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FINDING A PLACE FOR MARGINAL MIGRANTS IN THE INTERNATIONAL HUMAN RIGHTS SYSTEM

Leila Kavar

This article examines how international human rights law is shaping the politics of immigration. It argues that migrant human rights are neither conceptually nor practically incompatible with an international order premised upon state territorial sovereignty, and that the specific aesthetics of the contemporary international human rights system, namely its formalistic and legalistic tendencies, has facilitated its integration with a realm of policymaking traditionally reserved to state discretion. An exploration of two areas in the emerging field of migrant human rights traces the multi-scalar transnational legal processes through which these norms are formulated and internalized.

INTRODUCTION

In the “golden period” of human rights (Falk 2009) that followed the end of the Cold War, a number of citizenship and immigration scholars announced that international human rights norms would soon transform the politics of migration. Arguing provocatively against Arendt’s claim that “rights of man” are nil if not encoded in citizen rights by nation-states, they posited that the spread of human rights discourses would create a new place for “guests and aliens” within the law. The “transnationalization” of the legal regime most intimately tied to the principles of state territorial sovereignty was seen to herald a new world order in which human rights would replace citizenship as the primary marker of political affiliation.

While some of these analyses centered on the discursive implications of changes in national laws allowing migrants access to social services programs (Layton-Henry 1990; Soysal 1994), others were more juridically oriented, arguing that international legal regimes would imminently overpower restrictionist immigration laws. Among the more ambitious of these transnationalist claims was Saskia Sassen’s suggestion that the distinction between the citizen and the alien was being eroded as part of a more general reformulation of territory, authority, and rights that she linked to structural changes in the global economic system (1996). Sassen argued that in the new transnational order based on human rights, and enforced through international law, even unauthorized migrants would be able to claim rights to residence and to family reunification. David Jacobson made similar claims (1996), arguing that the contemporary phenomenon of intensive transnational migration undermines the relevance and legitimacy of nationally-based models of membership. According to Jacobson, international human rights codes and institutions provide a new model that is more appropriate to current conditions. He suggests that the judiciary is playing a crucial role in this development by encouraging

individuals and NGOs to make claims on the basis of international human rights instruments.

However, not all scholars have been so optimistic about the capacity of human rights norms to transform immigration policies. One set of criticism is based on a perceived irreconcilability at the conceptual level between human rights and immigration control. The contemporary international human rights system, whether embodied in the United Nations or in regional treaty-based structures, is built upon agreements between nation-states who enjoy complete sovereignty in matters of citizenship. Because they exist only upon the concession of nation-states, the rights of aliens bear the heavy mark of the state's immigration powers and are destined to remain "stratified and reversible" (Joppke 2010). Obligating states to grant rights to immigrants is conceptually incompatible with a fundamental premise of the international system.

A related set of criticisms is empirically based and focuses on the manner in which national judiciaries have integrated human rights principles into immigration law. As a matter of practice, judicial decisions do grant rights to immigrants but they do so on the basis of national law or international treaties that states find it in their interests to sign. Looking at this empirical record, scholars have variously argued that judicial recognition of immigrant and refugee rights has been animated by the commitment of the judiciary either to norms of equal protection (Guiraudon 2000) or to principles of reasoned decision-making (Dauvergne 2008). Not only are references to human rights absent from most of these decisions, but analysis of the existing jurisprudence also suggests that human rights advocates are most likely to win their cases when they frame them not as immigration cases, but rather as administrative law cases or civil rights cases (Motomura 2008). Based on the results of these empirical studies, and with the benefit of hindsight, it seems clear that transnational theorists over-estimated the power of international human rights norms to transform immigration jurisprudence.

Nevertheless, I argue in this paper that it is too soon to categorically dismiss the potential for international human rights norms to shape the set of rights accorded to marginal migrants. As Derrida reminds us, laws as they are embodied in the Western tradition of state-sanctioned rights are inherently capable of according rights to foreigners and strangers (Derrida 2000, 19). Moreover, the particular epistemic qualities of human rights law, which make this body of law both more and less compatible with the positivist vision of law than critics of transnationalism have acknowledged, also imbue human rights principles with the capacity to infuse a range of other existing legal regimes governing migration. On the one hand, international human rights law has become sufficiently formalized and technocratic so as to be typified by conditional rather than absolute formulations of rights, thus preempting claims of conceptual incompatibility with sovereign authority. On the other hand, when it comes to implementation, the norms contained in international human rights instruments are enforced through a process that is decentralized, diffuse, and fundamentally distinct from the positivist vision of law as the command of the sovereign. This means that international human rights norms may well make their way into migration-related policies even when states refuse to ratify international conventions and even if national courts refuse to cite international principles as direct authority.

I illustrate these claims by examining two sets of transnational processes that have formulated and implemented a human rights approach to marginal migrants: 1) the

substantial cross-fertilization between refugee law and human rights law, and 2) the as yet less developed but potentially far-reaching cross-fertilization of migrant labor standards and human rights law. Conceptualizing international human rights law as being simultaneously positivistic in its formulation and non-positivistic in its implementation allows us to see that, contrary to the claims of previous scholarship, the body of law governing marginal migrants is neither categorically opposed to human rights in principle nor incompatible with human rights in practice. Instead of asserting overly broad claims about the sources and scope of migrant rights, what is needed is a close and careful analysis of the transnational chain of actors and activities through which new forms of migrant human rights are being produced. Using two case studies, this paper traces these processes by which marginal migrants are being constructed through law as rights-bearing individuals.

