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Making the Machine Work: Technocratic Engineering of Rights for Domestic Workers at the International Labour Organization

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ABSTRACT

In September 2013, the International Labour Organization (ILO) Convention concerning decent work for domestic workers entered into force, thereby bringing domestic workers into the mainstream of labor law. This article explores how the interests of the ILO's constituents were shaken up and reconfigured to build support for new labor protections amidst the shifting global context of deregulation. I argue that technocratic devices—charts, questionnaires, and paragraph formatting—wielded by ILO insiders contributed to this development by creating epistemic space for this new category of employees to be recognized and for consensus to be secured on appropriate labor standards for this group. I draw on a pragmatist ethnographic approach to show how the ILO's lawmaking apparatus melded technical law and grassroots activism so as to make domestic worker rights become a legal reality.

INTRODUCTION

In September 2013, The Domestic Workers Convention, 2011 (No. 189) and its supplementing Recommendation (No. 201) entered into force, having been voted into the corpus of international labor law two years earlier by the tripartite constituency of the International Labour Organization (ILO).² These international instruments offer legal protections to workers exposed to exploitation as temporary foreign contract labor who are disadvantaged by racial and gender hierarchies and who traditionally have been excluded from the protections of domestic labor laws.³ In the growing number of states that have ratified the ILO Domestic Workers

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² The texts of all ILO Conventions and Recommendations cited in this article may be found online at www.ilo.org/normlex.

³ See generally GRACE CHANG, DISPOSABLE DOMESTICS: IMMIGRANT WOMEN WORKERS IN THE GLOBAL ECONOMY (2000); PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE

Convention and its accompanying Recommendation, these international standards are important because they address long-standing gaps in public policy on this question.⁴ While it is still too soon to know how these standards will be implemented, the enactment of the Domestic Workers Convention has energized ongoing transnational mobilizations by and for domestic workers and there are signs that these standards are guiding reforms in an increasing number of countries.⁵

Moreover, for scholars of global governance, the enactment of these recent international legal instruments offers a window to examine the success of an innovative regulatory project at a moment when national regulatory agencies continue to consider proposals for reducing their labor market interventions. In this contemporary global context of deregulation, the Domestic Workers Convention has been heralded as an instance of regulatory dynamism, insofar as its extension of legal protections to workers whose "service" had previously been considered a "status" can be understood as a fundamental reconstruction of traditional arrangements.⁶ As recent studies have shown, the impetus for the international law-making effort that culminated in the Convention emerged from a transnational advocacy movement that focused its efforts on empowering domestic workers.⁷ Certainly, the mobilization of domestic worker activists

SHADOWS OF AFFLUENCE (2001); SHIRLENA HUANG ET AL., ASIAN WOMEN AS TRANSNATIONAL DOMESTIC WORKERS (2005); MARY ROMERO, MAID IN THE U.S.A. (1992); Ray Jureidini & Nayla Moukarbel, *Female Sri Lankan Domestic Workers in Lebanon: A Case of 'Contract Slavery'?*, 30 J. ETHNIC & MIGRATION STUD. 581 (2004) (providing extra background material on the exploitation of domestic workers who have traditionally been excluded from national labor protections).

⁴ A list of ratifying states for Convention 189 and Recommendation 201 can be found at www.ilo.org. The United States is a signatory to these instruments, although it has not yet ratified them.

⁵ See Helen Schwenken & Elisabeth Prügl, *An ILO Convention for Domestic Workers: Contextualizing the Debate*, 13 INT'L FEMINIST J. POL. 437, 439-40 (2011). Martin Oelz, *The ILO's Domestic Workers Convention and Recommendation: A Window of Opportunity for Social Justice*, 153 INT'L Labour Rev. 143, 167-169 (2014).

⁶ Adelle Blackett, *The Decent Work for Domestic Workers Convention and Recommendation, 2011*, 106 AM. J. INT'L L. 778 (2012).

⁷ Eileen Boris & Jennifer N. Fish, "*Slaves No More*": *Making Global Labor Standards for Domestic Workers*, FEMINIST STUD. (forthcoming).

throughout the convention-drafting process was a crucial factor in the emergence of new international labor standards and illustrates the practice of governance at a local scale.

Yet, even with the determined and energetic support of a transnational mobilization of domestic worker activists, there is reason to suspect that some additional form of “facilitation” was required to establish consensus on the substantive terms of reference for standard-setting in the area of domestic work. It is significant that ILO Convention 189 and Recommendation 201 resulted from only four weeks of negotiations, a remarkably brief period from the point of view of domestic worker advocates familiar with the slow-pace of international lawmaking.⁸ It is unclear how a law-making body whose government and employer representatives expressed strong reservations over any new standard-setting initiative came to agreement and produced a new set of legal understandings on an issue that had not even been on the radar of mainstream labor policymakers,

In this article, I build on existing accounts of how “Decent Work for Domestic Workers” became part of contemporary labor law by exploring the enactment of Convention 189 and Recommendation 201 through a theoretical and methodological framework that draws inspiration from philosopher of science Bruno Latour's ethnographic studies of the material semiotics of expert knowledge-production.⁹ Applying this approach to the context of legal knowledge production, my analysis takes the entirety of the convention-production process as a focus and examines this process as an assemblage of epistemic translations.. I argue that, in the case of the Domestic Workers Convention, these translations were bound together through the creative deployment of technical devices and legal techniques that cemented previously unstable

⁸ Telephone Interview with Ana Avendano, Legal Office, AFL-CIO (Apr. 2012).

⁹ *See generally* BRUNO LATOUR, REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK-THEORY (2005) (emphasized the contributions of both human and non-human actants in facilitating the process of scientific discovery).

normative and empirical assumptions about domestic work, thereby making it possible to forge international consensus on how this activity should be governed.

In what follows, I first discuss the theoretical framework used to interrogate the law-making apparatus at work in the Domestic Workers Convention and explain the methods and empirical materials engaged in this study. I then provide two brief background sections, offering readers who are not familiar with ILO processes a sketch of the law-making apparatus of international labor legislation, as well as an overview of the evolving contemporary political context for labor regulation. This sets the groundwork for my detailed examination, in Sections VI and VII, of the procedures involved in defining the project of standard setting for domestic workers and in instantiating these standards within the specific form of Convention 189. This close empirical description of the convention-drafting process is followed by an analysis section that unpacks how technical devices wielded by lawyers, economists, and international civil servants within the ILO facilitated the reorganization of “law” and “society” required for the instantiation of new governance norms.

I. INTERROGATING THE TECHNIQUES THROUGH WHICH LEGAL KNOWLEDGE IS MADE

As scholars of governance have rediscovered the importance of legal techniques and technicalities, they have looked to the field of Science and Technology Studies (STS), and particularly to the work of Bruno Latour, for methodological and theoretical guidance. Building on prior STS scholarship emphasizing a pragmatist and constructivist theoretical orientation, Latour elaborates an analytical framework for empirical study of expert knowledge production, an approach that he terms Actor-Network Theory (ANT). According to Latour, ANT can be distinguished from prior constructivist approaches in the sociology of science, which in his view have placed undue emphasis on the agentic powers of political and economic structures and

have ignored the agentive role of objects (tools and technologies) in forging social relations and social knowledge.¹⁵ As Latour points out, this agentive role of objects—mediating associations and interactions among human actants—is particularly apparent in scientific laboratories, since structuralist explanations of scientific knowledge that ignore the place of technical innovation are clearly implausible.¹⁶ As Latour puts it, it is true that scientists master the world, “but only if the world comes to them in the form of two-dimensional, superposable, combinable inscriptions.”¹⁷ In other words, if we want to understand scientific knowledge, we need to look at the techniques and technical devices deployed in the production of epistemic stability at any given time and place.

