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Author(s): Adelle Blackett*

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CURRENT DEVELOPMENTS

THE DECENT WORK FOR DOMESTIC WORKERS CONVENTION AND RECOMMENDATION, 2011

*By Adelle Blackett**

The international landscape on the regulation of domestic work¹ is changing dramatically. At the hundredth session of the International Labour Conference (ILC) in June 2011, the International Labour Organization (ILO) adopted the historic Decent Work for Domestic Workers Convention, 2011 (No. 189) and accompanying Recommendation No. 201.² These new international labor standards come sixty-three years after the ILO adopted its first resolution on the conditions of employment of domestic workers³ and forty-six years after its second such resolution, which recalled the “urgent need” for standards “compatible with

* Associate Professor & William Dawson Scholar, McGill University. Dr. Blackett was the academic expert to the International Labour Organization (ILO) on international standard setting for domestic workers from 2008 to 2011. She was commissioned to write the International Labour Office’s *Law and Practice Report*, *infra* note 1, and was a member of the secretariat in both the 2010 and 2011 Decent Work for Domestic Workers Committees of the International Labour Conference. She thanks Anne Trebilcock, former ILO legal adviser and director of the Legal Department, for helpful comments on an earlier version of this essay. The opinions expressed are those of the author and do not necessarily reflect the position of the ILO.

¹ Domestic work includes a broad range of responsibilities, functions, and tasks, often invisible and undervalued, undertaken in and for a household. The *Law and Practice Report*, prepared in advance of the ninety-ninth session of the ILO’s International Labour Conference, contains a detailed discussion of the definitional challenges across jurisdictions, as well as the terminological challenges. Decent Work for Domestic Workers 15, 28–33 (2010), Report IV(1), International Labour Conference, 99th Sess., 2010, at http://www.ilo.org/ilc/ILCSessions/99thSession/reports/WCMS_104700 [hereinafter *Law and Practice Report*]. Domestic work is defined broadly in Article 1 of Convention No. 189, *infra* note 2, as “work performed in or for a household or households.” The records of, and documents associated with, the annual sessions of the International Labour Conference are available at <http://www.ilo.org/ilc/ILCSessions/lang—en/index.htm> (for sessions 85 of 1997 to 101 of 2012).

² June 16, 2011 [hereinafter Convention No. 189 and Recommendation No. 201]. Convention No. 189 was adopted by a vote of 396 to 16, with 63 abstentions. International Labour Conference, 100th Sess., Provisional Record 30, at 6 (2011). The accompanying Recommendation No. 201 was adopted by a vote of 434 to 8, with 42 abstentions. *Id.* at 8. These voting scores reflect a weighting system that includes government, employer, and worker representatives. The convention, *see* Art. 21(2), has received the two requisite ratifications (from Uruguay on June 14, 2012, and the Philippines on September 5, 2012) that will enable it to enter into force a year from the date that the second ratification was registered with the ILO’s director-general. *See* http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_189191/lang—en/index.htm. ILO labor standards, including conventions and recommendations, are available at <http://www.ilo.org/global/standards/>.

³ Resolution Concerning the Conditions of Employment of Domestic Workers (June 30, 1948). ILO resolutions are available at <http://www.ilo.org/public/english/bureau/leg/resolutions.htm>. Most ILO conventions and recommendations apply to domestic workers unless domestic workers are excluded through the application of flexibility clauses. The *Law and Practice Report* discusses the existing exclusions in conventions and also the cases in which ILO members have duly notified the ILO of their intention to invoke flexibility clauses. The report, *supra* note 1, para. 82, notes a paradox in ILO members’ practice: “Although ILO Members have expended considerable efforts in the drafting of flexibility clauses, few have resorted to them in practice.” Even so, a flexibility clause was included in Article 2 of Convention No. 189.

the self-respect and human dignity which are essential to social justice” for domestic workers.⁴ The robust, comprehensive international norms were adopted after two decades in which the ILO’s standard setting has been deeply criticized and its tripartite structure repeatedly challenged to become more representative. Since additional critique of the ILO standards system emerged at the ILC’s 101st session in 2012,⁵ it would be an overstatement to suggest that the new instruments reflect an unequivocally positive trend in standard setting. Even so, they offer a critical realist⁶ basis for considering that ILO standard setting remains salient and that international social dialogue remains possible.

This short article offers an overview and appraisal of the new convention and recommendation. First, it situates them in historical and regulatory context. Second, it discusses the substantive approach taken in these two documents to regulating decent work for domestic workers. It emphasizes the particular character of the claim to equality that pervades the treaty; its conception of equality has implications for labor rights, including current conceptions of migrant workers’ rights. Third, the article explores the potential implications of the treaty-making process employed, with particular emphasis on the role of social movements in bringing inclusive, democratic participation into the construction of international labor law.

I: HISTORIC EXCLUSION, BUT DYNAMIC CONTEMPORARY REGULATORY LANDSCAPE

International estimates place the number of domestic workers worldwide at 53 to 100 million.⁷ Women migrant workers currently make up virtually 50 percent of all migrants,⁸ and a significant majority of those women have become domestic workers.⁹ The number of women domestic workers is staggering when compared to the roughly one million seafarers, primarily

⁴ Resolution Concerning the Conditions of Employment of Domestic Workers (June 23, 1965).

⁵ International Labour Conference, 101st Sess., Provisional Record 19, Report of the Committee on the Application of Standards, pt. 1 (revised) (2012).

⁶ See Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics and the Subaltern in Counter-hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 1* (Boaventura de Sousa Santos & César A. Rodríguez-Garavito, eds., 2005) (identifying a critical realist sociology of “subaltern cosmopolitan legality that is fully alive to law’s contingency, but that moves beyond hyper-deconstructive critique to consider counter-hegemonic understandings and possibilities”); Anne Orford, *A Jurisprudence of the Limit*, in *INTERNATIONAL LAW AND ITS OTHERS 1* (Anne Orford ed., 2006). Specifically in labor law, see RUBEN J. GARCIA, *MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION* (2012).

⁷ International Labour Office, *Global and Regional Estimates on Domestic Workers* (2011), at http://www.ilo.org/travail/whatwedo/publications/WCMS_155951/. Methodological and conceptual challenges affect who “counts” as a domestic worker, rendering official estimates inaccurate (and presumably understated). For a discussion, see Martha Alter Chen, *Recognizing Domestic Workers, Regulating Domestic Work: Conceptual, Measurement, and Regulatory Challenges*, 23 *CAN. J. WOMEN & L.* 167 (2011).

⁸ UN Development Programme, *Overcoming Barriers: Human Mobility and Development 25* (2009), at <http://hdr.undp.org/en/reports/global/hdr2009/>; UN Department of Economic and Social Affairs, *United Nations Population Facts*, Nov. 2010, at 3 (adding that the proportion varies with age), at http://www.un.org/esa/population/publications/popfacts/popfacts_2010-6.pdf.