THE LEGALIZATION OF HUMAN RIGHTS

The contemporary system of international human rights came into being only after the Second World War, based upon the UN Charter, the Nuremberg and Tokyo war crimes trials, and the Universal Declaration of Human Rights. Within this system, the principal enforcers of human rights law are nation-states. The approach to human rights that the international “community” initially adopted was primarily aspirational. “The rules were largely declaratory and precatory, and the few mechanisms created had virtually no enforcement” (Koh 1999, 1408)

It was not until the mid-1960s that international institutions began to undertake a “gradual assumption of responsibility” for developing and implementing human rights law (Alston 1992). Spurred by the influx of newly independent states, the UN finally adopted the two conventions that together form the International Bill of Rights as well as the Convention on the Elimination of All Forms of Racial Discrimination. Initial steps were also taken towards strengthening the international institutions that would enforce this new body of law. In the 1970s, the UN Commission on Human Rights, which had been largely inactive for its first twenty years of existence, was given the power to examine complaints filed against states by individuals and groups and was also empowered to initiate inquiries into “thematic”—as opposed to country-specific—violations (Steiner & Alston 2008).

The political climate of the late 1970s proved propitious for the expansion and legalization of human rights. Political rights in particular received increased attention from activists looking for a “neutral” alternative to the perceived excesses of both authoritarian and totalitarian states, coinciding with shifts in US foreign policy rhetoric during the post-Vietnam Carter Administration that created openings for the institutionalization of human rights structures within the UN. The higher profile given to human rights issues by the Carter Administration and several of its allies “contributed to a climate in which task expansion was almost an imperative” (Alston 1992, 361). The result was that a bureaucratic momentum in support of international human rights was set in place, allowing the legalization of human rights to further develop (Falk 2009).

Despite the return to Cold War diplomacy during the 1980s, this process of legalization continued. The United Nations General Assembly enacted a series of human rights conventions aimed at eliminating discrimination against women, prohibiting

torture, and protecting the rights of children. As these treaties acquired sufficient state ratifications to enter into force, committees to monitor their implementation came into being. These monitoring committees were staffed with technical experts who tended to represent their expertise more than the priorities of their countries of origin when reviewing reports on treaty compliance submitted by ratifying countries (Haas 2008).

In the post-Cold War period, the declared victory of the capitalist West and the collapse of the communist block created a normative vacuum on the world stage, strengthening international institutions and giving renewed energy to international human rights law. New structures, such as the Office of the High Commissioner on Human Rights and the Ad-Hoc International Criminal Tribunals, were created. The UN sponsored a series of major international conferences focused on human rights, most significantly the 1993 World Conference on Human Rights in Vienna. The commitment of the Ford Foundation to funding human rights NGOs injected additional energy into this increasingly professionalized field (Cummings 2007; Keck & Sikkink 1998). Recent studies suggest that human rights treaty-based institutions, which initially had difficulty being taken seriously, are gaining increased attention, with national delegations preparing lengthy reports assessing the national implementation of international human rights law (Merry 2007).

The aggregate effect of these developments is that the international human rights system had come to be characterized by a degree of *legalization* that those present at the birth of the United Nations might not have anticipated. An ever-widening set of moral claims is formulated as positive human rights law (Wilson 2007). Specialized jurists cultivate technical expertise and seek to develop a coherent and justiciable legal regime (Goodale 2007). Committees of experts interpret human rights instruments using specialized procedures, striving for perfection of form rather than representing the interests of their states of origin. The actors that produce international human rights knowledge and the transnational continuum of activities - at various levels of scale - that connects them have come to be characterized by "a certain aesthetic of information" that is profoundly legalistic (Riles 2000, 2).

The conditional formulations of rights contained in contemporary international human rights conventions are typical of this legalistic aesthetic. The 1948 Universal Declaration of Human Rights had adopted an aspirational and idealistic framing of rights, but the provisions in subsequent treaties have been drafted so that rights are qualified and balanced against other interests by phrases such as "as appropriate" or "as soon as possible" (Merry 2006). Legalization is also apparent in the epistemic culture that has emerged among those engaged in implementing treaty norms. In contrast with previous less professionalized models of political solidarity activism, the current model of human rights activism is based on classifying claims in terms of legal standards and on making them quantifiable and verifiable (Tate 2007, 118). At the international level, the human rights system has undergone a similar professionalization and institutionalization. As participation in human rights treaties has grown exponentially and the proliferation of treaty bodies has continued, these norm-declaring sites have consolidated and specialized their internal procedures so that technical expertise is brought to bear on an ever-wider array of claims (Crawford 2000, 3).

But is international human rights law really law? If we rely on a positivist vision of the sovereign issuing commands that the subjects are obliged to obey, then

international law does not look particularly law-like in its implementation. Even as international human rights law has become increasingly technical and legalistic in its formulation, state-to-state enforcement mechanisms seldom have the power to mandate compliance with international principles and most enforcement remains declaratory rather than judicial in character.