Within the domain of sociolegal scholarship, legal anthropologist Annelise Riles offers one of the first in-depth explorations of how the ANT approach might be applied to study the material dimensions of global governance. Riles painstakingly traces the expert legal practices associated with the private regulation, through collateral guarantees, of cross-border financial transactions to investigate the inner logic of this modality of global governance.¹⁸ Focusing on technical law as an object of phenomenological and cultural interrogation, Riles moves away from attempts to “unmask” technical knowledge categories and, instead, provides a detailed account of how technical knowledge about financial markets is produced and experienced. She is careful to note that the legal practices of private regulatory groups such as the International Swaps and Derivatives Association (ISDA) are embedded in broader structures of power; yet, she insists that technical knowledge cannot be reduced to social context because it has “its own

¹⁵ See LATOUR, *supra* note 5, at 63-86.

¹⁶ BRUNO LATOUR, *PANDORA’S HOPE: ESSAYS ON THE REALITY OF SCIENCE STUDIES* 19 (1999).

¹⁷ BRUNO LATOUR, *PANDORA’S HOPE: ESSAYS ON THE REALITY OF SCIENCE STUDIES* 29 (1999).

¹⁸ See *generally* ANNE LISE RILES, *COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS* (2011) (analyzing how day-to-day private actions can be reformed to produce more effective forms of market regulation).

epistemological and material autonomy."¹⁹ By looking at the material qualities of regulatory practices, Riles contends, we can gain valuable insights into the precise mechanisms by which technical legal knowledge mediates the governance of global financial markets.²⁰ Riles' insights are instructive for those examining ILO, an institution in which science and technical law have traditionally played important roles.

While Riles focuses her investigation on private governance of financial markets, I explore technical knowledge produced by the ILO that extends state-centered regulation into labor markets. Using the Domestic Workers Convention enacted by the ILO in June 2011 as a case study, my analysis aims to elucidate how technical devices embedded in the century-old law-making apparatus of international labor legislation mediated the translation of "decent work for domestic workers" into an accepted and uncontroversial subject for regulatory governance.

Certainly, knowledge production by ILO bureaucrats was not the sole factor facilitating the realization of the Domestic Workers Convention. The ILO's labor standard-setting apparatus is embedded within a broader global governance regime that exerts an influence over its operations.²¹ Moreover, as discussed further in Part VI, the activities of a transnational advocacy movement for domestic workers played a crucial role both in placing "decent work for domestic workers" on the ILO's agenda and in lobbying behind the scenes for the convention's eventual enactment.²² Finally, political dynamics among the delegates, as well as domestic political considerations, contributed to shaping the form and content of the convention in important ways.

¹⁹ See Riles, *supra*, at 20.

²⁰ *ibid.*

²¹ See Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 126, 126 (Philip Alston ed., 1992); Guy Standing, *The ILO: An Agency for Globalization?*, 39 *DEV. & CHANGE* 355, 355 (2008).

²² See, e.g., Boris & Fish, *supra* note 4; Stuart C. Rosewarne, *The ILO's Domestic Worker Convention (C189): Challenging the Gendered Disadvantage of Asia's Foreign Domestic Workers?*, 4 *GLOBAL LAB. J.* 1, 6 (2013).

In short, a complex set of interactions among a range of actors produced the Domestic Workers Convention. My exploration of how technical devices shaped the experience of ILC participants' aims to complement other scholarly studies that focus on these various dimensions of international labor lawmaking and thereby assemble a fuller picture of this process.

Technical knowledge produced by the ILO bureaucracy facilitated the process of domestic worker standard setting in significant ways. These interventions operated through a technocratic modality that manifested itself in both their ideational and material dimensions. My empirical examination of this process calls attention to three specific technical devices—charts, questionnaires, and split paragraphs—that, I argue, are integral to the modality of knowledge production associated with the ILO secretariat and the organization's standard-setting apparatus. In the case of the Domestic Workers Convention, these technical devices played a central role in facilitating the realization of new legal instruments. These findings remind us that it is not only neoliberal governance programs that are advanced through technical expertise. Exploring the aesthetics of international regulation within the setting of the ILO—an organization that is institutionally committed to opposing free market privatization—offers a glimpse of how technical devices might be deployed more widely in the formulation of alternative modalities of global governance.

II. DATA COLLECTION AND ANALYSIS

My analysis of the standard-setting process engaged in the formulation of the Domestic Workers Convention relies on two distinct sources of data: (1) written artifacts generated as part of the convention drafting process, and (2) unstructured interviews with actors who played a key role in the process and who provided context for interpreting the documents. The research was facilitated by the fact that, similar to other U.N. agencies, the ILO generates a large number of

documents and all official documents associated with the convention-drafting process are made available to the public, which facilitates research. These documents include the text of the original proposals for standard setting on domestic workers submitted to the ILO Governing Body, which set the process in motion, as well as the proceedings of the committee of delegates to the International Labour Conferences of 2010 and 2011 that was charged with drafting the Domestic Workers Convention.

For the interview portion of the research, I spoke with staff members of the ILO secretariat who had overseen the drafting of the Domestic Workers Convention as well as with individuals who participated in the drafting process as representatives of the ILO's tripartite constituents. Unstructured interviews with the relatively small circle of ILO officials most closely involved in this process were invaluable for fleshing out the dynamics of convention drafting. At the same time, cognizant that members of the ILO Secretariat might provide an overly generous account of their own contributions, I maintained contrasting institutional affiliations with my other informants who served to prevent the resulting analysis from being unduly biased toward any single perspective.

While the involvement of some of these interviewees undoubtedly predisposes them to emphasize their own contributions, this is not a major concern. My overall aim in interpreting both the narratives these actors offer and the documentary artifacts associated with the drafting process is not to formulate any strong causal claim regarding the primacy of technical devices and bureaucratic knowledge to the enactment of the convention. Rather, in calling attention to the contributions of previously unexplored components such as technical devices, this study offers a further layer of nuance to elucidate how new legal knowledge is produced and aims to enhance our understanding of international lawmaking.

III. THE LAW-MAKING APPARATUS OF INTERNATIONAL LABOR LEGISLATION

Before examining the specific case of standard setting for domestic workers, I provide a brief historical overview of the development of the law-making apparatus of international labor legislation. Due to the contemporary dominance of neoliberal market-based approaches, the political rationales that have historically formed the basis for international labor legislation are no longer widely familiar. A historical lens offers a background on the general relations between the ILO's staff and its constituent representatives, as well as the institutional context that guides their interactions. These institutions established the political boundaries within which technical expertise could operate as it sought to engineer coherent standards for domestic work.

Institutionally, the ILO is a United Nations agency dealing with labor issues that is distinguished by its tripartite governing structure. Governments, employers, and workers are represented in a 2:1:1 ratio on both the ILO Governing Body and at the annual International Labour Conference.²³ The Governing Body drafts the ILO's program and budget, supervises the work of the ILO secretariat, and elects the director-general. The International Labour Conference (ILC) includes delegates from all of the ILO's Member States. It meets in Geneva every year in June and has the authority to adopt international conventions on labor standards, which are binding on states that ratify them.²⁴ The ILC also adopts nonbinding recommendations and declarations.

The ILO's Geneva-based Secretariat, the International Labour Office, is charged with carrying out the agenda set by the Governing Body. From its founding period, in the aftermath of the First World War, the Secretariat has included "political and diplomatic" divisions, which

²³ ILO, *Rules of the Game: A Brief Introduction to International Labour Standards* (2009) 16-17.