⁹ ILO, *Women and Men Migrant Workers: Moving Towards Equal Rights and Opportunities* (n.d.), at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_101118.pdf; see also Law and Practice Report, *supra* note 1, at 6 (table on domestic workers as a percentage of total population, by sex). It is crucial to note that that some domestic workers are men (and often from minority communities). See, e.g., JoAnn McGregor, *Joining the BBC (British Bottom Cleaners): Zimbabwean Migrants and the UK Care Industry*, 33 *J. ETHNIC & MIGRATION STUD.* 801, 802 (2007).

male, in the maritime industry¹⁰ (considered by some to have been the “world’s first genuinely global industry”).¹¹ Although the ILO has adopted numerous specific international labor standards regulating maritime labor since the organization was established in 1919, domestic workers, by comparison, had been largely ignored.

In setting the stage for its new regulatory standards on decent work for domestic workers, the International Labour Office’s *Law and Practice Report* identified the fundamental linkage between the history of domestic work and contemporary needs:

Domestic work is one of the oldest and most important occupations for many women in many countries. It is linked to the global history of slavery, colonialism and other forms of servitude. In its contemporary manifestations, domestic work is a global phenomenon that perpetuates hierarchies based on race, ethnicity, indigenous status, caste and nationality. Care work in the household—whether performed by paid employees or by unpaid household members as part of their family responsibilities and as a “labour of love”—is quite simply indispensable for the economy outside the household to function. The growing participation of women in the labour force, changes in the organization of work and the intensification of work, as well as the lack of policies reconciling work and family life, the decline in state provision of care services, the feminization of international migration and the ageing of societies have all increased the demand for care work in recent years.

Domestic work, however, is still undervalued. It is looked upon as unskilled because most women have traditionally been considered capable of doing the work, and the skills they are taught by other women in the home are perceived to be innate. When paid, therefore, the work remains undervalued and poorly regulated. By contrast, studies that provide space for domestic workers to speak often reveal their belief in the dignity of their hard work, and, as such, it warrants recognition and respect and calls for regulation.¹²

Decent work for domestic workers has come to be understood as a human rights claim. The ILO’s *Law and Practice Report* framed that claim in concrete and specific terms. Domestic workers have been largely excluded from labor laws, and their “service” was considered a “status.” The report sought to ensure that labor regulatory frameworks could be reconstructed, to recognize domestic workers’ human rights claim to be included.¹³ It built on the need to acknowledge both the economic importance of care work in the home and the “central dignity and humanity of caring for others.”¹⁴ It took a historically rooted, remedial approach that recognized the legacy of inequitable law and practice toward domestic workers. And through specific regulation, it sought to promote substantive equality for domestic workers.

¹⁰ The ILO estimates the number of seafarers worldwide at 1.2 million, see http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_187660. According to the International Maritime Organization, see <http://www.imo.org/OurWork/HumanElement/GoToSea/Pages/Default.aspx>, the worldwide supply of seafarers in 2010 was estimated at 624,000 officers and 747,000 ratings. The International Transport Workers Federation, see <http://www.itfseafarers.org/ITI-women-seafarers.cfm>, estimates that only 2 percent of seafarers are women.

¹¹ Cleopatra Doumbia-Henry, *The Consolidated Maritime Labour Convention: A Marriage of the Traditional and the New*, in *LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L’AVENIR: MÉLANGES EN L’HONNEUR DE NICOLAS VALTICOS* 319, 320 (Jean-Claude Javillier & Bernard Gernigon eds., 2004).

¹² *Law and Practice Report*, *supra* note 1, paras. 18, 19.

¹³ *Id.*, paras. 48–52. The report provided a detailed comparative law analysis of seventy-two ILO members, comprising 80 percent of the world’s population. It offered a theoretical framework for understanding how domestic work can be regulated, and made a case to the ILO’s constituency—its tripartite deliberative community of governments, workers’ representatives, and employers’ representatives—in favor of moving forward on standard setting through a binding convention, supplemented by a nonbinding recommendation. The constituency responded to a detailed questionnaire in the report, on the basis of which the new international labor standards were negotiated.

¹⁴ Adelle Blackett, *Introduction: Regulating Decent Work for Domestic Workers*, 23 *CAN. J. WOMEN & L.* 1, 19 (2011).

The new convention and recommendation have been accompanied by an outpouring of other international and regional documents of varying normative authority. In 2011, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families issued its General Comment No. 1 on Migrant Domestic Workers.¹⁵ The Committee on the Elimination of Discrimination Against Women issued its General Recommendation No. 26 on Women Migrant Workers.¹⁶ Slightly in advance of the ILC's second session, the Parliamentary Assembly of the Council of Europe adopted Resolution 1811 and accompanying Recommendation 1970, both under the title Protecting Migrant Women in the Labour Market.¹⁷ In addition to calling upon the Committee of Ministers to recognize domestic work as real work, to eliminate discrimination, and to involve migrant women in the development of immigration and social policy, Recommendation 1970 "encourage[d] the governments of member states to actively participate in the drafting of the International Labour Organization's (ILO) future convention on domestic workers and to adhere to its provisions."¹⁸ Holders of special mandates from the UN High Commissioner for Human Rights have issued reports and recommendations on domestic work, notably from the perspective of minority issues and contemporary forms of slavery.¹⁹

The domestic law landscape has also witnessed significant movement worldwide. The United States has introduced regulations that would extend Fair Labor Standards Act²⁰ protections to live-in domestic workers and require employers to keep records on domestic workers' hours of work.²¹ In *Banao v. Commissioner of Registration*, the Hong Kong High Court's court of first instance judicially extended a form of permanent resident status to a foreign domestic "helper" of Philippine nationality.²² Reversed on appeal,²³ the landmark case is to be

¹⁵ UN Doc. CMW/C/GC/1 (Feb. 23, 2011), at http://www2.ohchr.org/english/bodies/cmw/cmw_migrant_domestic_workers.htm.

¹⁶ UN Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008), at http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf.

¹⁷ The resolution is available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1811.htm>, and the recommendation at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/EREC1970.htm>.

¹⁸ Recommendation 1970, *supra* note 17, para. 3.3.

¹⁹ See, e.g., UN Human Rights Council, Recommendations of the Forum on Minority Issues at Its Third Session, on Minorities and Effective Participation in Economic Life (14 and 15 December 2010), UN Doc. A/HRC/16/46 (2011); Gulnara Shahinian (Special Rapporteur), Contemporary Forms of Slavery, Including Its Causes and Consequences, UN Doc. A/HRC/15/20 (June 18, 2010) (this report includes a section entitled "Domestic Servitude: A Global Human Rights Concern"); see also UN High Commissioner for Human Rights, Rights of Migrant Domestic Workers in Europe, at http://www.europe.ohchr.org/Documents/Publications/Study_Domestic_Migrant_webversion.pdf.

²⁰ 29 U.S.C. §§201–219 (2006 & Supp. III 2009).

²¹ See Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81190 (proposed Dec. 27, 2011), at <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=25639>. The exclusion of occupational categories like domestic work and farm labor, which are deeply rooted in a history of slavery in the United States, has been controversial.

²² Vallejos Evangeline Banao v. Comm'r of Registration, Case No. HCAL 124/2010 (C.F.I. Sept. 30, 2011), at http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=78403&QS=%2B&TP=JU; see Kevin Drew, *Court Rules on Side of Maids' Right to Residency*, N.Y. TIMES, Sept. 30, 2011, at <http://www.nytimes.com/2011/10/01/world/asia/court-rules-on-side-of-maids-rights-to-residency.html>.

