

# CHAPTER 2

## MAKING RIGHTS IN TIMES OF CRISIS: CIVIL SOCIETY AND THE MIGRANT WORKERS CONVENTION

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### 1 Introduction

[I]t turned out that the moment human beings lacked their own government and had to fall back on their minimum rights, no authority was left to protect them and no institution was willing to guarantee them ... [What was] supposedly inalienable, proved to be unenforceable.

Hannah Arendt, 1951<sup>1</sup>

Judging by headlines in the popular press, we are living in ‘times of crisis’. Economic, political and environmental shocks are driving international migration on a scale not seen since the end of World War II, galvanising many of the same debates. This is no accident; institutional arrangements defining the landscape of migration policy today are largely the product of political and ideological struggles surrounding post-war reconstruction. The sociopolitical context in which these institutions operate has changed dramatically with the deepening of a globally networked economy. Yet throughout this period, controversies about racism and xenophobia, humanitarian obligation, and national sovereignty have had a tendency to reproduce similar dilemmas. For example, as Hannah Arendt famously observed, many of those who slip through the cracks between nation-states become legally invisible at the local level, however integral they may become to the communities in which they live and work.

Herself ‘stateless’ at the end of World War II, Arendt lived the bitter irony of an emergent world order in which human rights were a function of national citizenship. Even as the Universal Declaration of Human Rights (Universal Declaration) was being drafted, she expressed skepticism with regard to an international legal regime that guaranteed rights as a natural abstraction, arguing that such a conceptualisation

<sup>1</sup> H Arendt ‘The decline of the nation-state and the end of the rights of man’ in *The origins of totalitarianism* (2004) 372.

obscures the active, historical process through which we create rights in public life. According to Arendt, refugees are ‘the most symptomatic group in contemporary politics’<sup>2</sup> because they make evident a contradiction that lies at the heart of the liberal nation-state itself, a universal rule of law authorised by ‘a people’ with a particular and necessarily exclusive membership.

The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general – without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself [sic] – *and* different in general, representing nothing but his [sic] own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.<sup>3</sup>

She considered the post-war refugee crisis not as the aberrant consequence of war, but a feature of national sovereignty itself, one that would continue to manifest itself through discrimination and criminalisation of migrants.

Today, migrants in many countries have effectively traded their citizenship rights at home for a job elsewhere. This may be because those rights have lost their meaning under intolerable conditions of war, poverty, environmental crisis, political repression, or discrimination. Others leave home to reunite with family, or to find a better job, education, or investment capital. Whatever the combination of factors that impels that drastic and often dangerous step, most international migrants will find work, wherever they land.<sup>4</sup> As such, migrants are likely to be integral participants in multiple life-worlds, contributing through their labour, social networks and remittances to welfare and economic development both at home and abroad.<sup>5</sup> This situation often receives tacit approval as long as it enhances local competitiveness and preserves the viability of other, better-paid jobs. On the other hand, fears of economic insecurity and terrorism have also fueled xenophobia in many countries, contributing to a volatile policy environment indifferent to both the contributions and the needs of non-citizens.

2 Arendt (n 1 above) 353.

3 Arendt (n 1 above) 383.

4 As of 2013, about 232 million people reside outside their country of birth. According to the ILO, most of these persons, or about 90 per cent – a population roughly the size of Brazil’s – are working or being supported by someone who is. ILO *International labour migration: A rights-based approach* (2010) 15-19. About 7 per cent of this total, or 15.7 million persons, are classified as refugees. UN Department of Economic and Social Affairs, Population Division *Trends in international migrant stock: The 2013 revision* United Nations database, POP/DB/MIG/Stock/Rev 2013. See [www.unmigration.org](http://www.unmigration.org). (accessed 25 October 2017).

5 Key sources on the formation of transnational communities include: L Basch et al *Nations unbound: Transnational projects, postcolonial predicaments and deterritorialized nation-states* (1994); A Ong *Flexible citizenship: The cultural logics of transnationality* (1999); and J Urry *Mobilities* (2007).

These developments manifest the ways in which globalisation both challenges and consolidates national sovereignty. Sociologists have brought attention to the ways in which differential pathways in the international circulation of money, goods, services, and people have contributed to a gradual mutation of state-centred border regimes. Increasingly, international mobilities traverse a global web of bordered spaces, with variable sites of enforcement governed by often contradictory norms and practices at multiple scales of jurisdiction.<sup>6</sup> Within this increasingly fragmented institutional terrain, rearrangements of economic interest and legal authority streamline normative processes in ways that enhance efficiency at the expense of transparency.<sup>7</sup> The encompassment of migration policy within security discourse reflects this trend, which is giving rise to autonomous systems largely beyond the reach of traditional democratic processes. On the other hand, these dynamics are also creating a transnational public sphere of civil society organisations, committed to preserving a space for participatory politics wherever critical decisions are being made.