²⁴ ILO, *Rules of the Game: A Brief Introduction to International Labour Standards* (2009) 14.

coordinate with each of the organization's constituent groups (workers, employers, and governments), as well as a separate "scientific" or "technical" division, which produce publications, statistics, and information.²⁷ The ILO's first Director-General, the French socialist politician Albert Thomas, encouraged the secretariat's production of technical information as a means by which the organization could avoid being dragged into the morass of polarized international politics.²⁸ Thomas also asserted the authority of the secretariat to steer the convention-drafting process by providing initial draft texts for consideration by ILC delegates, a practice now formalized in ILO operating procedures.²⁹ The ILO leadership thus has a lengthy tradition of deploying institutional power to set the agenda of international negotiations. In his classic account of the ILO, organizational theorist Robert Cox describes it as a "limited monarchy" in which proactive insiders can maneuver within the bounds of constituent interests.³¹ Although the pace of international labor lawmaking has waxed and waned over time, the ILO Secretariat's basic protocols and procedures have changed relatively little.³² Yet, it is an open question whether, in the contemporary international political environment, the ILO's standard-setting apparatus, with its marked emphasis on technical expertise, can be made operational or whether it will end up rusting on the shelf like the industrial machinery whose operations it was originally designed to regulate.

²⁷ E.J. PHELAN, YES AND ALBERT THOMAS 210 (Columbia University Press 1949) (1936).

²⁸ *Id.* at 184.

²⁹ *Id.* at 251.

³¹ Robert W. Cox, *ILO: Limited Monarchy*, in *THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION* 102 (Robert W. Cox et al. eds., 1973).

³² See generally EDWARD C. LORENZ, *DEFINING GLOBAL JUSTICE: THE HISTORY OF U.S. INTERNATIONAL LABOR STANDARDS POLICY* (2001); Daniel Roger Maul, *The International Labour Organization and the Globalization of Human Rights, 1944-1970*, in *HUMAN RIGHTS IN THE TWENTIETH CENTURY* 301 (Stefan-Ludwig Hoffmann ed., 2011) (tracing the history of international labor laws and policies).

IV. THE CONTEMPORARY POLITICS OF INTERNATIONAL STANDARD SETTING

The current moment is a particularly challenging one for international labor legislation and for social democratic programs more generally, given the dominance of a global governance ideology privileging deregulation and labor market flexibility. The ILO has been criticized for allegedly acceding to pressure from its largest funders, particularly the U.S. government, to deemphasize its traditional social democratic program and its commitment to organized collective bargaining and to focus, instead, on supporting corporate social responsibility initiatives.³³ At the end of the 1990s, seeking to reassert the ILO's relevance in international debates on poverty, globalization, and the U.N. Millennium Development Goals, the ILO Secretariat initiated a call for all Member States to commit to the general principles contained in the 1998 "Declaration of Fundamental Rights at Work," but this new agenda drew intense criticism and was labeled by some observers as a move away from standards to "soft-promotionalism" and voluntarism in implementation.³⁴

Although ILO's standard setting project faces serious challenges, the current moment is also a particularly dynamic one for international policymaking on labor-related issues. Over the past two decades, while neoliberal governance projects have been contested by only a handful of states, innovative advocacy strategies have emerged on the global political scene as part of a broader mobilization for social justice or "globalization from below."³⁵ The recent and interlinked campaigns for migrant and domestic worker rights both emerged from this political context. Starting in the mid-1990s, a new transnational coalition of churches, dissident currents

³³ Standing, *supra* note 13, at 368.

³⁴ Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457, 518 (2004).

³⁵ Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in LAW AND GLOBALIZATION FROM BELOW 29, 54 (Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito eds., 2005).

within the international labor movement, and human rights nongovernmental organizations (NGOs) began to push for the enactment of enhanced and updated labor protections suitable to contemporary context in which global supply chains limit the effectiveness of traditional models of collective bargaining.³⁶ This transnational advocacy network sought to rebuild the progressive movement from the grassroots after decades of social democratic centralization, and its activists were committed to extending their agenda beyond the traditional labor constituency of mostly male, unionized, industrial employees. Working together, labor movement reformists and NGO participants in this advocacy network lobbied to convince representatives of the ILO Workers Group to incorporate informal sector workers such as self-employed women workers, migrant agricultural workers, and care workers.

Globally, this call to incorporate informal sector workers made inroads within the labor movement and the human rights professional advocacy community. Faced with a declining membership base, leaders of a number of national and international trade union federations were amenable to experimenting with new mobilization strategies that offered union representation to informal sector workers and irregular migrants.³⁷ Latin American and Caribbean trade unions were also actively working to facilitate the collective organization of women workers employed in the informal economy.³⁸ International women's rights advocates associated with Women in Informal Employment: Globalizing and Organizing (WIEGO), a policy research institute based at Harvard University, were also active in fostering contacts with grassroots organizations of

³⁶ LORENZ, *supra* note 22, at 209-17; *see also* Schwenken, *supra* note 2, at 439.

³⁷ LEAH A. HAUS, UNIONS, IMMIGRATION, AND INTERNATIONALIZATION: NEW CHALLENGES AND CHANGING COALITIONS IN THE UNITED STATES AND FRANCE (2002); Patrick A. Taran & Luc Demaret, *Action Imperatives for Trade Unions and Civil Society*, 15 ASIAN PAC. MIGRATION J. 391, 391-404 (2006).

³⁸ *See* Asha D'Souza, *Moving Towards Decent Work for Domestic Workers: An Overview of the ILO's Work 80* (ILO Bureau for Gender Equality, Working Paper No. 2, 2010).

women workers in Southeast and South Asia.³⁹ Together, these initiatives paralleled the concerns of human rights NGOs who had embraced the cause of women's human rights and had begun expanding their programs on social and economic rights.⁴⁰

The campaign to develop international labor legislation for domestic workers emerged as a pilot project for this transnational advocacy movement, which, by the mid-2000s, had attracted institutionalized support. For reformists within the International Union of Food and Allied Workers (IUF), a “global domestic worker movement” was a flagship for ongoing efforts to represent informal-sector workers.⁴¹ Because domestic worker advocates succeeded in developing an organizational infrastructure with groups such as the Europe-based RESPECT Network, a campaign for a new ILO convention provided a tangible goal for women around which this project could be organized.⁴² At an international conference held in Amsterdam in November 2006 under the auspices of the IUF, participants resolved to undertake a concerted campaign for ILO standard setting in the area of domestic work.⁴³ To advance the goal of building a global movement, advocates formed the International Domestic Workers Network (IDWN). It aimed to foster relations with supportive labor organizations, NGOs, and research institutes, while also providing a platform through which domestic worker organizations could

³⁹ See WOMEN IN INFORMAL EMP.: GLOBALIZING AND ORGANIZING, <http://www.wiego.org> (last visited Apr. 13, 2014).

⁴⁰ See JO BECKER, CAMPAIGNING FOR JUSTICE: HUMAN RIGHTS AND ADVOCACY IN PRACTICE 32-58 (2013).

⁴¹ Telephone Interview with Barbro Budin, Equality Officer, Int'l Union of Food and Allied Workers (Apr. 23, 2012).

⁴² The Rights Equality Solidarity Power Europe Cooperation Today (RESPECT) network was created in 1998 as a network of migrant domestic workers grassroots organizations, migrant rights support organizations, trade unions, and human rights NGOs. It receives funding from the European Commission and promotes the rights of migrant domestic workers and the implementation of public policy measures to improve their working conditions, to prevent abuse and exploitation, and campaigns for recognition of the value of their work and their legal recognition. *About Us*, RESPECT, <http://www.respectnetwork.eu/about-us> (last visited Apr. 13, 2014).

⁴³ See, e.g., Celia Mather, *Respect and Rights: Protection for Domestic/Household Workers!*, (2006), <http://www.ifwea.org/@Bin/148866/2006RespectAndRightsDmstcWrkrs.pdf>.

build their organizing capacities.⁴⁴ The goal was to build a strong movement for regulating domestic work that would have both top-down and bottom-up support.