Yet, the dearth of international enforcement mechanisms does not mean that international law is not observed. As Harold Koh explains, it is primarily through a process of “interaction, interpretation, and internalization,” in which nongovernmental activists play a key role, that international norms are implemented (Koh 1999, 1417). Human rights entrepreneurs mobilize popular opinion and political support so that international norms become socially, politically and legally internalized, with the result that they are eventually incorporated into the domestic legal system through executive action, legislative action, judicial interpretation, or some combination of the three.

Koh gives the example of the nongovernmental International Campaign to Ban Landmines, which successfully pushed for an international convention on this issue. Activists then leveraged the moral authority of international norms to lobby U.S. legislators and administrators to enact a moratorium on the sale of landmines and to develop new technologies to aid in demining, even though the U.S. had not yet signed the convention. This kind of transnational process is also visible in the development and legal internalization of international human rights norms that resulted in the outlawing of the juvenile death penalty (Smith 2007). International norms have the potential to spread and take root once their domestic internalization acquires sufficient momentum. Koh suggests that just as federal automobile standards over time conditioned drivers not to drive without a seatbelt, in part through the industry’s adoption of buckle-up alarms and in part through a process of socialization whereby wearing seatbelts came to be viewed as an integral part of what it meant to be a law-abiding person, so too, international legal standards come to be internalized through multi-sited processes of institutionalization and socialization. This conception of law’s capacity for social internalization is similar to what socio-legal scholars have analyzed in terms of the ideological dimension of legality.

Bringing this approach to her study of transnational human rights activism against gendered violence, Sally Engle Merry suggests that the significance of the legal standards contained in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) lies in their capacity to coalesce and express particular cultural understandings, so that people come to understand themselves in terms of these legal categories (Merry 2007). Merry shows how these standards have been used by local activists to structure domestic political discussions, even in states that have not officially ratified the treaty, about the need to criminalize domestic violence (Merry 2006). Although national law also has this constitutive quality, the production of new cultural categories is the primary means of norm enforcement within the international human rights system.

An epistemology of international human rights law that characterizes it as legalized but not centrally-commanded, renders visible the diverse processes of knowledge construction that have allowed human rights for marginal migrants to be formulated and implemented. Working through this conceptual lens allows us to see how innovative legal forms emerge and make their way into practice through a multi-sited and multi-scaled chain of actors and activities that cannot easily be compressed into the

confines of either an institution or a professional network (Wilson 2007). It is a form of legality that “depends deeply on its texts” (Merry 2007, 183) even if compliance with international law depends not on sovereign states enforcing rules but rather on the potential of these norms to bring about an internalization of new cultural and political categories.

As the following two case studies of “migrant rights as human rights” will demonstrate, broad political constraints also play a part in this process. The formulation and implementation of human rights for marginal migrants is a site of political contestation; it is neither automatic nor inevitable. In the case of the integration of refugee law with international human rights law, this process is fairly advanced. In the case of migrant worker rights, new legal forms are developing but much remains to be done in terms of implementing these human rights standards.

A HUMAN RIGHTS APPROACH TO REFUGEE PROTECTION

The international refugee law regime elaborates a specific, albeit narrow, place for foreign migrants within international law. States commit themselves not to send foreign migrants back to a country where they have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. According to the Universal Declaration of Human Rights, everyone has the right to seek and to enjoy asylum from persecution, but asylum remains a sovereign prerogative and there is no subjective right to be granted asylum. Moreover, unlike human rights law, refugee law does not attempt to set a corrective agenda, tell another country how to act, or propose plans for eradicating particular practices. “Refugee law does not seek to reform states and does not address root causes. Its role is palliative; it represents the interests of the individual in dissociating herself from her community and her state” (Anker 2002, 153-154).

As with the international human rights system, the origin of international refugee protection was closely tied the Second World War. An International Refugee Organization was created in 1944 to assist and protect those displaced by the war. The purpose of the 1951 Geneva Convention on Refugees, drafted under the auspices of the United Nations, was to transfer this responsibility to states. As it was written, the Convention only applied to those who had become refugees prior to 1951 as a result of events linked to WWII. Fifteen years later, the 1967 UN Protocol on Asylum, signed in New York but known as the “Bellagio Protocol,” expanded the refugee regime so that it became a weapon of the Cold War to be wielded against Communist states, much as human rights were also being instrumentalized by the Super Powers at this time.

Beginning in the late 1970s, advocates in Western countries became active in pushing to sever the connection between refugee law and foreign policy and to develop a more legalistic approach for refugee status determination. In the US, this activism resulted in the passage of the Refugee Act of 1980, which explicitly aimed to bring US law more fully in line with the five grounds for persecution found in the 1967 Protocol. Similar activism took place in European countries, coinciding with the sharp increase in the number of asylum applicants, attributable in part to the closure of other routes to legal immigration in the mid-1970s (Martin 1990). Nevertheless, during much of the Reagan Presidency, refugee law as it was implemented retained an overtly Cold War approach.

