to what kind of refugee each right applies by reference to the refugee's degree of attachment with the host State;[15] second, by equating the minimum standard of treatment

14 CHETAIL, 2019, pp. 182-183.

15 This degree of attachment relates essentially to how long the refugee has been present in

required of the State to the standard treatment that State already provides to other categories of aliens or, in some instances, to its own nationals. Each of these two elements will now be discussed.

2.1. The degree of attachment required under the Refugee Convention to access work

The protection of the right to work under the Refugee Convention varies depending on the kind of work involved. First, refugees lawfully staying in the host State have a right to engage in wage-earning employment under at least the most favourable conditions accorded to other aliens in the same circumstances (Article 17). Second, self-employment is ensured to refugees lawfully in the State's territory under the same conditions accorded to aliens generally (Article 18). Third, refugees lawfully staying in the host State may also exercise of liberal professions according to the same standards of treatment accorded to aliens generally (Article 19). The table below summarises this structure:

TABLE 1 - The right to work under the Refugee Convention

	Type of work	Degree of attachment	Minimum standard of treatment
Article 17	Wage-earning employment	Lawful stay	Most favourable treatment accorded to aliens
Article 18	Self-employment	Lawful presence	Same conditions as aliens generally
Article 19	Liberal professions	Lawful stay	Same conditions as aliens generally

Source: Made by author.

Additionally, Article 17 establishes three scenarios in which refugees cannot be restricted from engaging in wage-earning employment: if the refu-

the host State and on what basis—for instance, different standards apply to refugees lawfully residing in a host State compared to refugees who are simply physically present therein. This does not necessarily imply, however, that a deeper level of attachment necessarily corresponds to higher standards of treatment, as noted by CHETAIL, 2019, pp. 181-182. The opposite view is held by HATHAWAY, 2021, pp. 176-178.

gee has completed three years' residence in the host country (art. 17(2)(a)); if they have a spouse possessing the nationality of the host country—except in case they have abandoned the spouse (art. 17(2)(b)); and if they have children who are nationals of the host country (art. 17(2)(c)).

The first important limitation that can be seen in this framework refers to the categories of refugees covered by each provision. Articles 17 and 19 only apply to refugees "lawfully staying" in the State of asylum. While this expression is not defined in the Refugee Convention, the equally authoritative[16] French text speaks of "résidant régulièrement" (regularly residing), thereby indicating that a refugee lawfully staying in the host country is one that lawfully resides there. Residence requires a certain degree of continuity, excluding refugees who are merely passing by or visiting for a specified period.[17]

The condition of lawful stay poses a problem for asylum seekers. Given that asylum seekers are usually authorised to remain in the host State only until their protection claim is decided, their permanence therein is precarious, uncertain, and of potentially limited duration. It is therefore debatable whether their presence in the host country is continuous enough to characterise residence. As Goodwin-Gill and McAdam[18] have argued, establishing one's lawful stay in a country would require some proof of "permanent, indefinite, unrestricted, or other residence status." Only asylum seekers who are lawfully residing in the State for reasons not connected to the asylum claim would hence fall under the scope of Articles 17 and 19.[19] This view has been endorsed by different scholars, with a caveat: according to these scholars, if the refugee status determination procedure is unduly prolonged, an asylum seeker may be considered as lawfully staying in the host State.[20]

The notion of undue delay does not, however, eliminate the uncertainties in the application of Articles 17 and 19 of the Refugee Convention to asylum seekers, since there is no clear parameter under refugee law of what such a delay might be. An attempt at clarifying this issue could be made

16 As per the rule codified in the Vienna Convention on the Law of Treaties (BRAZIL, 2009, art. 33).

17 As highlighted in CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS, 1951, p. 14. Nevertheless, residence need not be permanent, as noted by UNHCR, 2014, para. 137.

18 2021, p. 597. Similarly, see HATHAWAY, 2021, p. 925.

19 HATHAWAY, 2021, pp. 957-958.

20 MATHEW et al., 2010, p. 298. This position has also been endorsed by the UN High Commissioner for Refugees on one occasion (see UNHCR & COUNCIL OF EUROPE, 2014 apud COUNCIL OF EUROPE, 2014, para. 15) but does not seem supported by State practice.

by drawing inspiration from human rights law and human rights bodies' interpretation of what constitutes a reasonable length of proceedings. In general, these bodies have determined whether a given delay was reasonable by referring to the complexity of the subject matter of the proceedings, the interested party's procedural behaviour, and the authorities' behaviour.[21] Nevertheless, it should be noted that these interpretations stem from the right to a fair trial; while the IACtHR endorses the applicability of fair trial guarantees to asylum procedures, the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) do not,[22] hence limiting the potential of adherence to this interpretational guidance.

In addition to these bodies, the CESCR has recommended on occasion that States allow asylum seekers to access the labour market within one year after their arrival.[23] Nevertheless, the Committee made no link between this statement and the interpretation of the Refugee Convention, nor did it indicate that observing such a delay could be deemed an obligation on the part of States. It is thus unclear to what extent the CESCR's recommendations could influence the interpretation of Articles 17 and 19 of the Refugee Convention. Furthermore, subsuming the issue of asylum seekers' lawful stay in the host State to the question of whether the asylum procedures have been unduly delayed seems not to satisfactorily take into consideration the asylum seeker's own intention of staying in that country and the steps taken in this regard, which may be an indicator of the continuous character of the residence. Despite these uncertainties, we may consider that, at the very least, an asylum seeker living in the host country for a period of three years or more should be allowed to engage in wage-earning employment, since Article 17(2)(a) of the Refugee Convention prohibits restrictions upon wage-earning employment after such a delay.[24]

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21 Analyzed more in depth by CLOONEY & WEBB, 2021, pp. 400-402.

22 For a more detailed comparison among human rights bodies, see CANTOR, 2014, pp. 87, 90, 94-96, 99-102.

23 CESCR, 'Concluding Observations on the Combined Third to Fifth Periodic Reports of Romania', 2014, para. 12; CESCR, 'Concluding Observations on the Combined Fourth and Fifth Reports of Bulgaria', 2012, para. 9; CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Slovakia', 2012, para. 13.

24 As noted by Hathaway, 2021, pp. 958-959, the notion of residence in this provision does not relate to a specific residence status but to cases where refugees have been continuously living in the country of asylum.
Among Latin American States, Mexico has made a reservation on the entirety of Article 17(2) and Chile has changed the minimum period of residence from 3 to 10 years.