In February 2007, the organizers of the Amsterdam conference, in cooperation with International Congress of Federated Trade Unions (ICFTU) Director Anna Biondi, approached the ILO's Bureau of Worker Activities (ACTRAV) to explore possibilities for placing standard setting for domestic workers on the ILO's agenda.⁴⁵ As the primary liaison for worker interests within the ILO, ACTRAV has a mandate to support its constituents in the workers group. Moreover, when ILO began promoting migrant worker issues as one of its priorities, ACTRAV staff began including individuals with a background in international migrant human rights advocacy who supported nontraditional approaches to labor organizing. On hearing the proposal for domestic worker standard setting, ACTRAV staff embraced the project and decided to propose that the International Labour Conference discuss domestic worker standard setting at the next available opportunity.⁴⁶ The first step, in which technocratic knowledge would play a key mediating role, involved convincing the ILO Governing Body to formally place the topic on the ILC's conference agenda.

V. INSERTING DOMESTIC WORKERS INTO THE ILO AGENDA

The combination of deregulatory pressures and grassroots responses described in the previous section provide a sketch of the political context from which the project of domestic worker standard setting emerged. Commencing in the spring of 2007, the ILO's Geneva-based secretariat took up the domestic worker activists' proposal, and began the task of reorganizing a loose-knit but energetic transnational advocacy campaign into a law-making initiative. In order

⁴⁴ Boris & Fish, *supra* note 4.

⁴⁵ Telephone Interview with Barbro Budin, *supra* note 31.

⁴⁶ Telephone Interview with ACTRAV Staff (Apr. 17, 2012).

to advance, the standard-setting project would need to be made comprehensible for the ILO's tripartite constituency. And ACTRAV's team of specialized labor liaisons held primary responsibility for reframing the topic in the terms of the ILO's official mandate and making the case that domestic workers deserved a place on the ILO agenda.

The first step in doing so involved presenting “Decent Work for Domestic Workers” as one of the organization's major unfinished tasks that involved a range of strategic tasks and maneuvers. Representatives on the ILO's Governing Body were sent a briefing note calling attention to the fact that the ILO had first considered standard setting in this area in 1948 and that a resolution of the International Labour Conference in 1965 had again endorsed placing conditions of domestic workers on the agenda.⁴⁷ As the ACTRAV brief pointed out, “Much of the concern expressed in 1948 and 1965 remains valid today as the problems faced by domestic workers seem to have been further exacerbated and their numbers are growing.”⁴⁸ Strikingly, this history narrative strategically avoided mentioning that existing ILO conventions pertaining to migrant labor had not only failed to include domestic workers in their coverage, but also had explicitly excluded domestic workers from the expanding corpus of labor protections.⁴⁹ This was politically astute, since a stronger case could be made for regulating domestic work if it appeared as an unfinished project as opposed to a topic that fell outside the historical social democratic consensus.

⁴⁷ Telephone Interview with ACTRAV Staff, *supra*

⁴⁸ ILO, Second Item on the Agenda of the 300th Session of the Governing Body, Proposals for the agenda of the 99th Session (2010) of the International Labour Conference, Geneva, November 2007, para. 52.

⁴⁹ In the period of social democratic consensus immediately before and after the Second World War, foreign labor migrants had come to be included within the purview of international labor standard-setting, with ILO conventions committing states to providing permanent immigrants and regularly-admitted temporary guestworkers with no less favorable access to social assistance programs than that given to their own nationals. However, both the Migration for Employment Convention of 1939 and the revised Convention of 1949, explicitly excluded workers in the informal sector. *See* International Labour Organization, Migration for Employment Convention, June 28, 1939, ILO No. 66; International Labour Organization, Migration for Employment Convention, July 1, 1949, ILO No. 97.

Having gestured at the history of labor standards, the brief to the Governing Body also highlighted the link between domestic worker standard setting and the ILO's current mandate of promoting a "decent work agenda" as embodied in its 1998 "Declaration of Fundamental Principles and Rights at Work," which prioritized freedom of association, elimination of forced labor, abolition of child labor, and elimination of discrimination in employment.⁵⁰ In this respect, ACTRAV's brief could point to an expert report prepared as part of the general discussion on migrant workers at the 2004 International Labour Conference, which stressed that migrant domestic workers are among the world's most vulnerable workers.⁵¹ Along the same lines, the brief cited the *ILO Global Report of 2006*, which had noted the high incidence of child labor in domestic work. It emphasized the existence of comparative research by showing the need to address discriminatory labor laws that grant domestic workers lower levels of protection than other categories of workers.⁵² Finally, the brief highlighted that the ILO's Committee of Experts had noted that in some countries labor laws explicitly deny domestic workers the right to organize, severely threatening freedom of association.⁵³ In all of these ways, the proposal for aimed to convince members of the Governing Body that domestic worker standard setting was a logical extension of the organization's previously settled agenda.

While the rhetorical insertion of domestic worker standard setting into existing ILO projects was particularly successful in generating interest within the Governing Body for the general notion of promoting "Decent Work for Domestic Workers," the proposal for drafting a

⁵⁰ The text of the Declaration is available at www.ilo.org.

⁵¹ ILO, Provisional Record No. 22, International Labour Conference, 92nd Session, Geneva, June 2004, Conclusions, para. 7.

⁵² ILO, Second Item on the Agenda of the 300th Session of the Governing Body, Proposals for the agenda of the 99th Session (2010) of the International Labour Conference, Geneva, November 2007, para. 55.

⁵³ ILO, Freedom of association and collective bargaining; Right of workers and employers to establish and join organizations, Chapter III, Report III, Part 4B, ILC, 81st Session (Geneva, June 1994).

convention still faced opposition. In keeping with their group's previously established position, employer delegates remained adamantly opposed to any additional exercises in standard setting; meanwhile, some governments suggested convening a committee of experts rather than proceeding to standard setting right away. As the discussion of proposed agenda items was carried over to the next Governing Body meeting in March 2008 without a clear frontrunner among competing proposals, the task for supporters of standard setting for domestic workers was to garner support for their initiative by demonstrating that it was a natural extension of the ILO's current programs and policies.

To respond to concerns that standard setting for domestic workers was premature, ACTRAV staff produced an exhaustive stock-taking of ILO policies and programs related to domestic workers.⁵⁴ The genealogy of domestic work regulation within the ILO was extended to include a resolution adopted at the 1936 International Labour Conference that advocated inscribing the issue for future investigation and discussion.⁵⁵ This “mapping” of the existing research onto ILO’s historical documents points to initiatives on domestic workers undertaken by more than a dozen segments of the organization’s bureaucracy. In other words, compiling an arsenal of documents demonstrated a consensus building on the issue and made it possible to assert that “Decent Work for Domestic Workers” qualified as a project ripe for standard setting, tilled by technicians and experts.

Not surprisingly, in March 2008, the ILO Governing Body agreed to place domestic worker standard setting on the agenda of the 99th and 100th International Labour Conferences, with the aim of producing a convention by June 2011.

⁵⁴ ILO, Second Item on the Agenda of the 301st Session of the Governing Body, Proposals for the agenda of the 99th Session (2010) of the International Labour Conference, Geneva, March 2008, para. 44-66.

⁵⁵ ILO, Record of Proceedings, International Labour Conference, 20th Session, 1936, Appendix XVI: Resolutions adopted by the Conference, p. 740.