Asylum seekers from Communist states seeking asylum in the US, rather than having their claims examined individually, were presumed to have a well-founded fear of persecution. As human rights law became increasingly legalized, the contrast with the Cold War approach to refugee status determination appeared increasingly pronounced.

Yet, over the past several decades, human rights and refugee protection have become significantly more interconnected. Starting in the mid-1980s, we see the infusion of international refugee law with human rights norms, a process that continues to shape the substance of refugee protection. The cross-fertilization of refugee law and human rights law has brought about important changes in how violence and persecution are understood, both within the law and within the sphere of cultural understandings that guide policymaking and public discussion.

One component of this process has been the transformation of the United Nations High Commissioner for Refugees (UNHCR) into an active generator of legal norms. During its first three decades, the organization's knowledge and dissemination functions remained underdeveloped. But as the Cold War drew to a close, the Executive Committee of UNHCR grew increasingly active in issuing interpretations of international refugee law as part of an ongoing dialog with a growing circle of experts and advocates (Lambert 2009). Feminist approaches to refugee law were particularly influential in this process of legal development (Bonnerjea 1989). The transnational women's network that developed in the mid-1980s around the theme of "violence against women" (See Keck & Sikkink 1998) converged at the UNHCR, among many other sites. In 1985, the same year as the Nairobi UN Conference on Women, advocates were successful in pushing the UNHCR Executive Committee to mention in its conclusions the need to extend the protection of the Convention to women facing violence for having violated the traditions of their societies (Kelly 1993, 625).

In 1991, UNHCR went a step further; issuing guidelines that drew directly on the CEDAW Committee's published 1990 report interpreting gender-based violence as a human rights violation (633). The UNHCR *Guidelines on the Protection of Refugee Women* were careful to emphasize that it is national law, not international law, that determines what legal assistance an individual receives, where she will live, and what assistance will be provided. But they direct UNHCR staff to work with public officials in countries of asylum in order to:

Promote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status.... [And] promote acceptance of the notion that sexual violence against women is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or punish (High Commissioner for Refugees 1991, 19).

Similarly-worded principles establishing the normative validity of gender-based grounds for asylum were subsequently included in the concluding documents issued at a series of UN conferences that took place in the early 1990s, as well as in the 1994 report of the UN Special Rapporteur on Violence Against Women (Anker 2002, 142).

Having established gender-based violence as both a human rights violation and a form of persecution within international refugee law, activists then turned towards the task of bringing these principles home to the administration of national asylum systems. In Canada, a test case organized by a coalition of Canadian refugee advocates and

international women's human rights NGOs served as a focus for intensive administrative lobbying efforts to recognize gender-based violence as persecution (Kobayashi 1995). The Canadian Immigration and Refugee Board was responsive to these arguments, and in 1993 it issued guidelines for refugee status determination that drew on the text of the 1991 UNHCR guidelines. The Canadian *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* translate the general principles developed by UNHCR two years earlier into a "framework of analysis" for asylum adjudicators. Using a visual flowchart to guide adjudicators, the text outlines specific criteria for assessing the particular circumstances which have given rise to the claimant's fear of persecution and lists considerations that might support a gender-based asylum claim, such as whether the social position of women in the country of origin is such that it "engenders the degree of discrimination likely to amount to persecution" (Immigration and Refugee Board 1993, 8).

The Vienna Conference on Human Rights in the summer of 1993 provided a site for advocates and policymakers involved in the development of women's refugee norms to exchange ideas and share strategies (McClymont & Golub 2000, 52). In the following years, advocates in Belgium and France joined in efforts to achieve recognition of asylum claims brought by women fleeing traditional practices. At the same time, US advocates successfully lobbied the director of the Immigration and Naturalization Service to issue a memorandum to asylum officers, endorsing the possibility of using gender-based grounds to grant asylum (Anker 2002, 136). The "Coven Memo" draws explicitly on the text of the Canadian Guidelines and goes on to further elaborate some of the ways in which women might be seen to breach social mores (marrying outside an arranged marriage, wearing lipstick, etc) resulting in persecution.

While the Canadian and US guidelines had moved towards internalizing a human rights approach to international refugee norms, legalization was taken a step further as courts recognized gender-based asylum claims, and as jurisprudence in this area became increasingly principled. In the 1996 *Kasinga* decision, concerning the tribal practice of female genital cutting, the US Board of Immigration Appeals made an effort to enunciate justiciable principles that would delimit the scope of gender-based grounds for asylum while at the same time recognizing the legitimacy of a human rights approach to refugee law. The concurring opinion by Board Member Lory D. Rosenberg was particularly innovative, stating that, "The reason the persecution would be inflicted...is because of the persecutor's intent to overcome [Kasinga's] state of being non-mutilated and accordingly, free from male-dominated tribal control, including an arranged marriage" (In re *Kasinga*, 21 I. & N. Dec. 357, 365 (US BIA 1996)). The opinion thus took an important step towards translating gendered violence into refugee law's conceptual categories.