²³ Vallejos Evangeline Banao v. Comm'r of Registration, Case No. CACV 204/2011 (C.A. Mar. 28, 2012), at http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=81019; see *Hong Kong Government Wins Appeal in Maid Residency Case* (Mar. 28, 2012), at <http://www.bbc.co.uk/news/business-17532723>.

heard before the Hong Kong Court of Final Appeal.²⁴ Spain has adopted a new social security regime for domestic workers.²⁵ Caribbean states that have ratified the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (2001)²⁶ have recognized the free movement of domestic workers as a skilled occupational category since 2009.²⁷ India has extended social security coverage to domestic workers,²⁸ and a task force is considering associated reforms in labor law. Lebanon has enlisted support from the ILO on its National Steering Committee on Migrant Women Domestic Workers,²⁹ while international scrutiny—most recently as contained in the addendum (on the mission to Lebanon) to the special rapporteur's Report on Contemporary Forms of Slavery, Including Its Causes and Consequences³⁰—has kept the spotlight on the abuse of domestic workers and the potential for change. South African law, which has been innovative on employment conditions and access to justice for domestic workers in the post-apartheid era, has significantly influenced international standard setting.³¹

The international and domestic law landscape has been profoundly influenced by social movements of domestic workers, who have actively mobilized “from below.” Historically, domestic workers have repeatedly engaged in individual acts of resistance to attempts to control their working time and have thereby carved out limited spheres of autonomy in highly personalized work relationships.³² Perhaps most notably, domestic workers have commonly rejected live-in work and opted to live out whenever possible.³³ Collective actions have included media campaigns, lobbying efforts, hunger strikes, and calls for one-day work stoppages; in these ways, domestic workers have “act[ed] collectively . . . to bring about structural change and combat exploitative working conditions and discrimination.”³⁴ Active participa-

²⁴ See *Filipino Maid Takes Fight for Permanent Residency to Hong Kong's Top Court*, GUARDIAN, June 22, 2012, at <http://www.guardian.co.uk/world/2012/jun/22/filipino-maid-hong-kong-court>.

²⁵ Decreto No. 2346/1969 (May 11, 2011), at http://www.seg-social.es/Internet_1/Normativa/095320?ssSourceNodeld=1139.

²⁶ At http://www.caricom.org/jsp/community/revised_treaty-text.pdf.

²⁷ Article 46(4)(a) provides for the expansion of the category of “skilled community nationals.” See also Global Forum for Migration and Development, *Summary Report: Domestic Workers at the Interface of Migration and Development* (2011), at http://gfmnd.org/documents/switzerland/jamaica/gfmd_swiss11_jamaica-summary-report.pdf.

²⁸ Domestic Workers Welfare and Social Security Act, 2010, at http://ncw.nic.in/PDFFiles/domestic_worker_welfare_and_social_security_act_2010.pdf.

²⁹ See ILO, Regional Office for Arab States, *Regional Overview* (2011), at http://www.ilo.org/public/english/region/arpro/beirut/downloads/publ/overview_eng.pdf.

³⁰ UN Doc. A/HRC/21/41/Add.1 (July 4, 2012), at <http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx>.

³¹ It has been heavily studied. Limits with respect to regional migrant domestic workers and collective representation are the subject of ongoing reflection. SHIREEN ALLY, *FROM SERVANTS TO WORKERS: SOUTH AFRICAN DOMESTIC WORKERS AND THE DEMOCRATIC STATE* (2009); Laura Griffin, *Borderwork: “Illegality,” Un-bounded Labour and the Lives of Basotho Migrant Domestic Workers* (2010) (Ph.D. dissertation, University of Melbourne) (on file with author).

³² Blackett, *supra* note 14, at 41.

³³ ALANA ERICKSON COBLE, *CLEANING UP: THE TRANSFORMATION OF DOMESTIC SERVICE IN TWENTIETH CENTURY NEW YORK CITY* 56 (2006) (“No matter how desperate, domestics continued to reject live-in work. Independence was more important to them”); ALLY, *supra* note 31, at 52 (noting that the shift to live-out work constituted a way to claim “incredibly important autonomy from employers and the capacity to maintain an independent familial life.”).

³⁴ Law and Practice Report, *supra* note 1, para. 265.

tion of workers and their associations was crucial in moving the ILO's traditional tripartite constituents—governments, employers, and workers—toward the adoption of new, robust international labor standards.

II: THE HUMAN RIGHT TO LABOR RIGHTS: MEANINGFUL INCLUSION AT THE CORE OF DOMESTIC WORKERS' HUMAN RIGHTS CLAIM

The claim that domestic workers should be treated as other workers is deceptively simple. The *Law and Practice Report* asserted:

There is no fundamental distinction between work in the home and work beyond it, and no simple definition of public-private, home-workplace and employer-employee. Caring for children and the disabled or elderly persons in the home or in a public institution is all part of the same regulatory spectrum, wherein a range of migration and other policies shape both the supply of and the demand for care services.³⁵

The report also recognized that to establish meaningful standards recognizing domestic workers' status as workers, it was necessary to highlight the specificity of domestic work and to make visible the skill and effort involved in carrying out the work—which has historically been undervalued. The approach is one that reflects comparable worth, or equal pay for work of equal value.³⁶

The particular juxtaposition presented by regulating domestic work—both as “work like any other” and “work like no other”³⁷—facilitated the adoption of domestic workers' labor rights as a familiar idea and also captured the transformative power of challenging existing inequitable relations.³⁸ The juxtaposition encapsulated the special challenge of determining how to apply the substantive norm of equality to arrive at appropriate labor standards. It led to a new twist in the “labor rights as human rights” debate.³⁹ Although specialists in international labor law have expressed concern that the human rights frame would divert labor standards from their collective, social justice goals,⁴⁰ the use of that frame, including the goal of equitable inclusion, enabled the ILC's Decent Work for Domestic Workers Committee to understand the complexities of domestic workers' social exclusion and to formulate standards that fundamentally challenge the marginalization of those workers.⁴¹

³⁵ *Id.*, para. 38.

³⁶ Blackett, *supra* note 14, at 14. Equal pay for work of equal value is recognized in two conventions that the ILO considers to be fundamental: the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

³⁷ Law and Practice Report, *supra* note 1, paras. 45–47; see Adelle Blackett, *Promoting Domestic Workers' Human Dignity Through Specific Regulation*, in DOMESTIC WORK AND THE FORMATION OF EUROPEAN IDENTITY: UNDERSTANDING THE GLOBALIZATION OF DOMESTIC WORK, 16TH–21ST CENTURIES 247 (Antoinette Fauve-Chamoux ed., 2004).

³⁸ See SALLY ENGLE MERRY, HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 5 (2006).

³⁹ Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in LANCE A. COMPA & STEPHEN F. DIAMOND, HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 22 (2003).

⁴⁰ See, e.g., Kevin Kolben, *Labor Rights as Human Rights?* 50 VA. J. INT'L L. 449 (2010).