VI. DRAFTING “DECENT WORK FOR DOMESTIC WORKERS” INTO INTERNATIONAL LAW

Now that the table had been set to begin work on domestic workers’ issues at the ILO, the ILO agreed to convene its tripartite constituency for a discussion of domestic worker standard setting. However, it was not certain that the ILO would successfully translate “Decent Work for Domestic Workers” fifteen months later into a new international convention. For many traditionalists within the ILO, the idea of establishing standards for domestic workers was both unexpected and puzzling. Unlike the child labor issue, public opinion did not seem outraged by the treatment of domestic workers. Unsurprisingly, child labor was one of the few topics on which the ILO had recently managed to produce a successful convention.⁵⁶ Skeptics within the organization argued that the ILO should devote its attention to other projects, suggesting that members of the public would say, “I have a maid and I treat her well. She’s a contract worker, so I shouldn’t pay social security. It will have direct consequences on my pay, and I don’t want a jack-booted labor inspector bursting into my house.”⁵⁷ Supporters of domestic worker rights, although passionately committed to the issue, likewise did not anticipate the imminent completion of any new standard-setting instrument.⁵⁸

The new standard-setting initiative, having received the go-ahead from the Governing Body, was handed to the ILO’s Conditions of Work and Employment Branch (TRAVAIL), which would be responsible for drafting the text that would form the basis for the first round of International Labour Conference committee deliberations. According to standard ILO procedure, the first step in this drafting process is a “law and practice report” that canvasses regulatory

⁵⁶ See International Labour Organization, Worst Forms of Child Labour Convention, June 17, 1999, ILO C182. Other recent standard setting efforts had fallen short. An attempt in 1998 to create labor standards for contract workers had not been successful due to resistance by employers. The 2005 Meeting of Experts on labor standards for migrant workers had resulted only in a vague “Framework for Labour Migration” adopted by the Governing Body rather than a convention. The 1996 Homework Convention has been ratified by only four countries and is “effectively a dead letter.” Standing, *supra* note 13, at 366.

⁵⁷ Interview with George Dragnich, Former ILO Assistant Director General, in Washington, D.C. (Mar. 6, 2011).

⁵⁸ Telephone Interview with Barbro Budin, *supra* note 31.

practices across ILO Member States to lay out the “state of the art” in the relevant sector of employment.⁵⁹ In drafting the report, the aim was to translate the social justice agenda of a transnational advocacy network into a more legalized and programmatic form.

This translation was particularly challenging in the case of domestic workers because the report would first have to justify that a sector existed across national contexts. The term as commonly used appeared to encompass a range of activities that cut across the categories of “domestic helpers and cleaners” and “housekeeping and personal care” in the International Standard Classification of Occupations, which formed the basis for most labor force surveys.⁶⁰ Some national legislation specified the inclusion or exclusion of specific occupations in domestic work, but there was substantial variation across countries. Activists varied in whether they identified themselves as “care workers,” “household workers,” or “domestic workers.”⁶¹ Fitting “Decent Work for Domestic Workers” into the conceptual framework of international standard setting, which presents itself as formalizing practices that states have already adopted or are trying to adopt, would require substantial reinterpretation of existing law and practice.

Sensitive to these challenges, and willing to pursue all options to secure a successful convention that might make a difference to a particularly vulnerable group while also lifting the ILO’s flagging international reputation, the TRAVAIL office staff made the decision to recruit external expertise. Collaboration with external experts is a practice the ILO has often used when standard setting initiatives branch into new domains of economic activity, and in the case of standard setting for domestic workers the majority of the research for the Law and Practice

⁵⁹ ILO, *Rules of the Game: A Brief Introduction to International Labour Standards* (2009) 17.

⁶⁰ **"International Standard Classification of Occupations," ILO, <http://www.ilo.org/public/english/bureau/stat/isco/index.htm>**

⁶¹ See, e.g., Celia Mather, *Respect and Rights: Protection for Domestic/Household Workers!*, (2006), <http://www.ifwea.org/@Bin/148866/2006RespectAndRightsDmstcWrkrs.pdf>.

Report to a Canadian legal scholar, Adelle Blackett, who had previous ILO experience and had developed arguments applying human rights standards to care work. Blackett's involvement expanded the ambitions of the project. Not only would the *Law and Practice Report* for "Decent Work for Domestic Workers" follow traditional ILO practice of compiling national regulatory practices related to a previously unregulated area of employment, it would also aim to expand the bounds of existing labor law by grounding the discussion of labor protections in a critical race and feminist legal analysis.⁶²

Within the ILO's tradition of detailed technical knowledge production, the *Law and Practice Report* for "Decent Work for Domestic Workers" typically presents an especially exhaustive coverage of its subject. The original report was longer, but its published version had to be cut to one hundred pages for funding and translation reasons.⁶³ Blackett and her research assistant reviewed the law governing domestic work in seventy-two ILO Member States, presenting this research in the report's lengthy Appendix. This careful compilation of existing national laws aimed to preempt criticism that standard setting for domestic workers only addressed conditions in developed economies, thereby increasing the likelihood that the eventual convention would be broadly ratified.

To convince its readers that sufficient regulatory basis for writing specific standards existed, as opposed to a vague declaration of principle, the report details innovative techniques for advancing the social protections of domestic workers. Among the "good practices" discussed in the report,⁶⁴ the Working Conditions Chapter notes that French legislation offers "one of the most detailed attempts to gear the employment contract specifically to the domestic work

⁶² Adelle Blackett, Introduction: Regulating Decent Work for Domestic Workers, 23 *Can. J. Women & L.* 1, footnote 6 (2011)

⁶³ Email from Adelle Blackett to Leila Kavar, (July 30, 2012) (on file with author).

⁶⁴ Blackett studiously avoided the language of "best" practices, focusing instead on good practices, and thus acknowledging the limits of existing legal treatment of domestic workers. *Id.*

relationships and enforce it in such a way as to prevent abuse.”⁶⁵ Going beyond the traditional labor law topics of wages and hours, labor inspection, and access to dispute resolution mechanisms, the report also addresses the need to ensure equal treatment and freedom of association to ensure full social inclusion for domestic workers.⁶⁶ It highlights national legislation mandating that domestic workers should have access to food of good quality, as well as laws formalizing the conditions under which migrant domestic workers will be repatriated. The comprehensive marshaling of detail propels the readers to the conclusion that “creative experimentation in regulating the occupation is under way in a broad cross-section of member states around the world” and that an eventual convention would “build on many of the national regulatory innovations in law and practice identified in this report”⁶⁷

We likewise see legal engineering at work in the report's handling of public uncertainty over whether a sector-specific convention would be appropriate for the heterogeneous activities falling within the category of domestic work. The report begins by acknowledging this uncertainty over whether it is appropriate to speak of a "domestic work sector" in a short “Note on Terminology” at the end of its first chapter.⁶⁸ Having preempted the criticism of failing to address the issue, the report then proceeds to discursively and semantically smooth away any doubt that the existence of a “domestic work sector” is an established fact. This textual substitution of solidity for heterogeneity is illustrated in a section entitled “Defining Domestic Work,” which begins by setting out a general definition (“a fundamental criterion of domestic work is that it takes place in the ‘household’”), and then notes that “not all countries surveyed

⁶⁵ ILO, INT’L LABOUR CONFERENCE: DECENT WORK FOR DOMESTIC WORKERS REPORT IV(I) 47 (2010).

⁶⁶ *Id.* at 17-24.

⁶⁷ *Id.* at 94-95.

⁶⁸ Noting that the language surrounding “this occupation” has varied over time according to geographical and cultural context, and that “self-definition, particularly by those doing the work, is crucial.” *Id.* at 15.

provide guidance on the nature of domestic work.”⁶⁹ However, rather than focusing on intrasectoral differences, the text offers a series of charts that contrasts “domestic workers” with “general workers.”⁷⁰ Reading the footnote, one finds that the former is an aggregate of a variety of occupational classifications that vary across the seventy-one countries canvassed by the report.⁷¹ In the colored charts, however, “domestic workers” appears as a concrete and delimited labor force “sector,” akin to coal miners or steel workers. Similarly, a table listing “Domestic workers as a percentage of total employment” subsumes domestic workers into the broader category of workers whose employment relationship might be the subject of regulation.⁷²

We see yet another instance of textual devices translating uncertainty into certainty in the sections of the report that address criticisms or standard setting for domestic work based, first, on privacy rights and, second, on state sovereignty over immigration matters. The technique for addressing the first of these criticisms involves a rhetorical substitution of “household” for “home.” The report acknowledges privacy concerns evoked by labor inspections within the “household” but draws on an observation by the ILO’s Committee of Experts that the employer has consented to give up some privacy rights by choosing to make the household a workplace.⁷³ The second criticism, related to the argument that immigration status should take priority over labor protection, is addressed through a technique of textual re-ordering. Rather than subordinating labor law to immigration law, effectively denying labor protections to irregular migrants, a separate chapter on “Combating Forced Labour in Migrant Domestic Work,” instead, foregrounded a human rights perspective, creating positive obligations for states regardless of sovereignty or immigration status

⁶⁹ *Id.* at 28-30.