In the *Shah and Islam* decision three years later, concerning wives refusing to adhere to traditional norms, the British Law Lords went on to consider how broader patterns of discriminatory treatment structurally enabled the specific violence the applicants feared from their husbands (Regina v. Immigration Appeal Tribunal, ex parte *Shah*, [1999] 2 All E.R. 545 (H.L.) (UK)). When articulating a definition of persecution that could encompass gender-based claims, the Law Lords took notice of the *Kasinga* decision as well as other non-binding international precedents and also cited the gender guidelines developed by the UK Refugee Women's Group (Anker 2002, 137). The decision's analysis of persecution refers to two distinct legal components: serious harm

and failure of state protection. However, the Law Lords called on adjudicators to go beyond conventional juridical analysis to undertake a “global appraisal of an individual’s past and present situation in a particular cultural, social, political and legal milieu” and emphasized the need to bear in mind the “broad humanitarian purpose” of refugee law (*Regina v. Immigration Appeal Tribunal, ex parte Shah*, [1999] 2 All E.R. 545, 561 (H.L.) (UK)). In doing so, the decision grounded refugee law in juridical terms while endorsing a non-positivistic style of legal interpretation that remained open to accommodating future developments in human rights norms.

Administrative bodies, courts, advocates, and legal scholars continue to engage in dialog with one another across national borders on the topic of gender-based persecution. They borrow, adapt, and build on each other's legal innovations. The principles developed in early cases involving gender-based persecution have subsequently been extended to new fact patterns and to cases involving related forms of gender-based persecution (the Center for Gender and Refugee Studies at UC Hastings provides an exhaustive summary of the current law on gender-based persecution, see <http://cgrs.uchastings.edu/law/>). And through this transnational process of legal development, a complex and rich body of “transnationalized” international law has come into being, for which international human rights law provides the unifying theory (Anker 2002). There is now clear understanding that human rights principles give meaning to the “right to enjoy asylum” (Lambert 2009).

The grounding of refugee law interpretation in a human rights paradigm takes place despite the absence of a supervisory legal body for refugee law and despite the fact that foreign jurisprudence and legal instruments are rarely taken as directly authoritative, even when they are cited extra-nationally. Although litigation has played some role, administrative agencies are probably more significant in internalizing gender-based refugee principles. Most significant of all has been the role of NGOs. The international women’s human rights movement opened a space in which this development and dissemination of rights for a particular subset of marginal migrants could occur.

A HUMAN RIGHTS APPROACH TO MIGRANT LABOR STANDARDS

The development of a rights-based approach to migrant labor regulation represents another path by which marginalized migrants are finding a place within the international human rights system. Large-scale migrant labor flows have been a perennial feature of capitalist economies. States in need of migrant labor have facilitated these migrant labor flows, either by concluding bilateral guestworker agreements with migrant sending countries or by adopting a policy of non-interference with labor recruitment carried out by the private sector. The International Labour Organization (ILO) is charged with assisting states in organizing labor migration. In 1947, the ILO’s competence over the situation of migrants “in their quality as workers” was formally recognized by the UN (Hasenau 1991).

The origins of international migrant labor standards date to the period immediately following the First World War when pressure from workers’ organizations and the shock of the Soviet Revolution pushed the victorious powers to establish an international organization with the mandate of securing common action on matters affecting conditions of employment. The newly created ILO almost immediately

undertook the task of encouraging bilateral guestworker agreements in order to replace chaotic prewar labor recruitment practices and provide a solution to postwar Europe's intensified manpower needs (Hasenau 1991, 689). Early recommendations stipulated that the recruitment of migrant workers should be permitted only by mutual agreement between countries concerned and after consultation with employers' and workers' organizations of the industries concerned (Hasenau 1991, 689). Demonstrating a similarly corporatist approach, unemployment benefits would be accessible to migrant workers solely on condition of reciprocity, so as to protect social security schemes in destination countries from being flooded with an influx of less able workers.

After the Second World War, ILO practices moved away from supporting a regime of bilateral agreements and placed greater emphasis on establishing flexible universal standards. The ILO's 1949 Migration for Employment Convention covered all migrant workers, without condition of reciprocity, so long as they possessed the proper work and residence permits. Supplementary provisions added in 1975 recommended that states provide full social security benefits and that migrant workers be allowed to change employers. Yet, reflecting the pro-restrictionist position typical of the labor movement at the time, this move towards principles of equal treatment was accompanied by an increasing focus on suppressing clandestine migration. Undocumented migrants, identified by the ILO as "illegal workers," continued to be excluded from coverage under migrant labor conventions. Moreover, workers in sectors without labor union representation, including seasonal agricultural workers and domestic workers, also remained outside the ILO's corporatist regulatory model.

In the mid-1970s, the ILO's exclusive competence over international migrant labor standards was challenged from within the UN General Assembly. Developing countries with high levels of emigration were eager to address issues of migrant worker rights through the UN rather than the ILO, both because they viewed the symbolism of human rights as an effective mechanism for shaming the racist practices of destination countries and because their governments were averse to addressing migrant rights through an organization that was viewed as overly influenced by oppositional labor unions (Bohning 1991, 700). Moreover, the ILO's recent emphasis on curtailing clandestine migration was unattractive to developing economies such as Mexico and Morocco that depended on high levels of emigration to supply employment opportunities and remittances (Bohning 1991, 700). When in 1978 the General Assembly established a working group to undertake the drafting of a UN Migrant Worker Convention, representatives of these countries took the lead in submitting an initial draft text that featured strong declaratory statements against the racist environment faced by their nationals in Europe and the United States (Lonnroth 1991, 732).