⁴¹ Substantive inclusion into a labor law paradigm might be considered a form of “workplace citizenship.” For a succinct discussion of the literature, see Michel Coutu & Gregor Murray, *Towards Citizenship at Work? An Introduction*, 60 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 617 (2005).

This frame of labor rights as human rights had important implications for how the ILC delegates approached the standard-setting process. They repeatedly considered how domestic work is traditionally carried out; they contrasted it with recognized workplace norms generally applicable to most other categories of workers and with work relationships comparable to, but less marginalized than, domestic work; and they considered how existing norms could be adapted to domestic work in order to arrive at a “decent work” standard.⁴² In the process, the ILO’s deliberative community gave substantive meaning to “decent work,” a notion that has been considered elusive and even counterproductive to traditional standard-setting and compliance efforts.⁴³

Working Time

A good example of the approach taken by Convention No. 189 and Recommendation No. 201 can be seen in relation to the “boundarilessness” of domestic workers’ time. The customary expectation across jurisdictions has been that “servants” will constantly be available to their “masters” to perform all required duties “within the reasonable limits of their physical strength and moral welfare.”⁴⁴ As the *Law and Practice Report* emphasizes:

This is not to imply that their working lives necessarily lack structure and regulatory control. On the contrary, their lives and work are regulated by strong non-state norms regarding work in the employer’s household, which vary significantly from one cultural context to the next but which result in domestic workers being among the most marginalized workers—and for whom decent work is often a distant aspiration.⁴⁵

In many countries the pluralist law of the “home-workplace” is at odds with state labor law—which, given its general scope, is taken to apply as a matter of principle to domestic workers unless they are expressly excluded. The *Law and Practice Report* sought to cut through the fiction of assuming that an industrial workplace model should be systematically applied to domestic work. By the same token, the standard setting was cautious to avoid the risk of reinforcing and reproducing inequality;⁴⁶ most notably, it retained from modern employment law that which distinguishes work from servitude. One critically important marker of that distinction is the control over “normal” working time.

Article 7 of the convention calls for working time to be regulated in keeping with the principle of equal treatment, including normal working hours, daily and weekly rest periods, and payment of wages at regular intervals. Article 11 requires that domestic workers be covered by

⁴² International Labour Conference, 99th Sess., Provisional Record 12 (2010); International Labour Conference, 100th Sess., Provisional Record 15 (2011).

⁴³ William R. Simpson, *Standard-Setting and Supervision: A System in Difficulty*, in LES NORMES INTERNATIONALES DU TRAVAIL, *supra* note 11, at 52; Leah F. Vosko, ‘Decent Work’: *The Shifting Role of the ILO and the Struggle for Global Social Justice*, 2 GLOBAL SOC. POL’Y 19 (2002); Isabelle Duplessis, *La mollesse et le droit international du travail: Mode de régulation privilégié pour société décentralisée*, in GOVERNANCE, INTERNATIONAL LAW AND CORPORATE SOCIETAL RESPONSIBILITY 1 (Jean-Claude Javillier ed., 2007), available at <http://www.ilo.org/public/english/bureau/inst/publications/discussion/dp18207.pdf>.

⁴⁴ Erna Magnus, *The Social, Economic, and Legal Conditions of Domestic Servants: I*, 30 INT’L LAB. REV. 190, 206 (1934).

⁴⁵ Law and Practice Report, *supra* note 1, para. 39 (footnote omitted); see also Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom, *Beyond Formality and Informality*, in LINKING THE FORMAL AND INFORMAL ECONOMY: CONCEPTS AND POLICIES 4 (Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom eds., 2007).

⁴⁶ See COLLEEN SHEPPARD, INCLUSIVE EQUALITY 103 (2010).

minimum wage laws where they exist and that remuneration be established “without discrimination based on sex.”⁴⁷ Article 12 requires payment of wages by “lawful means” and attempts to limit the payment of wages in kind—which can be a major source of abuse.

The new standards also challenge “customary” or implicit norms in domestic work. For example, Article 13 of Recommendation No. 201 states that “[t]ime spent by domestic workers accompanying the household members on holiday should not be counted as part of their paid annual leave.” This provision seems almost too obvious to be made explicit, but it actually runs contrary to a prevalent practice regarding domestic workers. More broadly, the approach of the convention and recommendation to the regulation of time represents a marked departure from traditional arrangements, which have reflected the profoundly unequal bargaining power between domestic workers and their employers. Rather than legitimizing lengthy working hours for domestic workers as a means of enabling employers to achieve what they perceive as a suitable work/life balance, Article 25(1)(c) of Recommendation No. 201 calls for “the concerns and rights of domestic workers [to be] taken into account in the context of more general efforts to reconcile work and family responsibilities.”

Article 9 of Convention No. 189 is a basic, but salient, example of the effort to offer concrete standards that foster domestic workers’ autonomy:

Each Member shall take measures to ensure that domestic workers:

- (a) are free to reach agreement with their employer or potential employer on whether to reside in the household;
- (b) who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave; and
- (c) are entitled to keep in their possession their travel and identity documents.⁴⁸

This article recognizes how space (what one might call the “home-workplace”) frames domestic workers’ exercise of autonomy. Paragraph (a) challenges the “normalization” of a live-in requirement, seeks to support domestic workers’ exercise of agency, and reaffirms the efforts of many domestic workers to resist live-in requirements. For most categories of workers, such a provision would be unnecessary and might even be considered absurd. For domestic workers, however, the provision is a hard-won gain. Paragraph (b) establishes concrete boundaries for live-in domestic workers: their “free” time is meant to be their own. Paragraph (c) provides official recognition of a disturbingly common problem associated with forced labor and trafficking of migrant domestic workers.

For legal scholars who recognize the limits of law to yield societal transformation, all three paragraphs of Article 9 serve as a sobering reminder that live-in domestic work may easily lead, in practice, to forced labor and to contemporary forms of slavery or servitude. International labor lawyers also recognize the limits of (international) law in curtailing these practices. One might well ask when and under what conditions a “decent work” strategy should end and an “abolitionist” strategy—that is, one banning migrant live-in arrangements altogether—should

⁴⁷ See also UN Convention on the Elimination of All Forms of Discrimination Against Women, Art. 11, para. 1(d), *opened for signature* Mar. 1, 1980, 1249 UNTS 13 (entered into force Sept. 3, 1981).

⁴⁸ Convention No. 189, *supra* note 2, at 4–5.

begin.⁴⁹ The consensus on working time and living conditions forged in negotiating the convention and recommendation suggests that a normative line has been largely established: the legal strategy has been to normalize domestic workers' working hours through specific and general working-time regulation. The negotiated, normative consensus on the meaning of decent work for domestic workers in the convention and recommendation is part of domestic workers' broader political mobilization for societal enfranchisement.