⁷⁰ *Id.* at 49-50.

⁷¹ *Id.* at 49-50.

⁷² *Id.* at 6.

⁷³ *Id.* at 73.

At the end of this comprehensive and critically informed discussion of law and practice, the report's final section consists of a questionnaire addressed to Member States.⁷⁴ The wording of each of the sixty-three questions was the result of extensive informal consultations carried out by the Secretariat with ILO constituents and was carefully chosen to avoid having responses stating that standard setting was premature.⁷⁵ Phrases such as "consistent with national practice" were chosen to reassure constituents that any enacted standard setting instrument would include flexibility devices.⁷⁶ Drafters also gave careful attention to the ordering of the questions relating to the convention's substantive provisions, beginning with issues of fundamental rights, then moving to working conditions and social security and placing controversial issues such as labor inspection and protections specific to migrant domestic workers at the end of the questionnaire. Presented as a logical progression from the scientific data amassed in the report's preceding analysis, the questionnaire was designed to delimit and structure the convention-drafting process so as to reduce as much as possible the likelihood that standard setting would be paralyzed by constituent disagreements during the official ILC discussion sessions.⁷⁷

The Secretariat's efforts to lay the groundwork for eventual constituent discussion continued into the next phase of the convention-drafting process. In this phase, the TRAVAIL staff compiled and organized Member-State responses to the questionnaire received between March and August 2009 into a set of "proposed conclusions" that would serve as the draft text for ILC negotiations. The secretariat referred to this second report as the "telephone book," due to its massive length (433 pages) and yellow cover page.⁷⁸ One important function of this *Yellow*

⁷⁴ *Id.* at 97-117.

⁷⁵ Telephone Interview with TRAVAIL Staff (Apr. 18, 2012).

⁷⁶ ILO, INT'L LABOUR CONFERENCE: DECENT WORK FOR DOMESTIC WORKERS REPORT IV(I) 47 (2010) at 106.

⁷⁷ Telephone Interview with TRAVAIL Staff (Apr. 18, 2012).

⁷⁸ Telephone Interview with TRAVAIL Staff (Apr. 20, 2012).

Report was to highlight the participatory nature of the consultation process and generate constituent “buy-in” for the forthcoming ILC sessions.⁷⁹ The report’s preface presents a lengthy list of respondents, highlighting participation from more than 103 Member States, thereby displaying the interest that standard setting was generating. Included among the list of respondents were international worker and employer associations and NGOs who were technically not entitled to submit formal responses but whose participation, in the calculation of the secretariat, contributed to creating a sense of momentum for standard setting.⁸⁰ Devoting more than 400 pages to a detailed discussion of these constituent responses, the report affirmed pluralistic internationalism of standard setting. In these ways, textual devices were deployed so as to reduce constituent hesitancy by imbuing domestic worker standard setting with an aura of legislative inevitability.

At the same time that the *Yellow Report* cultivated a spirit of constituent participation, it transformed and reworked constituent responses to generate momentum for lawmaking. The secretariat controlled how responses were presented, offering summaries rather than reproducing the full text of the responses, which allowed the secretariat to underline areas of common ground. The report’s discussion section goes even further toward clearing the path to consensus. By aggregating responses that endorsed one of three different forms of convention (stand-alone, combined with a recommendation, or including binding and nonbinding provisions). In the end, the secretariat could make the claim that “a considerable majority of respondents favour the adoption of a convention,” while covering differences of opinion.⁸¹

⁷⁹ Telephone Interview with TRAVAIL Staff (Apr. 20, 2012).

⁸⁰ Telephone Interview with TRAVAIL Staff (Apr. 20, 2012). Perhaps in the interest of fostering pluralistic internationalism, the authors of the report avoid any mention of the fact that the International Trade Union Congress had provided a template of questionnaire responses to promote a unified response on the part of national worker associations.

⁸¹ ILO, INT’L LABOUR CONFERENCE: DECENT WORK FOR DOMESTIC WORKERS REPORT IV(2) (2010).

The technocratic style of this engineering, in contrast with a more explicitly political mode of intervention, is highlighted by the fact that the text of the “Proposed Conclusions,” presented at the conclusion of the *Yellow Report*, represent less a revision of the questionnaire based on Member-State responses than a reorganization of its contents. Difficult issues such as regulation of “stand by” time, where disagreement could not be smoothed away through generous interpretation, were relegated to the nonbinding recommendation accompanying the convention.⁸² The Secretariat built exclusion clauses into sections of the conclusions where the secretariat anticipated that this was the only means of obtaining widespread support.⁸³ These legal technical devices aimed to preserve the viability of standard setting by bridging the gap between political realities and the aspiration of universal applicability characteristic of the ILO’s post-1998 fundamental rights approach.

By the time the International Labour Conference’s Committee on Domestic Workers gathered for its first discussion, the apparatus of international labor lawmaking had already made substantial progress toward carving out a settled understanding of “Decent Work for Domestic Workers.” Indeed, the convention’s conceptual core proved sturdy enough to withstand committee discussions in June 2010 that were characterized by an obstructionist employer delegation, an energetic but acutely inexperienced worker delegation, and a weak committee chair who, according to some participants, had difficulty with crowd control.⁸⁴ The fully-reviewed text that the 2010 ILC Committee managed, albeit narrowly, to extract from the cauldron of its disorganized and sometimes antagonistic scrutiny included a number of minor

⁸² Telephone Interview with TRAVAIL Staff (Apr. 20, 2012).

⁸³ For example, point five in the proposed conclusions states, “the Convention should apply to all domestic workers, provided that a Member which has ratified it may . . . exclude wholly or partly from its scope limited categories of workers when its application to them would raise special problems of a substantive nature.” This aimed to take care of the fact that many countries had special laws governing “au pairs.” *Id.* at 418.

⁸⁴ Interview with Robert Shepard, Senior U.S. Gov’t ILC Delegate, in Washington, D.C. (Apr. 2012).

amendments—most notably a revised definition of the scope of coverage—but was substantially the same as the Office’s proposed conclusions.⁸⁵

As the convention-drafting process moved ahead, the aim for the Secretariat’s technocrats was to deploy their expertise to facilitate consensus without stripping all meaning from the text. One aspect of achieving this revision consisted of purely formal revisions: replacing “should” with “shall” to conform with ILO stylistic conventions. But there was also room for exercising editorial judgment, such as moving clauses around to create a more readable instrument and amending language to ensure the form of the text was consistent with other ILO instruments. In the end, this revision process enhanced legal legibility and allowed the text to pass muster as part of the body of international law. As a binding treaty on ratifying states, it could not adopt the “additive approach to resolving differences,” favored by U.N. declarations, in which legibility is arguably less important than the text’s aspirational and expressive role in representing all points of view regardless of coherence.⁸⁶ By August 2010, the Office had produced a third report, the *Brown Report*, which transformed the texts from “proposed conclusions” into the more legally legible form of “proposed convention and recommendation.”⁸⁷

In the fall of 2010 and winter of 2011, the standard setting process moved from a technocratic to a political modality that took the form of a series of informal consultations with decision makers who were not present at the Committee’s deliberations. Here again, the Secretariat intervened to informally broker consensus. Following the ILO tradition of providing support for Member States’ consultations with employer and worker representatives, TRAVAIL staff took trips to meet with key governments to talk about the Convention, to build political

⁸⁵ See generally ILO, INT’L LABOUR CONFERENCE: REPORT OF THE COMMITTEE ON DOMESTIC WORKERS PROVISIONAL RECORD NO. 12 (2010).