In contrast, Article 18 of the Refugee Convention, concerning self-employment, enounces a lesser level of attachment. This provision ensures that refugees "lawfully in [the host State's] territory" shall benefit from a treatment not less favourable than that accorded to aliens in general in connection with the right to engage on their own account in "agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies." The French text ("se trouvant régulièrement") gives the idea of lawful presence in the host State rather than residence. Refugees and asylum seekers who find themselves in a host State for shorter periods of time or without continuity could thus benefit from this provision.

In a similar manner to Articles 17 and 19, the term "lawful" in Article 18 has not usually been interpreted as indicating complete deference to States' domestic law.[25] Otherwise, States could simply leave refugees in a legal limbo, refraining from analysing asylum claims or granting refugees other kinds of status as a means to avoid their obligations under Article 18. Deferring the meaning of lawful presence entirely to domestic legislation would also risk conflating this level of attachment with that of lawful stay, disregarding the choice of the Refugee Convention's drafters to adopt different levels of attachment.[26] Instead, this provision has been understood as covering both presence that is explicitly authorised by the State and that which is known and not prohibited.[27] Accordingly, asylum seekers should be able to engage in self-employment as soon as they initiate the asylum procedure and for the duration of the proceedings. After refugee status is formally recognised, the lawfulness of one's presence is even more evident and there should be no barriers to the applicability of Article 18.

It should be highlighted that Article 18 does not cover self-employment in activities understood as liberal professions,[28] such as law or medicine. These are covered by Article 19 and limited to refugees and asylum seekers

lawfully residing in the host State.

25 Divergences still exist, however, as seen in GOODWIN-GILL & MCADAM, 2021, p. 596.

26 HATHAWAY, 2021, p. 205.

27 UNCHR, 2014, para. 135; MATHEW et al., 2010, p. 298. Similar views are expressed by: HATHAWAY, 2021, pp. 208-209; EDWARDS, 'Gainful Employment, Article 18', 2011, pp. 976-978. This position also reflected a decision reached by the HRC, 1994, para. 9.2. Nonetheless, the application of this interpretation has not been uniform, as discussed in MATHEW, 2012, p. 83.

28 While there is no exhaustive definition of what liberal professions are, they are commonly understood as those that require a certain level of qualification and are not exercised by salaried employees or State agents, such as lawyers, physicians, architects, and accountants. See: COSTA, 2006, p. 57.

As can be seen, although the Refugee Convention can be effectively invoked to enable recognised refugees to access the labour market, the position of asylum seekers is more precarious, as the Convention does not prohibit host States from denying asylum seekers access to wage-earning employment or liberal professions until their residence has acquired a more continuous character. The standards of treatment enounced in the Convention also allow States to further limit refugees' and asylum seekers' access to work, as will be seen ahead.

2.2. Standards of treatment applicable to the right to work under the Refugee Convention.

The level of protection States must offer to refugees regarding access to work also depends on the kind of work at stake. Article 17 enounces the highest standard of treatment in this regard, providing that States must accord at least the most favourable treatment accorded to foreigners in the same circumstances in relation to access to wage-earning employment. The proposition of requiring States to provide treatment comparable to that of nationals was rejected during the drafting of the Refugee Convention,[29] so that Article 17(3) contains merely a recommendation in this sense.

The notion of most favourable treatment can refer to the treatment granted to a specific group of favoured third-country nationals[30] or to a given category of migrants, such as permanent residents.[31] Still, the Refugee Convention does not indicate minimum parameters below which States should not fall. If the most favourable standards a State adopts are still quite restrictive, such as requiring specific documents or a level of command of the local language that refugees do not usually possess, there is no conventional obligation for the host State to adapt its standards or assist the refugee in meeting them. Although Article 6 of the Convention establishes that States should not impose requirements that "by their nature a refugee

29 See, for instance: UN AD HOC COMMITTEE ON REFUGEES AND STATELESS PERSONS, 1951, pp. 40-42 (Austria, France, United Kingdom); UN AD HOC COMMITTEE ON REFUGEES AND STATELESS PERSONS, 1950, paras. 14, 19, 54 (France, Belgium, United Kingdom, Denmark, Turkey).

30 Notably among Latin American States, Brazil grants Portuguese nationals a more beneficial treatment in many areas concerning access to rights and services but has formulated a reservation to the Refugee Convention stating that such treatment shall not be accorded to refugees.

31 MATHEW, 2012, p. 89.

is incapable of fulfilling", incapacity is a high threshold and seems to render this formulation quite malleable in favour of the host State. It could be argued that it is not impossible for a refugee to master the local language or produce certain documents if they took the necessary time and effort to do so, for example. Another kind of practice that significantly constrains refugees' access to wage-earning employment refers to the establishment of quotas limiting the number of non-nationals that employers may hire, as it happens for instance in Chile and Panama.[32] While these restrictions may potentially be justified under international law in certain cases, the fact remains that the Refugee Convention does not provide legal grounds to effectively dispute, on a case-by-case basis, whether such requirements are unreasonable or have a disproportionate impact on refugees' and asylum seekers' ability to make a living.

The above-mentioned concerns are even more relevant to the right to engage in self-employment and liberal professions, since Articles 18 and 19 enounce a lower standard of treatment. These provisions require States to accord to refugees a treatment as favourable as possible and that is at least as favourable as the one accorded to aliens generally in the same circumstances. This lower standard allows States a significant margin of manoeuvre in restricting the access of non-nationals to work, as long as those restrictions do not single out refugees.[33]

While many States in Latin America do not formally impose restrictions on refugees' and asylum seekers' access to work,[34] these groups still face considerable difficulties in this regard. This stems from the very nature of their predicament—lack of connections in the host State, knowledge of the local language, xenophobia, and other forms of discrimination on the part of local population, among others. These challenges place refugees and asylum seekers in a scenario of material inequality in relation to the host State's nationals, or even in relation to other categories of non-nationals. The Refugee Convention does not require States to take positive action to

32 In Chile, 85% of the employees hired must possess Chilean nationality, whereas in Panama this quota is of 90%. See: CHILE, 2002, arts.19-20; PANAMA, 1971, art. 17.

33 EDWARDS, 'Gainful Employment, Article 18', 2011, p. 979.

34 As seen generally in GRUPO ARTICULADOR REGIONAL DEL PLAN DE ACCIÓN BRASIL 2017, 2018.

revert these kinds of situations.[35]

Accordingly, even though the Refugee Convention does require States to guarantee refugees' access work, this protection has important limitations. Firstly, the Refugee Convention does not provide for immediate access to wage-earning employment or liberal professions to individuals whose asylum claims have not yet been decided, leaving them with little choice but to look for more informal and precarious kinds of work. Secondly, although the Refugee Convention establishes precise standards of treatment regarding refugees' access to work, allowing a degree of foreseeability as to the expected level of protection, the content of these standards is still quite malleable. In equating the treatment of refugees and asylum seekers to that granted to other categories of non-nationals, the Refugee Convention does not establish concrete minimum parameters for States to observe, nor does it provide legal grounds for requiring States to improve their standards of treatment. Thirdly, the Refugee Convention does not require States to act to remedy material conditions that adversely affect refugees' and asylum seekers' ability to secure work.