Rethinking Migrant Workers' Rights

The new convention and recommendation are not international migration instruments per se. The negotiations focused on many dimensions of domestic workers' conditions of employment: freedom of association and collective bargaining rights,⁵⁰ labor inspection and enforcement, social protection needs. Even so, a distinctive feature of the new instruments is the approach they take to migration. The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990),⁵¹ as well as the ILO Migration for Employment Convention (Revised), 1949 (No. 97)⁵² and the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143),⁵³ establishes and reinforces separate sets of rights, depending on a person's particular migration status.⁵⁴ As Catherine Dauvergne has aptly noted regarding the UN convention, "the steadfast attempt in this treaty to protect the rights of even those migrant workers who have no legal migration status"⁵⁵ regrettably results in "a text that demonstrates precisely how few rights these workers have, and how narrowly their entitlement to 'human' rights has been read. The document . . . is a paragon of the inabilities of law to address the new illegality of people."⁵⁶ This shortcoming is especially acute since migrant domestic work is, in many regions, characterized by the precarious immigration status associated with largely undocumented employment in the informal economy. Even in situations where legal migration schemes exist, they are often so fragile that a worker may slide from legal to irregular status simply by leaving an abusive employer.

⁴⁹ This challenge pervades attempts by member states to regulate conditions of work bilaterally and to ban (temporarily) their nationals from participating in domestic worker schemes in some countries without "decent work" concessions. See, e.g., Joyce J. Wangui, *Pursuit of Greener Pastures in Saudi Arabia Spells Doom for Kenyan Immigrants* (July 10, 2011), at http://www.thewip.net/contributors/2011/07/pursuit_of_greener_pastures_in.html.

⁵⁰ These two elements are beyond the scope of this Current Development, but I address them in a forthcoming book chapter: Adelle Blackett, *L'autonomie collective, élément clé du travail décent des travailleuses et travailleurs domestiques*, in *L'AUTONOMIE COLLECTIVE EN DROIT DU TRAVAIL: PERSPECTIVES NATIONALES ET INTERNATIONALES* (Dominic Roux ed., forthcoming).

⁵¹ GA Res. 45/158 (Dec. 18, 1990).

⁵² Article 6 articulates an equality of treatment standard between "immigrants lawfully in its territory" and national workers, at least for a defined set of conditions of employment.

⁵³ Equal treatment is addressed in Article 10.

⁵⁴ Leah F. Vosko, *Out of the Shadows? The Non-binding Multilateral Framework on Migration (2006) and Prospects for Using International Labour Regulation to Forge Global Labour Market Membership*, in *THE IDEA OF LABOUR LAW* 365, 369–77 (Guy Davidov & Brian Langille eds., 2011) (discussing three phases in international labor regulation on migrant workers, and the current problems of exclusion).

⁵⁵ CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW* 22 (2008).

⁵⁶ *Id.* Dauvergne accentuates the "reciprocity" between illegality and sovereignty in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 51.

By contrast, the provisions of Convention No. 189 and Recommendation No. 201 apply generally to domestic workers as defined therein. The instruments succeed in regulating domestic workers—including migrant domestic workers—as workers.⁵⁷ For the purposes of the convention, the term “domestic worker” means “any person engaged in domestic work within an employment relationship.”⁵⁸ The convention does interact with national legal doctrines, however, with a consequent risk that in some jurisdictions, the convention’s use of the language of “employment relationships” could be interpreted to exclude from its coverage those migrant workers without legal migration status—if their employment contracts are considered to be unenforceable. That is, national jurisprudence varies on the effects of migrant status on the employment relationship,⁵⁹ and the new instruments address this matter only indirectly.⁶⁰ Taken together, however, the instruments clarify that all domestic workers should enjoy a broad range of specific, contextualized rights. The instruments are also broadly consistent with existing international labor standards that are applicable to workers generally, and they build on the ILO’s position that “unless a Convention or Recommendation expressly excludes domestic workers, these workers are included in the international instrument’s scope.”⁶¹

The new convention and recommendation include numerous provisions that are especially relevant to migrant domestic workers, such as requiring ILO members to address the issue of repatriation terms and costs,⁶² envisaging mechanisms for recognizing social security contributions,⁶³ and considering pre-placement inspection visits of households where domestic workers are expected to be employed.⁶⁴ Article 26(4) of the recommendation even broaches the thorny issue of preventing abuse and violations of domestic workers’ rights in cases where employers claim diplomatic immunity. The instruments’ concern to include migrant workers is perhaps best captured in Article 8(3) of Convention No. 189: members agree to “take mea-

⁵⁷ I thank my colleague François Crépeau, UN special rapporteur on the human rights of migrants, for this insight. Strong human rights protections for migrant workers, regardless of their status, are also in keeping with principles 8 and 9 of the ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-Based Approach to Labour Migration (2006), at http://www.ilo.org/public/english/protection/migrant/download/multilat_fw_k_en.pdf.

⁵⁸ Convention No. 189, *supra* note 2, Art. 1(b).

⁵⁹ See, e.g., *Hoffman Plastic Compounds, Inc. v. Nat’l Labor Relations Bd.*, 535 U.S. 137 (2002); cf. *Discovery Health Ltd. v. Comm’n for Conciliation, Mediation & Arbitration*, Case No. JR 2877/06, 2008 (29) ILJ 1480 (LC) (S. Afr. Mar. 28, 2008), at <http://www.saflii.org/za/cases/ZALC/2008/24.html> (distinguishing between the “contract” and the employment “relationship”).

⁶⁰ Article 8(1) of Convention No. 189, *supra* note 2, calls for

[n]ational laws and regulations . . . [to] require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to in Article 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies.

Although this provision seeks to protect migrant domestic workers’ rights and to reduce the uncertainties associated with unenforceable contracts, it does not address the difficulties of undocumented migrant domestic workers already present in the receiving country.

⁶¹ Law and Practice Report, *supra* note 1, para. 56.

⁶² Convention No. 189, *supra* note 2, Art. 8(4); Recommendation No. 201, *supra* note 2, para. 22.

⁶³ Recommendation No. 201, *supra* note 2, para. 20(2).

⁶⁴ *Id.*, para. 21(1)(b).

tures to cooperate with each other to ensure the effective application of the provisions of this Convention to migrant domestic workers.”⁶⁵

The convention and recommendation address challenges that are specific to migrant domestic workers and seek to set standards for some of the most vexing transnational dimensions. One especially significant example concerns private employment agencies, which the UN committee on migrant workers recognizes as the locus of much documented abuse.⁶⁶ Article 15 of Convention No. 189 defines an extensive set of requirements to protect domestic workers, including migrant workers, from abuses and fraudulent practices and to ensure that any such abuses or practices are properly investigated.⁶⁷ The article is adapted from the ILO’s Private Employment Agencies Convention, 1997 (No. 181).⁶⁸ That instrument signaled an important change in international labor law by lifting the “ban” on recourse by ILO members to private employment agencies.⁶⁹ Although Convention No. 181’s express goal was to protect

⁶⁵ Convention No. 189, *supra* note 2, at 4. The cooperation theme is developed further in paragraph 26(2) of Recommendation No. 201.

⁶⁶ General Comment No. 1 on Migrant Domestic Workers, *supra* note 15, para. 9. It is worth noting that the Council of Europe has called for member states to establish international cooperation among labor inspectors, police, and border guards. Parliamentary Assembly of the Council of Europe, Res. 1534 (2007), *The Situation of Migrant Workers in Temporary Employment Agencies (TEAs)*, at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1534.htm>.