As the drafting process continued throughout the 1980s, however, the text of the UN Migrant Worker Convention acquired elements of the legalistic aesthetic that has come to typify the contemporary international human rights system. The first steps in this direction were taken by delegates from small-sized, social democratic Mediterranean and Scandinavian states (the so-called MESCA group), who came to embrace the Convention drafting process as an opportunity to create a "serious, well-functioning human rights instrument" that would further the overall legalization of the international system that these states relied upon to protect their own security (Lonnroth 1991, 733). Their approach focused on making the legal document as useful as possible for the

individual migrant worker rather than adopting the collective rights framework endorsed by developing countries. They also moved away from the initial draft text's more radical statements of absolute rights, replacing these with provisions in which rights are qualified by the state's reserved authority to regulate admission and regularization.

In the final phases of the Convention's drafting, legalization developed a life of its own. German legal experts pointed out lacunae and legal errors as well as contradictions within the text, even though it was clear from the beginning that Germany was unlikely to sign the Convention (1991, 734). Similarly, there was widespread belief that the US would not sign and ratify the Convention in the immediate future, but US delegates nevertheless strove to make the draft meet high legal standards and to make its content as close to its interests as possible "in order to create prerequisites for an eventual ratification at some later stage" and in order to prevent the instrument from becoming a mere political device (1991, 734). These drafters acted as positivist legal technicians, softening differences between the various delegations, proposing compromises and alternative formulations that would take into account the various interests and thereby make the negotiations progress while ensuring that the text remained cohesive and non-contradictory.

The Convention that was finally enacted by the General Assembly in December 1990 illustrates how human rights can be made compatible with migrant labor issues in a manner that produces legally enforceable standards. The text moves away from the ILO's corporatist framework by conceptualizing an individual migrant worker whose rights are not dependent on his or her representation by traditional labor organizations (Bohning 1991, 703). Basic civil and political rights to liberty, free expression, and privacy were reformulated in the specific context of labor migration, thereby articulating rights to freedom of movement, guaranteed days of rest, control over personal documents, advance information about terms of employment, etc. In addition, the Convention's balance of sovereign territorial authority and individual human rights signals an attempt to produce a text that would be taken seriously by ratifying states (Bosniak 1991). Thus, while the Convention emphasizes that states must treat individuals with dignity and human respect even if they are undocumented, it contains no provision enunciating a right to enter any other country. Rather than a statement of vision, the Convention aims to be a legally enforceable document that could also provide a conceptual base for the future development of migrant worker rights.

Yet progress was initially slow in further developing the Convention's principles. Over the ten years following its enactment by the General Assembly, only eleven countries ratified it. In large part, this was due to the fact that the drafting process had been state-centric and no broad social movement had done the work of shifting consciousness among politicians and the public towards support of the Convention or in favor of migrant worker rights more generally. In order for these rights to be implemented in the form of either enforceable administrative guidelines or judicial principles, they would need to be embraced by a transnational constituency of human rights entrepreneurs who could propel the internalization of international norms at the local level.

A transnational movement in defense of migrant worker rights did eventually emerge in the 1990s through a process of coalition building and as the result of the changing political dynamics produced by economic globalization. On the one hand,

migrant workers in the informal sector, who had been excluded from the traditional labor regulations, mobilized through a panoply of geographically diverse grassroots organizations (D'Souza 2010). Inspired by the rights-based discourse popularized by the women's movement and indigenous people's movement, associations of migrant domestic workers were particularly active in framing their struggles in the language of universal human rights (Freeman et al. 2003). On the other hand, the trade union movement, which had previously been hostile to migrant workers and uninterested in organizing workers in the informal sector, moved towards adopting a human rights approach to migrant labor issues. Labor federations in Europe and North America rejuvenated their organizing agenda to reverse declining union density, reconsidered their views on the ability of the state to completely control migration in an era of economic internationalization, and became normatively committed to the idea that migrants have rights that are impeded by tough immigration control measures (Haus 2002).

International human rights conferences during the 1990s provided important sites for networking among activist organizations. Migrant worker activists and their supporters held meetings, distributed information, and were successful in including language on migrant workers into the final conference documents (Grange & d'Auchamp 2009, 83). The discussions generated at these international conferences also served to anchor the issue of migrant human rights on the agenda of the UN Commission on Human Rights, which was itself becoming increasingly participatory as NGO consultative status was opened to national and regional NGOs after 1996. In the late 1990s, the Commission initiated an Intergovernmental Working Group on the Human Rights of Migrants as well as a Special Rapporteur on the issue. These structures in turn provided additional sites for engagement between inter-governmental organizations and NGOs and thus paved the way for the creation in 1998 of a "Global Campaign for Ratification of the Convention on Rights of Migrants" (Grange & d'Auchamp 2009, 84). As a result, by the beginning of the new millennium, the emerging coalition of grassroots associations campaigning for migrant worker rights was reinforced not only by trade union activism at the national and international level but also by international human rights NGOs and religious organizations such as the World Council of Churches and Caritas.