3. The right to work under the ICESCR: potential in need of concreteness

The right to work within the framework of international human rights law is an important complement to the Refugee Convention. The most explicit protection of this right is found in Article 6 of the ICESCR, which encompasses "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." Article 7 further establishes the right to just and favourable conditions of work, among which is the requirement that work should ensure a decent living for the individual and their family.

While the full enjoyment of the rights enshrined in the ICESCR is subject to progressive realisation according to States' available resources (Article 2(1)), the question of refugees' and asylum seekers' access to the labour market is more appropriately understood by reference to two obligations of immediate effect: non-discrimination and ensuring the minimum

35 HATHAWAY, 2021, p. 950. Indeed, the only obligation of non-discrimination enounced in the Refugee Convention refers to that between different groups of refugees (Article 3).

core of the Covenant's rights.[36] After all, States are not required to ensure refugees' and asylum seekers' right to work to a greater extent than to their own nationals and claims of lack of resources cannot, in principle, justify failure to meet the minimum core of economic, social, and cultural rights. According to the CESCR's reiterated interpretation, the inobservance of these immediate obligations can only be justified when a State has used all of its resources—including not only financial resources, but also those derived from technical and informational capacities, available staff, and international cooperation, among others[37]—to satisfy such duties as a matter of priority.[38]

The CESCR has defined the core obligations arising from the right to work as comprising States' duties to: ensure access to employment in a way that allows individuals to live a life of dignity; avoid discrimination; and develop and implement a national employment strategy and plan of action.[39] Compliance with these obligations should focus on addressing the situation of disadvantaged and marginalised groups,[40] which include refugees and asylum seekers.[41] On a broader note, the CESCR has affirmed that denying access to work to particular individuals or groups constitutes a violation of Article 6 of the Covenant.[42]

Following this reasoning, States have the obligation under the ICESCR to allow refugees and asylum seekers to immediately access work opportunities that enable them to earn a living in non-discriminatory conditions.[43] Moreover, the duty of non-discrimination includes the elimination of substantive discrimination, which often requires positive measures on the part of States to promote substantive equality between different groups.[44] States would then be required not only to formally allow refugees and asylum seekers to access the labour market but also to ensure that these groups are not disadvantaged in their search for work opportunities in comparison to

36 CESCR, 1991, para. 1; CESCR, 'General Comment No 20', 2009, para. 7.

37 CESCR, 1991, para. 13.

38 CESCR, 1991, para. 10; CESCR, 'General Comment No 20', 2009, para. 13.

39 CESCR, 2006, para. 31.

40 CESCR, 2006, para. 31.

41 CESCR, 'Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights', para. 7.

42 CESCR, 2006, para. 32.

43 MATHEW, 2012, pp. 106-109.

44 CESCR, 'General Comment No 20', 2009, para. 9.

nationals. Hence, contrary to the Refugee Convention, the ICESCR establishes minimum standards of protection concerning the right to work that apply to all States, regardless of their domestic law. The challenge to this potentially broad legal protection lies precisely in defining what amounts to discrimination in this context.

It is well established under human rights law that not every kind of differential treatment between individuals or groups is discriminatory. Rather, distinctions are lawful when they are necessary to pursue a legitimate goal and are reasonably proportionate to this goal.[45] When differential treatment is based on a ground deemed impermissible under international law—among which the CESCR identifies both nationality and migratory status[46]—there may be a higher level of scrutiny as to the lawfulness of the distinction, requiring a higher degree of justification from the State.[47] Still, the same conditions of legitimacy of the goal, reasonableness, and proportionality apply all the same.

Regarding the reasons that could be thought to justify differential treatment of refugees' and asylum seekers' access to the labour market, a few can be advanced. States may claim they have special duties towards their own nationals[48] and thus seek to favour them in certain areas of employment—for instance, by prohibiting non-nationals from engaging in certain kinds of work,[49] establishing quotas that limit the number of foreigners employers may hire,[50] or bureaucratic proceedings that require extensive documentation and compelling justifications to justify hiring a non-national.[51] States may also consider that certain jobs, in particular public functions—such as positions related to public and national security, the administration of public resources, or the judicial system—are best reserved to nationals, due to the

45 CESCR, 'General Comment No 20', 2009, para. 13.

46 CESCR, 'General Comment No 20', 2009, para. 30.

47 As GERARDS, 2007, pp. 35, 38-39, explains, this is because distinctions based on those grounds "immediately raise a suspicion of unreasonableness and prejudice."

48 Such an argument was invoked by Austria in attempt to justify differential treatment between nationals and non-nationals regarding access to a social security fund in ECTHR, 1996, para. 45.

49 For instance, in Panama, non-nationals cannot work, among others, as engineers (PANAMA, 1965, art. 1(a)) or psychologists (PANAMA, 1975, art. 2(a)).

50 CHILE, 2002; PANAMA, 1971; PERU, 1991, art. 4; GUATEMALA, 1961, art. 13.

51 Notably: ARGENTINA, [n.d.].

presumably stronger ties they have with the State.[52] In the specific case of asylum seekers,[53] broader restrictions to their access to the labour market could be advanced for reasons of migration control:[54] if an asylum seeker is allowed to work, they might create deeper ties with the host country, which could potentially make removal more difficult if their asylum claim is ultimately rejected.[55] Restrictive practices in this regard could also be seen as an effort to discourage so-called "economic migrants"[56] from trying to claim asylum in that State.

Specifically, regarding differential treatment stemming from the lack of measures adopted by the State to eliminate substantive discrimination, States may seek to justify this omission by pointing to the need of directing scarce resources to other areas in order to fulfil other rights. While a general allegation of lack of resources is not enough to excuse inaction,[57] the State may potentially be able to prove that its available resources were used to fulfil other priority obligations, such as the minimum core content of socioeconomic rights, or to prioritise other marginalised groups.