If Arendt is right that the exclusion of the non-citizen has been a condition of possibility for national sovereignty, then attention to changes in the conceptualisation of that critical figure – as migrant or refugee, desirable worker or unwelcome invader – may illuminate transformations in the institution of citizenship.<sup>8</sup> In this chapter, we pursue such an analysis with respect to the erratic trajectory of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). Like the 1951 Convention Related to the Status of Refugees, the ICRMW asserts an obligation by sovereign states to recognise a non-citizen's right to have rights. The earlier convention applies to an unrecognised foreigner's rights at entry and while under the protection of a state granting asylum; the latter applies to all non-

6 Sociologist Saskia Sassen calls this diffusion of border regulation 'transversal borderings'. See S Sassen 'Bordering capabilities versus borders: Implications for national borders' (2009) 30 *Michigan Journal of International Law* 567.

7 It may appear as though institutional fragmentation would undermine rather than enhance efficiency. As a number of observers have pointed out, however, tendentious interpretations of the 'rule of law' and a 'thinning out' of bureaucratic processes can facilitate discretionary decision-making in ways that serve short-term managerial objectives. See C Dauvergne 'Sovereignty, migration and the rule of law in global times' (2004) 67 *The Modern Law Review* 588-615. For more on the transformations of authority and scale within contemporary legal systems, see F von Benda-Beckmann et al (eds) *Rules of law and laws of ruling* (2008); P Schiff Berman 'The globalization of jurisdiction' 2002 151 *University of Pennsylvania Law Review* 311; and JDR Craid & S Michael Lynk *Globalization and the future of labour law* (2006).

8 An extensive legal scholarship on the denationalisation of citizenship has emerged in recent years. See L Bosniak 'Citizenship denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447; A Shachar *The birthright lottery: Citizenship and global economy* (2009); and W Boyd 'Ways of seeing in environmental law' (2010) 37 *Ecology Law Quarterly* 843. In the social sciences literature, see S Sassen (n 6 above); EF Isin *Being political: Genealogies of citizenship* (2002); S Bibler Coutin *Nations of emigrants: Shifting boundaries of citizenship in El Salvador and the United States* (2007); and T Nail *The figure of the Migrant* (2015).

citizens already residing in another country. Strictly speaking, their contents are complementary, mutually reinforcing, and consistent with a growing body of international law that recognises 'the inherent dignity and the equal and inalienable rights of all members of the human family'.<sup>9</sup> However, as nation-states struggle to assert boundaries in the midst of ongoing crises, real and perceived, resistance to both Conventions brings into stark relief the practical limitations of this formulation.

In the pages that follow, we consider current anxieties over refugee admissions and the role of migrant workers within the historical context of these landmark treaties. Separated by forty years of dramatic change, they represent different moments in the unfolding of the legal and political tensions at the heart of Arendt's paradox, as colonial independence movements, the end of the Cold War, and changes in the organisation of capitalism generated new migrations and inflected political sensitivities regarding how to address them. Notwithstanding significant shifts in the human rights landscape, however, negotiations surrounding the drafting and promotion of the ICRMW have taken place on a preexisting field of legal qualifications that sabotage its reception by many states, even as certain features of the global environment have intensified its urgency and mobilised an international movement for migrants' rights. Today, the legal distinction between refugee and migrant represents a fault line of political, institutional and ethical tensions that underlies the international law governing the treatment of non-citizens. Yet human rights, what historian Kenneth Cmiel called 'that noble, yet slippery phrase', are made not given; they circulate like a global currency representing changing aspirations of justice, expressing the local histories of universal claims.<sup>10</sup> Thus, we argue that the heated debates over categorical definitions are less a matter of legal interpretation than of contradiction embedded within the law itself, which is never devoid of politics. Furthermore, in turning to the lessons of history to make sense of our current conundrum, we find that the ICRMW serves as a particularly revealing case study for considering how rights have become a compelling motivation for collective action.

## **2 Why must they move? The paradox of the deserving migrant**

Whether it is considered the cause or the consequence of crisis, international migration tends to provoke state action in a political climate of uncertainty. In recent years, the US government has been taken to task for detaining undocumented minors and their guardians, while Mexico

9 Preamble, Universal Declaration of Human Rights.

10 K Cmiel 'The recent history of human rights' (2004) 109 *American Historical Review* 126-134.

cracks down against Central Americans along its own southern border;<sup>11</sup> the Dominican Republic implemented a court ruling denying birthright citizenship to children of Haitian descent,<sup>12</sup> and researchers investigating the abuse of migrant workers have been intimidated, harassed, and expelled from Thailand, Qatar and the United Arab Emirates.<sup>13</sup> The Australian High Court has upheld the offshore detention of asylum seekers on the pacific island of Nauru,<sup>14</sup> while the Florida state legislature debated a bill that would allow the governor to use military force to block refugees from entering or resettling in the state.<sup>15</sup> Even in Europe, where the principle of *non-refoulement* has been most thoroughly incorporated into national and regional statutes,<sup>16</sup> politicians espousing an agenda of nativist populism have gained ground throughout Europe,<sup>17</sup> as a growing reluctance to grant asylum to ‘third-country nationals’<sup>18</sup> erupts into open hostility.