This transnational campaign on behalf of the Convention has propelled a dissemination of the concept of migrant worker rights, even in states that show little interest in signing or ratifying the Convention. In Europe, a Platform for Migrant Worker Rights was launched in 2002 to lobby EU policymakers, and awareness-raising campaigns have been successful in eliciting calls for ratification and statements in support of the Convention's principles from the European Commission and the European Parliament (MacDonald & Cholewinski 2009). During the same period, US-based NGOs who participated in the Global Campaign have drawn on the Convention's provisions when filing statements and shadow reports on the protection of migrant workers' human rights in both the Human Rights Committee and the Inter-American Commission on Human Rights (Smith 2007, 306). Similarly, a "Human Rights Tribunal" condemning violations of migrant domestic workers' rights under the Convention was organized in 2005 by a coalition of local and international NGOs in New York City (311). The Global Campaign has thus constructed a new "norm-creating forum" (Koh 1999) for promoting a human rights approach to migrant labor issues.

One of the sites where this rights-based approach has been most visibly developed is, somewhat surprisingly, within the ILO itself. Beginning in the late 1990s, the organization lent its institutional support to the Global Campaign as part of a more general infusion of human rights concepts into its work (Bohning 1991). As a result, nongovernmental participants in the Global Campaign exercised significant influence over the drafting of the ILO's *Multilateral Framework on Labour Migration* (Grange & d'Auchamp 2009), which compiles an exhaustive list of international best practices for the implementation of migrant worker rights. Among the rights-oriented practices that are singled out as models for other countries is the policy of the Philippines Overseas Employment Administration requiring legally enforceable work contracts and monitoring recruitment agencies to ensure their compliance, as well as New Zealand's policy of providing information on labor rights in several languages and organizing English language classes for migrant workers (International Migration Programme 2006, 50). In addition, over the past ten years, the ILO has played an important role in developing effective and useful programs to protect migrant workers by organizing regional workshops with trade unions and with the government ministries concerned with migrant workers (D'Souza 2010).

The ILO's most recent contribution in this area has been to undertake the drafting of a new convention on the rights of domestic workers, scheduled to be completed in July 2011. The text draws on legislative language developed in recent years by migrant domestic workers and their supporters in a variety of national contexts, including the "Freedom Charter for Domestic Workers" passed in 2007 by the Philippines Senate and the "Domestic Workers Bill of Rights" passed in 2010 by New York State (D'Souza 2010). The Domestic Worker Convention aims to further articulate provisions contained in the Migrant Workers Convention, detailing specific ways in which these principles can be made meaningful in the context of migrant domestic work. For example, elaborating on the principle of equal standards for workplace safety, the ILO Convention's draft text specifies that destination countries should "provid[e] for a system of visits to households in which migrant domestic workers will be employed and develop a network of emergency housing" (International Labour Office 2010). Migrant domestic workers have traditionally been exempted from minimum labor standards and principles of equal treatment, and are among the most vulnerable migrant workers. These marginal migrants have now become the subject of human rights oriented legal development.

In sum, the process of legally implementing the norms contained in the UN Migrant Workers Convention is still in its early stages. There has been some progress made in disseminating the Convention's norms in destination countries and advocates are optimistic about the prospects for further progress even though this process is taking place largely in the absence of any directly binding legal authority. Because the Convention has not been ratified by many migrant destination states, lobbying efforts before legislatures and administrative agencies appear to hold more potential than litigation for realizing migrant workers' human rights. At this point, migrant worker rights have a foothold within the international human rights system but their legal development remains far from complete.

CONCLUSION

The transnational process through which human rights are being developed for marginal migrants is still in its early stages. It has not received the attention nor produced the sometimes spectacular policy outcomes that have resulted from other transnational processes, such as those that have added a strong security dimension to the politics of immigration (Bigo 2001; Guiraudon & Joppke 2001) or those that have paired migration with discussions of economic development (Castles & Wise 2008). It is these latter framings of immigration that have dominated the ongoing development of EU immigration and asylum policy, seen most clearly in the 1999 Tampere Programme and its regulation-centered rather than rights-centered approach. A number of inter-state dialogues, such as the UN-sponsored Global Forum on Migration and Development or the Transatlantic Council on Migration, have also made highly visible links between migration and either development or security. Indeed, in Europe, international cooperation between border enforcement officials was so effective that it provided the initial impetus for developing a European migrant rights NGO network, which aimed to contribute a rights-based perspective to counteract the security emphasis of EU policymaking (Guiraudon 2002).

The dominance of the security and development frames within policy circles demonstrates just how difficult it is in the current macro-political context of aggressive neoliberal globalization to develop and enforce the rights of marginal migrants. The lukewarm reception accorded to the Convention on the Rights of Migrant Workers has been due at least in part to the fact that its enactment by the General Assembly coincided with a period of rampant globalization in which the forces of capital have found it in their interest to maintain a mobile but highly vulnerable labor force (Taran 2009).