In principle, the above-mentioned goals could be considered as responding to social interests and needs and, hence, as legitimate ones. At the same time, not all kinds of restrictions adopted in pursuit of these aims are reasonable or proportionate. A complete bar to refugees' and asylum seekers' access to work, in both formal and informal markets, would hardly fulfil these requirements, as it would go against the very core content of the right to work and potentially leave these individuals destitute, thereby also endangering the right to an adequate standard of living (art. 11 of the ICESCR). Likewise, prolonged inaction on the part of the State in seeking to redress substantive discrimination against refugees and asylum seekers

52 For instance, Costa Rica reserves many public functions, such as that of Supreme Court justices and representatives of the Legislative Assembly, to nationals: COSTA RICA, 1949, arts. 108, 159.

53 Such an aim could not be considered legitimate in relation to recognized refugees, since the latter have already established that they cannot return to their country of origin due to a well-founded fear of persecution.

54 Both the ECtHR and the IACtHR have conceded that, in general, migration control is a legitimate goal for States to seek in restricting the rights of non-nationals. See, notably: ECTHR, 2008, para. 176; IACTHR, 2010, para. 169.

55 MATHEW, 2012, p. 117.

56 The limits and misleading connotations of this term have been highlighted in particular by FOSTER, 2007, pp. 5-21.

57 CESCR, 1991, para. 10; CESCR, 'General Comment No 20', 2009, para. 13.

searching for work can hardly be considered proportionate, since the State cannot ignore the needs of certain groups under its jurisdiction when planning how to distribute its limited resources. Moreover, not all kinds of positive measures necessarily require significant resource expenditure. Notably, the State may use part of its resources to support campaigns and programs managed by civil society actors, thereby taking advantage of their resources as well.

In Latin American countries—like in many others—the main challenges faced by recognised refugees the right to work come from material obstacles and substantive discrimination rather than formal impediments.[58] Factors such as racism, language barriers, lack of inclusion in labour placement programs, and lack of information regarding refugees' rights, both on the part of refugees themselves and of the local communities, lead significant numbers of refugees to resort to informal forms of work.[59] The situation of asylum seekers tends to be even more difficult: in addition to facing the same material challenges as refugees, in seven Latin American countries[60] asylum seekers do not receive documentation allowing them to access the formal labour market. This puts them even more at risk of being subjected to abusive and exploitative practices when engaging in informal work.[61]

The question then is whether the above-mentioned situations entail violations of the right to work by the State or whether, however unfortunate they may be, Latin American States can avoid international responsibility by qualifying them as lawful distinctions, according to the aforementioned criteria. This discussion depends on to how to interpret abstract notions such as proportionality and reasonability. This is where the pronouncements of human rights bodies are of primary importance to clarify the law and where, unfortunately, the CESCR has been quite vague.

When referring to the right to work without discrimination, the CESCR rarely ever specifies concrete measures that States should adopt or refrain from adopting to that end. Though the Committee has identified a

58 Only four out of the 21 Latin American countries considered have not enacted legislation ensuring refugees' access to the formal labour market (Cuba, Haiti, Honduras, and Trinidad and Tobago).

59 GRUPO ARTICULADOR REGIONAL DEL PLAN DE ACCIÓN BRASIL 2017, 2018, pp. 2-3, 24, 27-29, 31, 35, 37-38, 43, 49-50, 56-57, 64; LEUTERT et al., 2019, p. 28.

60 Colombia, Dominican Republic, El Salvador, Mexico, Nicaragua, Panama, and Venezuela.

61 GRUPO ARTICULADOR REGIONAL DEL PLAN DE ACCIÓN BRASIL 2017, 2018.

few groups who tend to be disadvantaged in their enjoyment of the right to work, it mentioned some measures that States should take in relation to only four of these groups: women, highlighting that pregnancies must not constitute an obstacle to employment or a justification for dismissals;[62] young persons, indicating that States should adopt policies to promote adequate education and employment opportunities;[63] older persons, calling for the implementation of different kinds of retirement preparation programmes;[64] and persons with disabilities, requiring States to eliminate physical barriers for these persons and to promote flexible work arrangements to accommodate their needs.[65] Even though these measures are far from exhaustive and there is room for further development, attention is drawn to the fact that similar measures have not been mentioned in relation to refugees, asylum seekers, or even migrants in general. In General Comment No. 18, the CESCR referred solely to migrant workers—without specifying whom it considered to be included in this category[66]—and affirmed the need for national plans of action to promote the principle of non-discrimination.[67] No further guidance on what non-discrimination entails regarding refugees and asylum seekers, or on what kind of conduct States should adopt, was provided. Furthermore, the fact that the measures the CESCR mentioned concerning other marginalised groups were closely tied to the specific situation of those groups, and not framed in a more general manner, raises questions as to whether the Committee intended to convey that States were required to adopt equivalent measures for refugees and asylum seekers—for instance, promoting education and employment opportunities to the latter groups as well. It is worth noting that, when giving examples of particularly disadvantaged groups who may benefit from targeted employment programmes and other measures to facilitate access to the labour market, the CESCR makes

62 CESCR, 2006, para. 13.

63 CESCR, 2006, para. 14.

64 CESCR, 1996, para. 24.

65 CESCR, 1995, paras. 22-23.

66 On that occasion, the CESCR also made reference to the principle of non-discrimination enounced in Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). However, as a general rule, the ICRMW does not apply to refugees, as per its art. 3(d). It is thus unclear what definition of migrant workers the CESCR considered in its General Comment No. 18.

67 CESCR, 2006, para. 18.

no mention to refugees and asylum seekers.[68] Although the Committee has not expressed the reasons for this approach, one can reasonably suppose it seeks to avoid debates on the tensions between migration control and migrants' rights unless strictly necessary.

This can be seen in the CESCR's statement on the duties of States towards refugees and migrants, in which the Committee maintained its vague references to the principle of non-discrimination and called on States to consider the higher vulnerability of asylum seekers and undocumented migrants without detailing States' obligations.[69] Moreover, while the CESCR recalled that Article 2(3) of the ICESCR[70] does not allow developing States to completely deny the enjoyment of economic rights to non-nationals,[71] it did not clarify the limits to developing States' discretion when relying on this provision.[72] Only when referring to labour rights, when work relations are already factually established, did the CESCR indicate that non-nationals should be treated as favorably as nationals.[73] This contributes to the uncertainty as to the extent to which Latin American States, generally understood as developing countries,[74] have the duty to ensure access to different kinds of work opportunities to refugees and asylum seekers and remedy substantive discrimination on this matter.

The CESCR has addressed the right to work of refugees and asylum seekers, as well as of other marginalized groups, in somewhat more detail in

68 CESCR, 'Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights', 2009, paras. 15-18.

69 CESCR, 'Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights', 2017, paras. 6-7, 11.

70 According to which "[d]eveloping countries […] may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

71 CESCR, 'Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights', 2017, para. 8.

72 Though some scholars have noted that, since Article 2(3) was adopted with the aim of reverting the economic domination of certain groups of non-nationals after decolonization, this prerogative should be interpreted narrowly and comply with the same conditions for the principle of non-discrimination in general. See notably: MATHEW, 2012, pp. 111-112; EDWARDS, 'Gainful Employment, Article 17', 2011, p. 960.