⁸⁶ ANNELISE RILES, *THE NETWORK INSIDE OUT* 79 (2000).

⁸⁷ ILO, INT’L LABOUR CONFERENCE: DECENT WORK FOR DOMESTIC WORKERS REPORT IV(1) (2011).

support, and to identify possible compromises to issues that had emerged through the Committee's debate.⁸⁸ This behind-the-scenes brokering was bolstered by energetic mobilizations on the part of domestic worker advocates and human rights groups who lobbied governments and employer organizations who had previously expressed misgivings about any new standard setting initiative to vote to enact the convention and recommendation.⁸⁹

During this period of consultations and informal negotiations, technical devices continued to play an important role. One technique deployed to bridge remaining differences consisted of splitting paragraphs of the proposed Convention into multiple parts, thereby dampening controversy or facilitating differentiated treatment of topics where the issues were ill suited to generic standards.⁹⁰ Another technique involved leaving the text unchanged but developing language to provide an optional starting point for the second round of negotiations, should delegates choose to use it.⁹¹ These interventions did little to alter the substantive content of the draft instruments, yet by preemptively smoothing over differences between constituents the Secretariat reduced the risk that any minor point of difference would instigate a more serious disagreement at the next round of committee discussions. In the spring of 2011, drafters sent a final set of reports containing the revised draft instruments to the ILO's Member States. The first of these *Blue Reports* also included an explanatory text that, in similar fashion to the *Yellow Report*, detailed the replies received in response to each article and summarized how proposed changes had been incorporated by the Office into the text.⁹² As with the *Yellow Report*, the *Blue Report* highlighted the large number of constituent responses to generate enthusiasm for the final

⁸⁸ Telephone Interview with TRAVAIL, *supra* note 52.

⁸⁹ Telephone Interview with Jo Becker, Advocacy Dir., Children's Rights Div., Human Rights Watch (Apr. 16, 2012).

⁹⁰ Telephone Interview with TRAVAIL, *supra* note 52.

⁹² ILO, INT'L LABOUR CONFERENCE: DECENT WORK FOR DOMESTIC WORKERS REPORT IV(2) (2011).

⁹² ILO, INT'L LABOUR CONFERENCE: DECENT WORK FOR DOMESTIC WORKERS REPORT IV(2) (2011).

round of negotiations, which would take place four months later when the ILC met for its one-hundredth session.

When the Domestic Worker Committee reconvened in June 2011 for a second and final round of negotiations, the adjustments made in the preceding year set the stage for a discussion without any major surprises. A new and more forceful committee chair, working with the secretariat, grouped similar amendments together and selected a single representative proposal for discussion rather than having the group work through each amendment individually.⁹³ Significantly, the International Organization of Employers dropped its prior opposition to standard setting for domestic workers and played a constructive role in the discussions. In nine fully packed days of sessions, the Committee was able to make its way through the convention and accompanying recommendation.⁹⁴ To the great delight of many delegates, not least the exuberant group of domestic worker activists in attendance, a two-thirds majority approved the texts on June 16th at the plenary sitting of the Conference.⁹⁵

VII. ANALYSIS: ENGINEERING INTERNATIONAL LABOR LAW

Standards for domestic workers entered the corpus of international labor law through a process that was powered by a transnational advocacy campaign but steered by members of the ILO's Geneva-based secretariat. The "insider" activists who shepherded the standard-setting process within the ILO were motivated by multiple goals. My interviewees, often in the same breath, explained their efforts with references to both the ILO's organizational mandate and their own social justice commitments. One might assume that more prosaic organizational

⁹³ ILO, INT'L LABOUR CONFERENCE: REPORT OF THE COMMITTEE ON DOMESTIC WORKERS PROVISIONAL RECORD NO. 15 (2011) para 55-58.

⁹⁴ See generally ILO, INT'L LABOUR CONFERENCE: REPORT OF THE COMMITTEE ON DOMESTIC WORKERS PROVISIONAL RECORD NO. 15 (2011).

⁹⁵ Eileen Boris & Jennifer N. Fish, "*Slaves No More*": Making Global Labor Standards for Domestic Workers, FEMINIST STUD. (forthcoming).

considerations, particularly a desire to restore the ILO's flagging reputation within the U.N. system, and personal career ambitions, also factored into their desire to see the project succeed.

Putting aside the tricky question of the values or preferences that motivated them, it is clear that expert involvement moved the process forward by bridging the distance between the contrasting modalities of partisanship and law.⁹⁶ Over the course of four years, five reports, two conferences, and numerous informal consultations, an international standard-setting apparatus that had fallen into disuse was mobilized by a loose network of international civil servants and expert consultants who worked individually and cooperatively to deploy the apparatus's law-making techniques. Many different law-making tactics were engaged in this process, but here I draw attention to the contributions of three particularly useful devices: charts, questionnaires, and split paragraphs.

A. Charts.

Before a convention could be enacted into law, its proponents needed to address concerns that domestic work as a sector of employment was not yet ready for standard setting. The 120-page *Law and Practice Report* and the subsequent 500-page *Yellow Report* are both notable for their length. Yet, it is the charts and appendices that are especially effective in impressing on skeptical readers the legal integrity of domestic worker standards. In the *Law and Practice Report*, the series of charts and tables that contrasts the “working conditions of domestic workers” with those of other recognized occupations transforms a heterogeneous composite of maids, nannies, and other household workers into a single entity. The “dynamism” of current

⁹⁶ This is not to suggest that there is any objective “reality” of labor relations that technical knowledge is obscuring or diverting. As Annelise Riles has shown in her study of UN lawmaking on gender issues, bureaucratic knowledge draws on sources of knowledge external to international institutions even as it converts this knowledge into a different modality. *See* Riles, *infra* note 72. In the case of the Domestic Worker standard-setting, the interventions of ILO insiders were grounded on both the endpoints of academic knowledge and the expressed claims of social movement activists. Yet, when incorporated into the standard-setting process, academic concepts and activist claims were translated—through the application of technocratic devices—into a more programmatic modality. *Id.*

national-level regulatory initiatives, crucial for asserting the regulatory basis of international standard setting, is made palpable by the insertion of an appendix containing details for each country and, in some cases, for subnational political units as well. In terms of their substantive content, these reports drew on critical academic perspectives that distance themselves from the scientific positivism of earlier progressive efforts.⁹⁷ Yet, their charts, tables, and appendices suggest that a scientific style of presentation retains its usefulness in establishing the shared body of knowledge on which regulations can be built.

B. Questionnaires.

The International Labour Conference is an unwieldy setting for lawmaking: negotiations are spaced at yearly intervals and a large number of the ILC delegates, particularly the workers' and employers' representatives, have not previously participated in international lawmaking. Early in its history, the ILO secretariat developed the constituent questionnaire as a means of seeking information from constituents about their eventual negotiating positions while guiding them toward a unified stance. ILO technocrats, charged with shepherding the Domestic Workers Convention through the drafting process, deployed this device with notable astuteness to cultivate consensus behind the scenes. The construction of the questionnaire's sixty questions—whose substance and phrasing would disqualify them as leading questions in any Anglo-American courtroom—provided the raw materials for carving out a consensus position. Moreover, reporting the results of the questionnaire provided a further opportunity for building consensus: in a single document, the *Yellow Report*, the secretariat first laboriously acknowledged and presented all individual constituent responses to the questionnaire (the first

⁹⁷ The Law and Practice Report for “Decent Work for Domestic Workers” explicitly disavows hierarchical regulatory modalities, redefining labor law as “labor inclusion,” stressing the gendered and racialized dimensions of domestic work, and studiously avoids economistic language. In the preliminary section of the report, although less so in the substantive chapters, legal regulation is conceptualized within a socially reconstructionist project driven by domestic workers' own struggles for recognition and respect. *See* ILO, *supra* note 45.