⁶⁷ Article 15 provides, in full, as follows:

1. To effectively protect domestic workers, including migrant domestic workers, recruited or placed by private employment agencies, against abusive practices, each Member shall:
 - (a) determine the conditions governing the operation of private employment agencies recruiting or placing domestic workers, in accordance with national laws, regulations and practice;
 - (b) ensure that adequate machinery and procedures exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers;
 - (c) adopt all necessary and appropriate measures, within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of domestic workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations that specify the respective obligations of the private employment agency and the household towards the domestic worker and provide for penalties, including prohibition of those private employment agencies that engage in fraudulent practices and abuses;
 - (d) consider, where domestic workers are recruited in one country for work in another, concluding bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment; and
 - (e) take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers.
2. In giving effect to each of the provisions of this Article, each Member shall consult with the most representative organizations of employers and workers and, where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers.

⁶⁸ *Opened for signature* June 19, 1997, 2115 UNTS 249 (entered into force May 10, 2000) [hereinafter Convention No. 181]. At the 2011 International Labour Conference, the U.S. governmental representative expressed the position that the proposed instrument should be aligned to Convention No. 181, “to establish practical guidelines in favour of domestic workers and reputable employment agencies, and to curtail exploitative operators.” Provisional Record 15, *supra* note 42, para. 24. The representative from Human Rights Watch also argued that “the provisions on employment agencies should be consistent with” Convention No. 181 and its accompanying recommendation, “and should prohibit agencies from charging domestic workers for recruitment costs incurred by employers, because that could lead domestic workers into debt and forced labour.” *Id.*, para. 49.

⁶⁹ Convention No. 181, *supra* note 68, Art. 3.

workers who use private agencies, the Convention also arguably reflected a level of realism, as private agencies are extensively used worldwide. That said, Convention No. 181's record is sobering; only twenty-five countries have ratified it in the fifteen years since it was signed.⁷⁰

Convention No. 181 defines private employment agencies broadly to include natural and legal persons, as well as "services for matching offers of and applications for employment"⁷¹—that is, placement agencies. By contrast, Convention No. 189 and Recommendation No. 201 do not define private employment agencies and do not define employers. The scope of application is broad enough to cover domestic workers' employment relationships not only with householders, but also with employment agencies.⁷² It is worth noting, however, that the convention and recommendation do not specifically mention "public" employment agencies, which remain active in some countries sometimes alongside private employment agencies and other times as a mediator of the transnational supply of domestic workers by licensing such agencies.⁷³

Article 15(e) of Convention No. 189—to the effect that "fees charged by private employment agencies [should not be] deducted from the remuneration of domestic workers"—will likely generate some interpretive challenges in relation to the somewhat different provision of Convention No. 181.⁷⁴ Article 7(1) of the latter states that "[p]rivate employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers." Potentially relevant factors emerge from the drafting history of Convention No. 189: to retain consistency with Convention No. 181; to ensure enough flexibility to promote ratification; to respect differing national conditions; and to ensure that the new instrument is, in the words of the governmental delegate from Australia, not "just a snapshot of what already existed in national laws. The Committee should not just strive to work towards offering protection, but commit to ensuring protection to domestic workers."⁷⁵ The workers' amendment to the *chaqueau* of Article 15—which begins with the words "To effectively protect domestic workers, including migrant domestic workers"—is likely to weigh heavily in any "observation"⁷⁶ on this provision by the ILO's Committee of Experts on the Application of Conventions and Recommendations.

⁷⁰ The number is accurate as of October 4, 2012. See ILO Table of Ratifications, at <http://www.ilo.org/dyn/normlex/en/>. The Convention has been subject to important critique. See, e.g., Paul Benjamin, *Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 181 (Guy Davidov & Brian Langille eds., 2006).

⁷¹ Convention No. 181, *supra* note 68, Art. 1(1)(a).

⁷² See discussion in Provisional Record 15, *supra* note 42, paras. 112–17.

⁷³ The convention and recommendation are both framed, however, to place responsibility on state actors, which would include public institutions like the Philippines Overseas Employment Administration. Linked to the Philippines Department of Labor and Employment, it is responsible for licensing private employment agencies, including those acting on behalf of foreign principals, under the Migrant Workers and Overseas Filipinos Act of 1995, Rep. Act No. 9422 (2007), as amended. Not only does the act regulate "private sector participation in the recruitment and overseas placement of workers by setting up a licensing and registration system," it provides pre-employment services and establishes a "system for promoting and monitoring the overseas employment of Filipino workers taking into consideration their welfare and the domestic manpower requirements." *Id.*, §23(b)(1).

⁷⁴ See, in particular, the explanation offered by the employers' vice-chairperson, which suggests that "his concern was to ensure that such fees were not charged prior to employment but rather that they be paid after domestic workers started receiving remuneration accruing from their employment." Provisional Record 15, *supra* note 42, para. 745. While he further asserted that "there was no prohibition in Convention No. 181 against charging agency fees," Article 7(2) permits exceptions only "[i]n the interest of the workers concerned," and following consultations.

⁷⁵ Provisional Record 15, *supra* note 42, para. 729.

⁷⁶ Article 37(1) of the ILO Constitution, June 28, 1919, 49 Stat. 2712, 225 Consol. T.S. 378, gives the International Court of Justice the authority to issue interpretations of the ILO Constitution and ILO conventions.

Will the new convention and recommendation be vulnerable to the same critique that Dauvergne made against the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families? She argued that that convention reduces the experience of “migrants” to their relationship to the market and considers them to be of international regulatory concern only insofar as they cross borders for “work.”⁷⁷ At the basic level, the new instruments are not subject to this criticism. Unlike the United Nations itself, the ILO is a UN specialized agency whose core mandate is to resist the commoditization of people’s labor power by pursuing social justice objectives, including improving their conditions of labor, in part through standard setting.⁷⁸ At a deeper level, moreover, the instruments bring international labor law closer to addressing the relationship between paid and unpaid care work, as well as between “work,” “rest,” “leisure,” and “life.”⁷⁹ It is telling that Article 1(a) of Convention No. 189 defines “domestic work” simply as “work performed in or for a household or households.” To achieve decent work for all domestic workers, including migrant domestic workers, it is necessary to look beyond the “worker” and beyond the “migrant” to consider the human being, who has care responsibilities of her own.⁸⁰ The instruments constitute an important step in this direction.

III: REPRESENTATION IN THE RENEWING OF INTERNATIONAL LABOR LAW

The adoption process for Convention No. 189 and Recommendation No. 201 has led some to signal a “renewal” of tripartism at the ILO. In March 2008, decent work for domestic workers was the only standard-setting item presented to the ILO Governing Body for potential inclusion in the 2010 and 2011 sessions of the ILC.⁸¹ The ILO’s “factory of international legal standards”⁸² had ground to a virtual halt by the 1990s—a victim of the previously rapid, more or less annual production of instruments, with little attention to low rates of ratification and

Article 37(2) provides for the establishment of a “tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention.” In its various activities, the Committee of Experts on the Application of Conventions and Recommendations, see <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/>, issues formal observations and responds to direct requests for advice. Given that the Committee of Experts was established in 1926 and has been issuing annual reports since 1932, the resulting body of “guidance” is formidable.