73 CESCR, 'Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights', 2017, para. 13.

74 Although this term is not clearly defined in the ICESCR, it has been understood to refer to countries that are economically less powerful, especially those that had been colonized. DANKWA, 1987, p. 238.

its Concluding Observations on States' periodic reports regarding compliance with the ICESCR. On those occasions, the CESCR has expressed concern about the lack of access to employment opportunities for asylum seekers and refugees and their prevalence in the informal economy,[75] including in Latin American States.[76] The CESCR has sometimes referred to specific measures that could address these problems, such as the implementation of technical and vocational training programmes, awareness-raising campaigns, and the issuance of personal identity documents.[77] Sometimes the Committee has also called upon States to ensure access to employment to refugees and asylum seekers[78] or to provide support to individuals in these groups seeking employment.[79]

The limitations of such statements lie in the fact that, in Concluding Observations, the CESCR usually avoids classifying particular situations as discriminatory[80] or as violating the ICESCR in any way, and refrains from dictating courses of action to States as obligations. Instead, the Committee tends to frame its conclusions as recommendations. This approach makes it difficult to discern whether the CESCR's suggestions correspond to legal duties of the State and to what extent. States are still left with quite a margin to argue that, while improving the access of refugees and asylum seeker to the labour market could be desirable, it is not legally required, since other concerns like immigration control, privileging national workers, or the need to direct resources to more pressing areas could potentially justify restricting the right to work or not eliminating certain material inequalities.

Therefore, even though the framework of human rights law has the potential to provide a greater level of protection regarding refugees' and

75 CESCR, 'Concluding observations on the second periodic report of Latvia', 2021, para. 19; CESCR, 2020, paras. 22-23.

76 CESCR, 2018, paras. 19, 24; CESCR, 'Concluding Observations on the Fifth Periodic Report of Costa Rica', 2016, para. 25; CESCR, 2010, para. 25.

77 CESCR, 2018, paras. 19, 24; CESCR, 'Concluding Observations on the Fifth Periodic Report of Costa Rica', 2016, paras. 19, 25; CESCR, 2001, para. 11. The CESCR has also mentioned awareness-raising campaigns as a strategy for combatting discrimination against refugees and asylum seekers more broadly in CESCR, 2022, paras. 13(a)-(b).

78 Notably: CESCR, 2019, para. 21; CESCR, 'Concluding Observations on the Fourth Periodic Report of Morocco', 2015, para. 14; CESCR, 'Concluding Observations on the Fifth Periodic Report of Sri Lanka', 2017, para. 20.

79 CESCR, 'Concluding observations on the third periodic report of the Plurinational State of Bolivia', 2021, paras. 26-27.

80 SAUL, KINLEY & MOWBRAY, 2014, p. 291.

asylum seekers' access to work, due to the flexibility of its contents, this very flexibility harms said potential without clearer guidance from the CESCR. This is where the case-law of the Inter-American human rights system can be particularly valuable in advancing these groups' access to the labour market in the Latin American region.

4. The Inter-American case-law: implementing equality of opportunities in access to work as a human right

To date, the Inter-American human rights bodies have not issued a decision on a case concerning access to the labour market by refugees and asylum seekers, or even by migrants in general. The often-celebrated Advisory Opinion OC-18/03 on the rights of undocumented migrants[81] focused on their rights *at* work rather than the right *to* work. Still, the IACommHR and the IACtHR have analysed this issue in relation to other similarly marginalised groups—groups subjected to substantive discrimination from the local community and lacking opportunities to find different kinds of work. Unlike the CESCR, Inter-American bodies, and especially the IACtHR, have tended to frame their reasoning concerning the right to work, the principle of non-discrimination, and the right to equality before the law in a broad manner, which allows for a greater margin in transposing this rationale to similarly marginalised groups, including refugees and asylum seekers. This section will provide an overview of the way the Inter-American bodies have addressed these issues and then develop on how their pronouncements in specific cases may be used towards the advancement of refugees' and asylum seekers' access to work.

4.1. Work and equality: general considerations from the Inter-American framework

The right to work is established under two different instruments in the Inter-American human rights framework. First, in Article 6 of the Protocol of San Salvador,[82] which links work to "the opportunity to secure the means for living a dignified and decent existence." Nevertheless, since only claims

81 IACTHR, 2003.

82 BRAZIL, 1999.

related to Articles 8 (trade union rights) and 13 (right to education) of the Protocol can be brought before Inter-American bodies,[83] Article 6 has had little influence in the development of the protection of the right to work within the regional human rights framework.

The second provision concerning this issue is Article 26 of the ACHR, which requires States to adopt measures to progressively achieve "the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States […]." Despite earlier debates as to whether this provision enabled the IACommHR and the IACtHR to exercise jurisdiction over socioeconomic rights,[84] since 2017 the IACtHR has taken a firmer stance in reaffirming the justiciability of such rights under Article 26,[85] including the right to work.[86]

In defining the content of the rights implicit under Article 26, the IACtHR has drawn much from the CESCR's General Comments.[87] In particular, the IACtHR has shared the CESCR's interpretation that the duties of non-discrimination and taking effective steps to realize socioeconomic rights are obligations of immediate effect.[88] Moreover, it has clarified that the right to work under the ACHR includes the guarantee of conditions that "ensure safety, health and hygiene in the workplace."[89]

The ACHR has two different provisions relating to the notions of equality and non-discrimination. The first is Article 1(1), which establishes the general principle that States must ensure the rights enshrined in the ACHR without discrimination on the basis of a non-exhaustive list of categories,

83 Article 19(6) of the Protocol of San Salvador.

84 See, notably: CAVALLARO & SCHAFFER, 2004; MELISH, 2006.

85 IACTHR, Case of Lagos del Campo v. Peru, 2017, paras. 141-149, 153.

86 IACTHR, Caso Spoltore vs. Argentina, 2020, para. 96.

87 IACTHR, Cuscul Piraval et al. v. Guatemala, 2018, paras. 106-107; IACTHR, Case of Poblete Vilches et al. v. Chile, 2018, paras. 120-121.

88 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 172. The IACtHR has yet to clarify its understanding in relation to the existence of a minimum core content of socioeconomic rights that should be ensured regardless of available resources. Nevertheless, situations concerning potential failures to satisfy this minimum core may be assessed by the Inter-American bodies under provisions such as the right to life and the prohibition of inhuman and degrading treatment, which in any event are not subject to progressive realisation.