These inhospitable conditions have compounded the inherent tensions of the international human rights system arising from international commitments to the protection of state sovereignty as well as to universal individual rights. Although this tension is present throughout the human rights field, in the area of international migration the conflict is all the greater. As legal scholar Linda Bosniak explains, when it comes to questions of migrant rights, “human rights interests contend not merely with states’ relative jurisdictional independence from international authority but also with a central substantive aspect of sovereignty: states’ plenary territorial powers, one attribute of which is their virtually uncontested authority to control the admission and exclusion of aliens and to confer nationality – to, in effect, prescribe the composition of the national community” (Bosniak 1991, 752). According to Bosniak, migrant rights present the ultimate “hard case,” the fact that migrant rights appear at all in international human rights law demonstrates the power of universal human rights principles.

In addition to telling us something about the power of human rights discourse, the development of migrant human rights provides insight into the culture of the contemporary international human rights system. As previous socio-legal work has pointed out, human rights laws are developed and internalized through a process that is transnational rather than simply international. Normative development is the result of “conversation, interplay, and dialogue” between public officials and a range of other actors who struggle to practice human rights according to their own vision (Speed 2008). In the field of migrant human rights we can see this in the way that grassroots campaigns by migrant domestic workers and their supporters have called on the spirit of the

Convention on the Rights of Migrant Workers to take their claims to the streets as part of efforts to educate the public about the Convention (Smith 2007). A recent study of the attempt in one US city to pass a local ordinance inspired by international human rights conventions demonstrates a similar dynamic whereby grassroots groups use human rights norms writ large as a tool for educating the public (Merry et al. 2010). The authors see this grassroots form of implementation as holding substantial transformative promise, especially in a political context where – as in the case of the Convention on the Rights of Migrant Workers - the US government has shown no interest in placing itself under the control of international law.

While grassroots movements are critical to the internalization of international human rights principles, the power of transnational legal processes derives from a symbiotic relationship between actors at different levels. In this respect, these processes diverge greatly from the legal positivist ideal of clear hierarchy. Widespread mobilization occurs when actors in a range of locations, and operating at a range of scales, are joined in a single “community” (Boyle 2002). UN institutions provide one possible node in this network of mobilization, but so do other sites of activity. Anthropologist Winifred Tate describes the landscape of the international human rights system as “ephemeral, developing through the specific temporal windows of conferences, commissions and meetings” (Tate 2007, 191). In the case of the Global Campaign for Ratification of the Migrant Rights Convention, a webportal (december18.net) proved to be a crucial site at which multilateral and intergovernmental agencies, international NGOs, national and regional NGOs, and grassroots groups could share information and coordinate strategies.

At the same time that the internalization and enforcement of migrant human rights principles has not proceeded according to a positivist vision of law, the process of formulating both migrant worker rights and refugee protections has been highly legalistic. A fundamental component of the contemporary epistemology of human rights is its legalization (Wilson 2007). This tendency towards formalism and technical expertise can serve instrumental purposes, allowing for consensus to develop and thus for new rights to be established in international human rights texts (Riles 2000). It allowed the Convention on the Rights of Migrant Workers to come into being. And rights for migrant workers have previously made an appearance in other international human rights instruments, similarly qualified by the principle of sovereign territorial authority (For a comprehensive survey, see Slinckx 2009).

But the legalization of human rights can also make it easier for those with power to wield them against the less powerful, finding legalistic justifications to suspend rights when it suits their ends. National security has proved to be a particularly useful justification for weakening the human rights prohibition on torture, even before the era of the so-called “war on terror” (Asad 1997). These national emergency exceptions have also found their way into refugee law, so that even if there is no doubt that an individual has a well-founded fear of persecution on account of one of the five grounds, he or she is ineligible for asylum if there is even a purely financial connection to a group that has been declared a “terrorist organization.”

The tendency to blur human rights with humanitarianism is also a danger of legalization, especially in the current political context in which “good migrants” are sharply distinguished from “bad migrants.” When legal arguments on behalf of gender-

based asylum claims adopt a pragmatic and instrumental tone, they emphasize that granting asylum to women fleeing traditional customs “won’t open the floodgates” to all of the poor and oppressed in the world (See Miller Bashir 1997). The legalistic qualities of international law ensure that few rights are absolute.

The challenges of implementing the Convention on the Rights of Migrant Workers also points to the ambiguous nature of legalized formulations of human rights. As Bosniak astutely points out, the difficulty in enforcing the Convention is practical, since undocumented migrant workers are unlikely to be able to claim their rights when by doing so they risk bringing themselves to the attention of immigration enforcement officials (Bosniak 1991, 765). If marginal migrants seeking to have human rights standards upheld are pitted alone against the state, the interests of the sovereign are bound to shape how law is applied in practice.

The reformulation of migrant rights as human rights is very much an ongoing political process. Marginal migrants are far from fully embedded within the individualistic and universalistic legal categories of human rights law. A conceptual distinction between the “deliberative” approach to human rights, which locates human rights discourse in the context of contemporary power structures, and the “protest” approach to human rights, which sees human rights as relatively more conducive to counter-hegemonic struggles, may be helpful in further theorizing the possible routes available to this unsettled field (Dembour 2010). Whether migrant human rights are best conceptualized as part of the current neo-liberal deliberated consensus of late modernity, or whether they are best understood as the result of protest, and thus subject to further expansion by social justice and migrant solidarity movements remains to be seen.

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