⁷⁷ DAUVERGNE, *supra* note 55, at 24.

⁷⁸ Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia), Art. I, May 10, 1944, 15 UNTS 35, at <http://www.un-documents.net/dec-phil.htm> It is worth recalling, however, that one of the ILO’s most influential conventions, the Indigenous and Tribal Peoples Convention, 1989 (No. 169), is anomalous in that it is not obviously focused on the “worker” or even on establishing international labor standards. It has its historical roots, however, in the regulation of colonial labor. See LUIS RODRÍGUEZ-PIÑERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989)* (2005).

⁷⁹ See Guy Standing, *GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE* (1999); Jennifer Nedelsky, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2011); see also Recommendation No. 201, *supra* note 2, Art. 25(1)(c).

⁸⁰ Adelle Blackett, *Domestic Workers at the Interface of Migration & Development: Action to Expand Good Practice* 34 (2011) (background paper prepared for the Global Forum on Migration and Development), at http://gfmnd.org/documents/switzerland/ghana/gfmd_swiss11_ghana_background_paper.pdf.

⁸¹ ILO Governing Body, 301st Session, Decision on the Second Item on the Agenda: Date, Place and Agenda of the 99th Session (2010) of the International Labour Conference (Mar. 16, 2008), at http://www.ilo.org/gb/decisions/GB301-decision/WCMS_093430/lang-en/index.htm.

⁸² RODRÍGUEZ-PIÑERO, *supra* note 78, at 8.

with limited ability to implement.⁸³ Since then, standard setting has resumed cautiously and has drawn on an experimental range of governance techniques in addition to the traditional, prescriptive form of conventions and recommendations.⁸⁴ More broadly, the negotiation and adoption of the new convention and recommendation reflected the ILO's effort to address and respond to a social movement. It was necessary for the ILO's traditional workers' representatives—trade unions—to show themselves ready and able to address the conditions of workers who were not predominantly organized in traditional trade unions and who were demanding recognition.⁸⁵ Organizations of domestic workers converged to claim the human right to be treated as workers. This social movement left an indelible imprint both on the process and the substance of the new convention and recommendation. The process became one in which an amplified form of the ILO's notion of tripartite "social dialogue"⁸⁶ played a central role, and the text of the instruments became much more contextualized and concrete.

In bringing to bear a constructivist, internationalist approach to Lon Fuller's theory of domestic legality, Jutta Brunnée and Stephen Toope present an interactional theory of international law to explain how "communities of practice" shape the transition from social norms to legality.⁸⁷ Brunnée and Toope share with other international lawyers the aim of extricating a legal theory from the various hybrid approaches to governance that have proliferated internationally in recent years.⁸⁸ Balakrishnan Rajagopal more explicitly challenges the silencing of the "other" in the construction of international law. He contends that international institutions constitute "discursive terrains" through which are recounted stories of colonialism, development, and third-world resistance through social movements.⁸⁹ He proposes to "de-elitize international law by writing resistance into it, to make it 'recognize' subaltern voices."⁹⁰ Rajagopal therefore cautions against rejecting international legal order. He calls, instead, for us to recognize how "international law and institutions provide important arenas for social movement action, as they expand the political space available for transformative politics."⁹¹

The challenge of expanding existing political spaces for transformation by the action of social movements took the ILO's long-standing and unique, but also heavily critiqued, tripar-

⁸³ See Simpson, *supra* note 43.

⁸⁴ I discuss these approaches in my review of *LES NORMES INTERNATIONALES DU TRAVAIL*, *supra* note 11, at 101 AJIL 529, 530–32 (2007).

⁸⁵ Luc Demaret, *Decent Work for Domestic Workers—International Convention on the Way*, *LABOUR EDUC.*, nos. 3–4, 2007 at 1, 3–4 (special issue on decent work for domestic workers), available at http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111439.pdf; see Anne Trebilcock, *Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW* 63 (Guy Davidov & Brian Langille eds., 2006).

⁸⁶ For an important early discussion of tripartism, tripartism plus, and social dialogue, see ANNE TREBILCOCK, *TOWARDS SOCIAL DIALOGUE: TRIPARTITE COOPERATION IN NATIONAL ECONOMIC AND SOCIAL POLICY MAKING* (1994). See also Tayo Fashoyin, *Tripartite Cooperation, Social Dialogue and National Development*, 143 INT'L LABOUR REV. 341 (2004).

⁸⁷ JUTTA BRUNNÉE & STEPHEN TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 16 (2011).

⁸⁸ *Id.*; see Benedict Kingsbury, *International Law as Inter-public Law*, in *MORAL UNIVERSALISM AND PLURALISM* 167 (Henry S. Richardson & Melissa S. Williams eds., 2009).

⁸⁹ BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 47 (2003).

⁹⁰ *Id.* at 292.

⁹¹ *Id.* at 23.

tite structure⁹² rather by surprise in the standard-setting exercise leading to the historic new instruments. The ILO's traditional constituencies comprising employers' organizations, workers' organizations, and governments were forced to confront both the limits of their representativeness in relation to domestic workers and how those limits, coupled with interests expressed by domestic workers' groups, affected their mandate and how to carry it out. Those traditional constituencies were moved to engage with the domestic workers who had earlier mobilized as a social movement to put the issue of decent work on the ILO agenda and who were subsequently present in significant numbers to ensure that the new convention and recommendation were adopted.

The employers' representatives were well aware of their steep learning curve. At the outset of the ILC's ninety-ninth session, in 2010, they acknowledged their unfamiliarity with this particular area of employment, affirmed a presumption that domestic work standards would "not directly affect the private sector companies" that they represented, and expressed concerns that "long-standing approaches to regulating work" were not applicable to domestic work.⁹³ Some delegates' procedural maneuvering (among other factors) produced a few tense moments, raising the specter that employers might simply walk out and abandon negotiations. In that same session, at the adoption of the Conclusions proposed in plenary by the Committee on Domestic Workers, several employers critiqued the quality of discussions, and the U.S. employer representative remarked that NGOs had become the fourth part of what were meant to have been tripartite discussions.⁹⁴

By the one-hundredth session, in 2011, however, the perceived interests of employers had evolved, and the delegates included at least one high-level representative from one of the only existing major domestic employers' associations (French *Syndicat des Particulier Employeurs* (Union of Individual Employers)), which is itself affiliated with both a major employers' union federation in France (*Mouvements des Entreprises de France* (Movement of French Enterprises)) and the International Organization of Employers. More generally, employers' representatives paid close attention to the particular features relevant to regulating domestic work relationships, and the employer vice-chairperson ultimately acknowledged the significance of the proposed instruments and commended the tripartite process that brought them about:

The Employer Vice-Chairperson considered that the work of the Committee represented a unique opportunity to bring the international spotlight on law on domestic work. He thanked the NGO Human Rights Watch for helping open the eyes of the Employers' group to the plight of domestic workers. The adoption of a Convention and Recommendation on decent work for domestic workers was a first step; real success would only be achieved when those instruments made a difference to domestic workers' lives. The Committee's discussions were a fine example of global tripartite negotiation. He recalled that, at the opening of the Committee's 2010 sittings, the Employers' group had been in favour of a Recommendation alone, but had shown pragmatism and realism by working towards a Convention and a Recommendation, which was the choice of the majority. He highlighted that his group was proud to be part of that process and saw the advancement of

⁹² Helpful recent critique can be found in JILL MURRAY, *TRANSNATIONAL LABOUR REGULATION: THE ILO AND EC COMPARED* (2001).