89 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 155.

including race, language, national or social origin, economic status, or "any other social condition." In establishing whether a category not expressly mentioned in Article 1(1) may constitute a prohibited ground of discrimination, the IACtHR assesses whether said category relates to permanent personal traits, groups that are traditionally marginalised, excluded, or subordinated, or criteria that are irrelevant for the equitable distribution of property, rights, or social benefits.[90]

The IACtHR adopts essentially the same criteria as the CESCR for assessing whether differential treatment is lawful—namely whether the differential treatment pursues a legitimate goal, has a reasonable and objective justification, and the means employed are proportionate to the end sought.[91] When distinctions are based on one of the grounds prohibited under Article 1(1), the Inter-American bodies consider that a higher level of scrutiny applies in verifying whether the conditions for a lawful distinction were met.[92] On two occasions, the IACtHR has framed this stricter standard as requiring the State to show: that the goal sought with the distinction is not only legitimate, but also imperative; that the method chosen to implement this distinction is not replaceable by a less grave method; and that the benefits of adopting the differential treatment are clearly superior to the restrictions that the distinction imposes. [93] This particularly high standard of scrutiny has not yet found a match in the pronouncements of the CESCR or even the IACommHR.

Article 24 of the ACHR also relates to the notion of non-discrimination in establishing two autonomous rights: equality before the law and equal protection of the law.[94] While Article 24 is usually restricted to the application or interpretation of a specific domestic law,[95] the IACommHR[96] and the IACtHR have considered that this provision is breached when the

90 IACTHR, Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples State Obligations concerning Change of Name, Gender Identity, and Rights Derived from a Relationship between Same-Sex Couples, 2017, para. 66.

91 IACTHR, Case of I.V. v. Bolivia, 2016, para. 241; IACTHR, 2014, para. 316.

92 IACOMMHR, 2002, para. 338; IACOMMHR, 2010, para. 40; IACTHR, 2015, para. 257.

93 IACTHR, Case of I.V. v. Bolivia, 2016, para. 241; IACTHR, Caso Pavez Pavez vs. Chile, 2022, para. 69.

94 ANTKOWIAK & GONZA, 2017, p. 32.

95 ANTKOWIAK & GONZA, 2017, p. 37.

96 See the IACommHR's arguments in IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 143.

legislation in place does not afford marginalised groups opportunities to achieve material equality.[97] Some scholars have even noted that the IACtHR often does not clearly differentiate between the application of Articles 1(1) and 24, treating them together as a broad right to equality.[98]

Regarding States' positive obligations connected to non-discrimination and equal protection of the law, the IACommHR[99] and the IACtHR[100] both have affirmed that States have the duty to adopt the necessary measures to combat de facto discriminatory and exclusionary practices, even if they stem from a situation of structural discrimination.[101] The specific measures that States must adopt depend on the particular needs of the individuals in question and the kind of marginalisation they are exposed to.[102] According to the IACtHR, the standard States must achieve is that of creating conditions of real equality for groups that have been historically excluded.[103]

4.2. Transposing the Inter-American case-law to the situations of refugees and asylum seekers

The discrimination that refugees and asylum seekers often face in accessing the labour market stems from different grounds, either in themselves or in combination,[104] such as, more frequently, race, economic status, nationality, and migratory status. Though only the first two grounds are explicitly mentioned in Article 1(1) of the ACHR, the IACtHR and the IACommHR both

97 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 199; IACTHR, 2021, paras. 108-109; IACTHR, Caso Guevara Días vs. Costa Rica, 2022, para. 58. This interpretation of the right to equal protection of the law stands out in comparison to that of other human rights bodies, which usually focus on the formal application of domestic law. See, for instance, HRC, 1992, para. 7.5.

98 FERRER MAC-GREGOR & PELAYO MÖLLER, 2014, p. 56; ANTKOWIAK & GONZA, 2017, p. 38.

99 IACOMMHR, 2016, para. 73.

100 IACTHR, 2010, para. 248; IACTHR, 2014, para. 263; IACTHR, 2012, para. 80.

101 IACTHR, Case of the Hacienda Brasil Verde Workers v. Brazil, 2016, para. 338.

102 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 186.

103 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 199; IACTHR, Cuscul Piraval et al. v. Guatemala, 2018, para. 130.

104 The IACtHR has paid special attention to the effects of intersectional discrimination, notably in: IACTHR, 2015, para. 290; IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para 191.

have considered that nationality[105] and refugee status[106] are also prohibited grounds of discrimination. Although discrimination against asylum seekers has not been expressly addressed in the case-law of Inter-American bodies, the IACtHR has broadly acknowledged that States must ensure human rights without discrimination based on regular or irregular migratory status,[107] thereby covering asylum seekers even when the host country does not accord to them a specific legal status. While acknowledging States' prerogatives concerning migration control, the IACtHR has repeatedly emphasised that a person's migratory status can never be a justification for depriving them of their human rights.[108] Hence, the lawfulness of differential treatment experienced by refugees and asylum seekers due to their migratory status or other prohibited grounds must be assessed under a high level of scrutiny.

The IACommHR applied this high level of scrutiny in a case concerning a Cuban woman residing regularly in Chile who had obtained a degree in law in the latter country and wished to register as a lawyer there.[109] However, Chilean domestic law prohibited non-nationals from practicing law.[110] According to the State, this restriction had the aims of suppressing the illegal practice of law and protecting Chilean attorneys from competition against foreign attorneys.[111] The IACommHR considered that protecting the market for national lawyers did not respond to a pressing social need and, hence, that this goal could not justify a distinction based on nationality under the ACHR.[112] As for suppressing the illegal practice of law, the IACommHR accepted that this could constitute a legitimate goal, but held that barring foreigners from becoming lawyers was not the least restrictive means to achieve this aim.[113] The IACommHR thus concluded that Chile had violated Articles 24 and 1(1) of the ACHR in relation to the petitioner.[114]

105 IACOMMHR, 2010, para. 40; IACTHR, 2015, para. 257.
106 IACOMMHR, 2019, para. 117; IACTHR, Case of I.V. v. Bolivia, 2016, para. 240.
107 IACTHR, 2013, para. 129.
108 IACTHR, 2003, para. 134; IACTHR, 2014, para. 402.
109 IACOMMHR, 2010, para. 2.
110 IACOMMHR, 2010, para. 10.
111 IACOMMHR, 2010, para. 41.
112 IACOMMHR, 2010, paras. 42-43.
113 IACOMMHR, 2010, para. 42.
114 IACOMMHR, 2010, para. 44.