416 pages) and then glossed this multitude into a unified set of “general conclusions” (the last six pages) that would subsequently serve as the textual basis for law-making negotiations. These devices, when skillfully deployed, allow a fastidious cultivation of consensus that simultaneously avoids alienating constituents.⁹⁸ In the case of the Domestic Workers Convention, they produced a draft convention solid enough to pass through a particularly turbulent committee review in one piece.

C. Split Paragraphs.

The success of international labor legislation has traditionally been assessed in terms of its ability to enact “standards with teeth” rather than general statements of principle.⁹⁹ However, despite the most careful preparations, not all issues allow for creative assertions of common ground. The aesthetic device of splitting paragraphs—a tool familiar to jurists trained in the formalist Civil Law tradition—emerged as a powerful instrument for bridging positions that, on their face, remained at odds. Following the first round of ILC discussions, the *Brown Report* and *Blue Report* each offered an opportunity to rework the text in this manner, repackaging wording that reflected hard-nosed treaty negotiations into a more palatable form that could be presented as the “official” text of the convention. Articles containing a single long paragraph, including exceptions for the powerful migrant-receiving states of the European Union, were split in two.¹⁰⁰ As redrafted, an initial paragraph laid out a declaration of universal principles applying to all migrant domestic workers, while a subsequent paragraph briefly noted that these universal standards would not apply to workers who, under already existing interstate agreements, “enjoy

⁹⁸ The questionnaire and its accompanying Law and Practice Report have arguably been less rigorously researched and comprehensive in scope in some of the ILO’s other recent conventions. Letter from Adelle Blackett, *supra* note 43.

⁹⁹ See Alston, *supra* note 24, at 496; Standing, *supra* note 13.

¹⁰⁰ ILO, INT’L LABOUR CONFERENCE: DECENT WORK FOR DOMESTIC WORKERS REPORT IV(2B) 12 (2011).

freedom of movement for the purpose of employment.”¹⁰¹ While the provision produced during negotiations had read as a blunt political acknowledgment of the European Union’s favoritism of EU residents, the redrafted text reads as a double affirmation of rights. As a technical solution, splitting paragraphs smoothed over the absence of universalism produced by disparities of power between states and made the text sufficiently politically palatable to overcome objections to its enactment as international law.

Analyzing the law-making role of mundane techniques such as charts, questionnaires, and split paragraphs calls our attention to aspects of the convention-drafting process that might previously have been dismissed as mere proceduralism. It is a form of close empirical analysis that parallels recent efforts by constructivist international relations scholars to bring a more detailed empiricism into the study of international organizations. These studies emphasize that actors within international organizations exercise an agenda-setting power to promote law-making efforts in the face of Member-State indifference.¹⁰² They also show that actors within international organizations can reinterpret constituent expectations, using rhetorical devices to reframe debates in a way that avoids alienating Member States.¹⁰³ In these accounts, an international organization is not simply an arena in which the dominant international regime of a given era is played out; rather, organizational dynamics are seen to exert their own unique influence over the content of policy norms.

¹⁰¹ ILO, INT’L LABOUR CONFERENCE: DECENT WORK FOR DOMESTIC WORKERS REPORT IV(2B) 12 (2011).

¹⁰² See MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 50 (2004). See generally RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE (2007). (showing that initiatives for capital account liberalization came from within the management of the IMF and that these initiatives faced little external opposition because potential opponents were either indifferent or uninformed).

¹⁰³ See generally NITSAN CHOREV, THE WORLD HEALTH ORGANIZATION BETWEEN NORTH AND SOUTH (2012) (answering the question of how international bureaucracies respond to external demands that may not be compatible with their own perceptions and goals).

My account of the politics of the ILO Domestic Workers Convention undertakes a finely detailed analysis of the law-making process, while offering two refinements of organizationally grounded approaches. First, I emphasize that it was not simply rhetorical skill but also a series of materially concrete techniques that contributed to constructing regulatory consensus on international standards. As ethnographic studies of science point out, laboratory instruments and modes of graphic inscription play a knowledge-construction role by bridging the gap between, on the one hand, the locality—particularity and materiality of lived experience—and, on the other hand, the standardization and universality that make scientific findings compatible with the existing body of synoptic knowledge.¹⁰⁴ Recent socio-legal work draws on these insights from science studies to explore the mediating role of documents in producing legal knowledge, with a focus on their aesthetic dimension.¹⁰⁵ My analysis explores the constructive work contributed by legal techniques engaged in the ILO’s convention-production process. It highlights the role of three particular technical devices in advancing international lawmaking: charts, questionnaires, and paragraph splitting. While Riles argues that governance through technique is a defining feature of neoliberalism,¹⁰⁶ the case study of the ILO reminds us that technical expertise likewise facilitates the regulatory knowledge production of the interventionist welfare state.

Second, my analysis differs from that of existing constructivist studies of international organizations by taking the entirety of the convention-production process as its focus. For organizational sociologists, the theoretical aim is to show that bureaucracies, at the national or international level, have the capacity to act as “autonomous agents” with distinct

¹⁰⁴ See LATOUR, *supra* note 11, at 51-72.

¹⁰⁵ Annelise Riles, *[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis*, in DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE 71, 74 (Annelise Riles ed., 2006).

¹⁰⁶ RILES, *supra* note 12, at 102.

“preferences.”¹⁰⁷ By contrast, my analysis avoids conceptualizing the ILO as a personified “agent.” Rather, I examine the process of international lawmaking as a series of transformations and translations effected by actors with a range of commitments who participated in its various stages. The object of study is a law-making “apparatus” consisting of a chain of knowledge-producing associations that exceeds the administrative control of any specific agent.¹⁰⁸ New legal norms creating rights for domestic workers were the product of a law-making apparatus that engaged multiple types of actors, agendas, and techniques. The effect of these technocratic interventions, which produced empirical certainty and political consensus where none had previously existed, was to advance the production of new international law.

CONCLUSION

As this article has shown, the achievement of “Decent Work for Domestic Workers” was made possible by the highly structured and tightly controlled process of ILO standard setting, and the skilled technicians who steered this law-making apparatus. The contributions of these human rights lawyers, labor economists, and “insider” labor advocates included both rhetorical reframing and more tangible modes of legal reengineering. Technocratic devices—charts, questionnaires, and split paragraphs—created a space for domestic workers to be recognized as a new category of employees and for international consensus to be secured on appropriate standards for this group. In the words of one seasoned NGO advocate who had observed the standard-setting process for the Domestic Worker Convention, this was a case where ILO technocrats and their expert collaborators “made the machine work.”¹⁰⁹

To be sure, technical devices do not operate outside of politics or history. If this form of expertise was successful in translating household servants and caregivers into workers and

¹⁰⁷ See CHOREV, *supra* note 70, at 18, 23.

¹⁰⁸ See LATOUR, *supra* note 11, at 192.

¹⁰⁹ Telephone Interview with Joe Becker, *supra* note 59.

rights-bearing subjects, it was because the ILO's constituents understood the performance of scientific positivism as a means of producing truth. Technocratic neutrality's persuasive appearance might be traced to the ILO's origins in the early twentieth century modernist reform program of international labor legislation, in which faith in the capacity of positivist science to transcend political and economic divisions featured so prominently. It might also be linked to the organization's more recent embrace of the human rights framework, a system likewise embedded in a distinctly modernist ontology of progress.¹¹⁰

Yet, regardless of the source of this epistemic potency, it was the careful marshaling and reassembling of information facilitated by technocratic interventions that generated the law-making *problematique* within which policymaking and politics continues to unfold. The case study of the Domestic Workers Convention thus presents a striking counter-example to studies that explore the role of "new" governance techniques, such as cost-benefit calculation and compliance review mechanisms, in furthering the current momentum for deregulation. In the context of labor standard setting, the devices wielded by legal experts contributed not to further deregulation but rather to the extension of important legal protections to vulnerable home-based caregivers whose claims to labor protections have only recently been incorporated into the global regime of labor governance.

¹¹⁰ SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 31, 72 (2012).