⁹³ Provisional Record 12, *supra* note 42, para. 12.

⁹⁴ International Labour Conference, 99th Sess., Provisional Record 19 (2010), at 35, 41.

decent work for domestic workers as a work in progress, in which employers would stand ready to support, lobby and push for implementation of the Convention at national level.⁹⁵

Although employer delegates concertedly argued for positions that promoted their perceived interests, the conceptualization of domestic workers' rights as human rights had a systematic impact on the new convention, even on matters such as the minimum wage. The employers largely supported the final version—a strong contrast to the process that almost prevented the adoption in 1996 of ILO Convention (No. 177) Concerning Home Work.⁹⁶

A crucial element in forging the new convention and recommendation was the participation of domestic workers in the proceedings of the conference committee. Although some domestic workers were members of the officially recognized workers' group, most were not part of the ILO's tripartite structure. An international network⁹⁷ brought together domestic workers from a broad range of national and regional⁹⁸ domestic workers' associations. This network and the International Trade Union Confederation worked in tandem with labor unions (including the food and allied workers' global union, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations) and Women in Informal Employment: Globalizing and Organizing to ensure a role for domestic workers in the deliberations. Domestic workers and other civil society representatives not affiliated with trade unions were physically seated beyond the semicircle of representatives, behind the workers' representatives and alongside other "observers." By the mutual agreement of the tripartite constituents' representatives (chairperson and workers' and employers' vice-chairpersons), they were granted limited speaking rights at the outset of each year's discussion.⁹⁹ They used that time compellingly—for example, to insist that standards that they considered critical, such as access to education, be retained in the instruments. Perhaps most importantly, throughout the conference individual domestic workers participated in the workers' group meetings, lobbied their governmental representatives, interacted with local Swiss media, and told their stories. It was hard for participants to forget the implications of the standard-setting process for the steadfast women of African, Asian, or indigenous descent who followed the deliberations intently, from beginning to end. To be sure, the international negotiations left much to be desired at times, and member states—in particular, from some Western democracies—found it difficult to acknowledge that their national laws remained "colonial" and, in order to achieve

⁹⁵ Provisional Record 15, *supra* note 42, para. 1278.

⁹⁶ *Opened for signature* June 20, 1996, 2108 UNTS 161 (entered into force Apr. 22, 2000); see Dan Gallin, *The ILO Home Work Convention—Ten Years Later* (2007) (presentation at Women, Work and Poverty: SEWA/UNIFEM Policy Conference on Home-Based Workers of South Asia) (noting the significant role of social movements, such as the Self-Employed Women's Association, in advocating for this convention), at http://previous.wiego.org/program_areas/org_rep/Gallin_homework_speech.pdf.

As of October 4, 2012, the convention had been ratified by only ten member states, see ILO Table of Ratifications, *supra* note 70, despite strong governmental support for its adoption. Three of the ratifications were submitted in 2012.

⁹⁷ The International Domestic Workers' Network took a leading role. See *C189: Domestic Workers Are Workers* (n.d.), at <http://www.idwn.info/campaign/c189-domestic-workers-are-workers/>; see also Christine Bonner, *Domestic Workers Around the World: Organizing for Empowerment* (2010), at <http://wiego.org/publications/domestic-workers-around-world-organising-empowerment>.

⁹⁸ Two key regional examples are the Committee on Asian Women and the Latin American and Caribbean Confederation of Domestic Workers.

⁹⁹ Standing Orders of the International Labour Conference, Art. 56, para. 9, at <http://www.ilo.org/public/english/standards/relm/ilc/ilc-so.htm>.

decent work for domestic workers, would need to be reformed rather than accommodated.¹⁰⁰ Nevertheless, domestic workers made themselves visible, made themselves heard, and had a real impact on the outcome.

IV. CONCLUSION

The historic Convention No. 189 and Recommendation No. 201 enrich our understanding of labor rights as human rights by challenging international lawyers to consider what it means for a historically marginalized group of workers to claim a substantive equality-based right to inclusion in the corpus of international labor law and national labor regulation. The instruments propose a fulsome vision of decent work and innovate on thorny topics like working time and migration.

The new instruments also reaffirm the contemporary relevance of social dialogue in working to forge consensus in international law. They broaden the scope of who matters in the ILO's traditionally tripartite process, expanding and deepening the relevant community of practice. They bring a sense of urgency and meaning to an international labor law that seeks social justice.

Any sober reader of the new international labor standards will, of course, be forced to ask whether state-made law, in general, and international labor law, in particular, can transform the structural inequality in domestic work. Harrowing news reports remind academic commentators and policy actors that too many migrant domestic workers continue to be abused—and even die from that abuse. It is conceivable that reformist, rights-based international regulation simply legitimizes a fundamentally inequalitarian, status-based work relationship that has become more rather than less prevalent with globalization.

That most serious concern is also a challenge. It is, of course, crucial to beware of law's fundamental contingency for achieving social justice goals. But it is equally important to respect the fact that domestic workers' social movements have claimed, framed, and now marshal the new convention and recommendation in support of regulatory and broader social change.¹⁰¹ In the process, they have forced international labor law to change, to include them. That is perhaps the strongest reason to keep critical skepticism in check and to work to ensure that the new decent work for domestic workers convention and recommendation are integral to international labor law's reconstruction.

¹⁰⁰ In a number of member states of the global South, regulatory innovation on domestic work has been dynamic and ongoing, and the resulting law and practice was used extensively in the preparatory work for Convention No. 189 and Recommendation No. 201. While the regulatory frameworks in some industrialized nations, such as France, are among the most original in the world, in other countries the laws are outdated and even regressive. Close study is needed of the implementation and enforcement of labor laws in many of the countries highlighted by the ILO. In this context the ILO will need to exercise caution in choosing comparative law examples to guide future law reform. See ILO, *Effective Protection of Domestic Workers: A Guide to Designing Labour Laws* (2012), at http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_173365/lang-en/index.htm; see also Roderick A. Macdonald & Hoi L. Kong, *Patchwork Law Reform: Your Idea Is Good in Practice, but It Won't Work in Theory*, 44 OSGOODE HALL L.J. 11 (2006).

¹⁰¹ See de Sousa Santos & Rodriguez-Garavito, *supra* note 6, at 17 (outlining a "sociology of re-emergence" that seeks to move beyond hyper-deconstructive critique toward a new legal "common sense"); see also Hilary Charlesworth & David Kennedy, *Afterward: and Forward—There Remains So Much We Do Not Know*, in INTERNATIONAL LAW AND ITS OTHERS, *supra* note 6, at 401, 408 (calling for international lawyers to confront the responsibility of being "active participants in intensely political and negotiable contexts . . . without sheltering behind the illusion of an impartial, objective, legal order").