The IACommHR's decision reveals a clearer and narrower understanding of States' margin of discretion in limiting access to the labour market to non-nationals than the one so far enounced by the CESCR. In scenarios involving refugees and asylum seekers, the Commission's reasoning is even more relevant, since these persons cannot return to their country of origin, where their nationality presumably would not prevent them from working on specific professions. Though one might envisage certain positions that a State may have an interest in reserving to nationals or people who have resided in the country for a considerable period, such as those relating to national security, the IACommHR's position makes it clear that protecting national workers from competition is not sufficient per se to justify differential treatment in access to the labour market under the ACHR. Practices such as those found in Panama, which prohibits non-nationals from working in a series of professions including law, engineering, and agronomy,[115] and in Brazil, which bars non-nationals from working in public positions in general, regardless of whether they relate to special State interests,[116] are hardly compatible with such standards.

In addition to enouncing a narrower view of States' possibilities of barring access of non-nationals to the labour market, the Inter-American bodies' case-law also provides guidance as to the positive obligations States have in eliminating substantive discrimination in this area. Two judgments of the IACtHR are particularly enlightening in this regard.

The first judgment, *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families*, concerned an explosion in a fireworks factory in a town in the north-eastern region of Brazil, during which 60 people died, including 40 women and six children. The factory's employees worked in highly informal conditions, and insufficient measures had been adopted to ensure their safety in the workplace.[117] In examining the case's

115 For the full list, see: PROFESIONES que no Pueden Ser Ejercidas por Extranjeros en Panamá, [n.d.].

116 Article 37, I, of the Brazilian Constitution of 1988 provides that foreigners shall be able to work in public positions in accordance with domestic law. However, to date, no such law has been enacted, which has led State authorities to bar access of foreigners to such positions. This restrictive stance has been endorsed by the Brazilian Superior Labour Court (Tribunal Superior do Trabalho), which, in 2017, held that a Haitian refugee who had applied to work as a garbageman was prevented from taking up the job due to this normative gap. BRAZIL, 2017.

117 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 61.

factual context, the IACtHR noted that the majority of the town's inhabitants faced serious structural disadvantages related to poverty, lack of or low formal education, and lack of infrastructure concerning basic sanitation.[118] Those poor socioeconomic conditions, compounded with racial and gender traits, led to the formation of prejudices and stereotypes that made it difficult for the persons affected to find work.[119] The fireworks factory was those individuals' only viable employment alternative.[120]

In other words, the local population was formally capable of accessing the labour market, but the existence of de facto structural discrimination effectively limited their options to informal and precarious kinds of work—like it often happens to refugees and asylum seekers. The IACtHR found that the perpetuation of this scenario and the lack of action by Brazil to reverse ran contrary to the State's obligation to provide individuals with the real possibility of achieving material equality and to combat situations of exclusion and marginalisation.[121] Brazil was thus held responsible for violations of Articles 1(1), 24, and 26 of the ACHR. As reparation, the IACtHR ordered Brazil to design and execute a socioeconomic development programme for the local population, focusing on the lack of employment options.[122] This programme should include, among others, professional and vocational training courses, measures to address school drop-out, and awareness-raising campaigns on human rights.

The second judgment, *Case of the Miskitos Divers*, related to the precarious working conditions faced by members of the Miskitos indigenous people in Honduras. Similarly to the Brazilian case, the Miskitos lived in poor socioeconomic conditions, with little access to schooling and health care.[123] As a result of these conditions, combined with the discrimination faced as an indigenous people, the Miskitos did not have access to varied labour

118 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 64.

119 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, paras. 71, 189.

120 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, paras. 189-190.

121 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, paras. 199-204.

122 IACTHR, Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, 2020, para. 289.

123 IACTHR, 2021, paras. 29-30.

opportunities and were often limited to working in lobster fishing by diving without equipment, an activity characterised by high degrees of informality and dangerousness.[124] The IACtHR found that the lack of State action to ensure better employment opportunities for the Miskitos and provide them with real opportunities of achieving material equality breached Article 24 of the ACHR.[125] However, since the parties had reached a friendly settlement, the IACtHR did not order additional measures of reparation regarding the improvement of the Miskitos' access to the labour market.

These two decisions show a broad understanding of the IACtHR as to the length States are required to go to comply with their obligations regarding the right to work without discrimination under the ACHR. It is not sufficient for individuals to have the formal possibility of working if they do not have adequate opportunities to do so in practice or are only able to work in informal and dangerous sectors due to discriminatory practices by the local community. When persons or groups are subjected to marginalisation and exclusion, the State is required to take targeted measures to promote their access to a greater array of work opportunities, adapted to their specific needs. Failure to act to remedy these situations reflects a normalisation of the structural discrimination that such groups face and, hence, cannot be tolerated.[126] The application of this reasoning to different kinds of marginalised groups—afro-descendants living in poverty in Brazil and the Miskitos in Honduras—without caveats also indicates that States have such obligations in relation to any groups that find themselves in similar detrimental circumstances.

It should be noted that the IACtHR has expressed concern with individuals' possibility of enjoying material equality of opportunities not only in relation to the right to work, but to other socioeconomic rights as well. In cases involving the right to health, for instance, the IACtHR has emphasised that States must ensure that marginalised groups have access to health care facilities from both a geographical and an economic standpoint.[127] Though the IACommHR has not published decisions that explore the issue of equality of opportunities as a human right in as much detail, the

124 IACTHR, 2021, paras. 31-38.

125 IACTHR, 2021, paras. 104-110.

126 IACTHR, Case of the Hacienda Brasil Verde Workers v. Brazil, 2016, para. 418.

127 IACTHR, Cuscul Piraval et al. v. Guatemala, 2018, para. 124.

Commission follows the general direction given by the IACtHR in affirming that States must guarantee the effective equality of all persons and combat discriminatory practices.[128]

These considerations apply to the situation of many refugees and asylum seekers in Latin America, who, as previously mentioned, usually lack opportunities in accessing different kinds of work and face poor socioeconomic conditions. In order to conform to the standards laid down by the Inter-American bodies—especially the IACtHR—States must adopt measures to refugees and asylum seekers with conditions to achieve material equality in terms of the right to work. Whereas this does not mean enabling these individuals to work in whatever position they wish regardless of applicable qualifications, nor that the State should directly find them employment, it does require the State to ensure equality of opportunities in accessing the labour market. The State could thus be required to establish vocational and professional training courses to refugees and asylum seekers, or to include them in programmes that already exist for the population at large, and to improve educational opportunities for refugees and asylum seekers in general.

Other measures specifically tailored to the needs of refugees and asylum seekers may also be required. Given the role that cultural barriers might play in hindering access to work opportunities, one can think of an obligation of the State to establish language courses and training on local social customs and rules to facilitate the development of these groups' networks within the local community. Moreover, States should promote to the general public, and to potential employers in particular, awareness-raising and informational campaigns about the rights of refugees and asylum seekers and the procedures for employing them.

As can be seen, the way in which the IACommHR and the IACtHR have interpreted States' obligations under the principle of non-discrimination, as well as the IACtHR's more detailed approach to the interplay between this principle and the right to work of marginalised groups, go beyond what the CESCR has expressly considered as States' obligations and beyond the minimum standards enshrined in the Refugee Convention. The standards set out in the Inter-American case-law ensure that States have a duty to provide the tools for refugees and asylum seekers to have not only formal access to the labour market but to substantive equality of opportunities in relation to the host State's society in finding employment as well.

128 IACOMMHR, 2016, para. 73.

4. Conclusion

The inclusion of refugees and asylum seekers in the labour market remains one of the greatest challenges to the predicament of these groups in Latin America, especially given that States are commonly unwilling to address the issue and have foreigners competing against national workers. The open-endedness of the obligations enounced under the Refugee Convention and international human rights law regarding the right to work of these groups gives States a relevant margin to interpret these obligations according to their interests, either by restricting refugees' and asylum seekers' access to certain labour sectors or, more commonly, by not taking active measures to remedy situations of substantive discrimination.

Human rights treaties provide for flexible standards that could be viewed as requiring States to take a more active role in ensuring equality of opportunities for these groups in their access to work. To achieve that, the pronouncements of the human rights bodies responsible for interpreting those instruments are paramount. Under the ICESCR, the most widely ratified treaty providing for the right to work of all persons, the CESCR has been overly cautious in addressing the content of States obligations concerning refugees' and asylum seekers' right to work. Aside from indicating that all persons should have access to the labour market without discrimination, the CESCR has yet to advance clearer standards as to what kinds of differential treatment are justified, what the limits of States' discretion in this regard are, and what positive measures are required from States in eliminating substantive discrimination.

Nevertheless, the case-law developed by the IACommHR and the IACtHR establishes stricter standards and clearer measures as to what States need to do to comply with their obligations under the ACHR. These bodies adopt a high level of scrutiny in assessing the lawfulness of differential treatment based on race, nationality, and refugee status, requiring that any distinctions respond to an imperative social need and are not replaceable for a less restrictive measure. Moreover, the IACtHR has consolidated its understanding that States must provide marginalised groups with the means for achieving material equality of opportunities vis-à-vis society at large in their access to the labour market, including through the establishment of training programmes and awareness-raising campaigns. The application of these standards to the context of refugees and asylum seekers requires

Latin American States not only to formally allow these groups to access different kinds of employment, in both the formal and informal markets, but to adopt targeted measures to ensure that affected individuals have more varied work options and are not limited to informal and dangerous forms of labour. Drawing attention to these legal obligations could thus offer a significant contribution to pushing for greater access to work by refugees and asylum seekers in Latin American States and to promoting their social inclusion more broadly.

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RESUMO: Refugiados e solicitantes de refúgio enfrentam vários obstáculos no gozo do seu direito ao trabalho, incluindo barreiras sob a legislação interna dos Estados receptores e discriminação substantiva. Apesar da existência de normas que protegem o direito ao trabalho sob o direito internacional dos refugiados e dos direitos humanos, elas geralmente são abstratas e deixam margem considerável aos Estados sobre até que ponto refugiados e solicitantes de refúgio podem acessar o mercado de trabalho. No entanto, a jurisprudência recente da Comissão e da Corte Interamericana de Direitos Humanos estabeleceu padrões mais protetores quanto ao direito ao trabalho e ao princípio da não-discriminação relativamente a grupos marginalizados. Este artigo busca demonstrar que esses padrões podem efetivamente ser aplicados a refugiados e solicitantes de refúgio, reduzindo assim a discricionariedade dos Estados na limitação do acesso desses grupos ao mercado de trabalho e oferecendo proteção mais concreta ao direito ao trabalho. Ao fazê-lo, o artigo analisará a extensão da proteção do direito ao trabalho desses grupos sob a Convenção sobre o Estatuto dos Refugiados, o Pacto Internacional sobre Direitos Econômicos, Sociais e Culturais e a Convenção Americana sobre Direitos Humanos a partir de declarações e decisões pertinentes de órgãos de direitos humanos sobre como esses instrumentos têm sido interpretados. O artigo então explorará mais a fundo a jurisprudência interamericana, mostrando o potencial dos padrões desenvolvidos nela à proteção do direito ao trabalho de refugiados e solicitantes de refúgio. Conclui-se que esses padrões podem e devem ser levados em consideração mais seriamente quando analisando a margem de discrição dos Estados em limitar o acesso de refugiados e solicitantes de refúgio ao mercado de trabalho e pode ser usada como base para exigir medidas positivas e proativas dos Estados na promoção desse acesso.
Palavras-chave: Direito ao trabalho; refugiados; solicitantes de refúgio; não-discriminação; Comissão Interamericana de Direitos Humanos; Corte Interamericana de Direitos Humanos.

ABSTRACT: Refugees and asylum seekers face several obstacles in enjoying their right to work, including bars under host States' domestic law and situations of substantive discrimination. Despite the existence of norms protecting the right to work under international refugee and human rights law, they are usually abstract and leave considerable discretion to States regarding the extent to which refugees and asylum seekers may access the labour market. Nevertheless, recent case-law of the Inter-American Commission and Court of Human Rights has set out more protective standards concerning the right to work and the principle that non-discrimination towards marginalised groups. This article aims to demonstrate that these standards can effectively be applied to refugees and asylum seekers, thus curtailing States' discretion in limiting their access to the labour market and offering more concrete protection of the right to work. In so doing, the article will analyse the extent to which these groups' right to work is protected under the Convention relating to the Status of Refugees, the International Covenant on Economic, Social and Cultural Rights, and the American Convention on Human Rights, drawing from relevant statements and decisions of human rights bodies on how these instruments have been interpreted. Then it will delve deeper into the Inter-American

case-law, showing the potential of the standards developed therein to the protection of refugees' and asylum seekers' right to work. It concludes that these standards can and ought to be taken into account more seriously when assessing States' discretion to limit refugees' and asylum seekers' access to the labour market and can be used as a basis to require positive and proactive measures from States in furthering this access.
Keywords: Right to work; refugees; asylum seekers; non-discrimination; Inter-American Commission of Human Rights; Inter-American Court of Human Rights.

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