Confronted with the most significant cross-border displacement of people since Arendt’s time, many Europeans express skepticism with respect to the viability of the Refugee Convention.<sup>19</sup> The individuals seeking asylum are not only fleeing the war in Syria, they point out, but also the warlords of Somalia, the flooding in Bangladesh, devastation in Iraq and Afghanistan, and numerous other circumstances of varying severity. In fact, the vast majority of these asylum seekers do not qualify as

11 See *Jenny L Flores et al v Jeh Johnson et al* 2015 CD Cal CV 85-4544 DMG (AGRx); and ‘Mexico’s migration crackdown escalates dangers for Central Americans’ *The Guardian* 13 October 2015.

12 See JM Katz ‘In exile’ *New York Times Magazine* 13 January 2016; *Case of Expelled Dominicans and Haitians v Dominican Republic* IACHR (28 Aug 2014) Ser C 282(1) Official Summary; and K Culliton-González ‘Born in the Americas: Birthright citizenship and human rights’ (2012) 25 *Harvard Human Rights Journal* 127.

13 See ‘Human rights in Thailand: Andy Hall’s legal battle to defend migrant workers’ *The Guardian* 22 January 2016; ‘UK human rights researchers held in Qatar Freed’ *The Guardian* 9 September 2014; ‘NYU professor is barred by United Arab Emirates’ *New York Times* 16 March 2016.

14 ‘High court finds offshore detention lawful’ *The Sydney Morning Herald* 3 February 2016.

15 ‘Florida bills would give state power to block refugees’ *Naples Daily News* 22 January 2016.

16 ‘Non-refoulement’ is the legal term of art for the prohibition of expulsion or return: ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ Convention Relating to the Status of Refugees art 33(1). See European Union Agency for Fundamental Rights and Council of Europe *Handbook on European law relating to asylum, border and immigration* (2014).

17 See ‘The March of Europe’s Little Trumps’ *The Economist* 12 December 2015; RM Dancygier *Immigration and conflict in Europe* (2010).

18 See T Hatton ‘The rise and fall of asylum: What happened and why?’ (2009) 119 *The Economic Journal* 183. In Europe, the term ‘third-country national’ refers to individuals who are nationals of a country that is not a member state of the European Union.

19 UNHCR *Global trends report* (2015); Amnesty International ‘EU-Turkey Summit: EU and Turkish leaders deal death blow to the right to seek asylum’ 8 March 2016 <https://www.amnesty.org/en/latest/news/2016/03/eu-turkey-summit-reaction/> (accessed 1 June 2016).

'Convention refugees', although their moral claim for protection cannot be denied. To quote Alexander Betts:

[A]lthough states' obligations to those fleeing persecution are based on a relatively high degree of legal precision, those relating to states' obligations to people fleeing deprivations are based on legal imprecision.<sup>20</sup>

The diversity of this 'mixed migration' brings to the fore the logical inconsistencies of a refugee protection regime founded on ambiguous criteria, exposing the parallel classifications of 'labour migrant' and 'refugee' as disparate categories that are neither mutually exclusive nor internally coherent.

Of course, the Refugee Convention was never intended to offer a comprehensive solution to the policy challenges of international migration. One of the earliest legally-binding treaties to follow the 1948 Universal Declaration, it requires only that states provide temporary protection to a relatively narrow category of persons who have already left their country, and can demonstrate a well-founded fear of persecution, should they return, for reasons of race, religion, nationality, political opinion, or membership of a particular social group.<sup>21</sup> As the specialised agency concerned with rights at work, the International Labour Organisation (ILO) was tasked with representing the interests of migrants within global labour markets. The Migration for Employment Convention (Revised), 1949 (No 97) and the Migrant Workers Convention, 1975 (No 143) both set minimum standards for equality of treatment, and provide guidelines for preventing the abuse of migrant workers. By bringing these labour rights into the human rights framework, the architects of the 1990 ICRMW hoped to lend them a higher degree of visibility, sectoral scope and international prestige.<sup>22</sup> Yet states have been reluctant to support any of these instruments,<sup>23</sup> and today the ICRMW is rarely raised – by advocates, journalists, or even human rights officials – as a point of

20 A Betts *Survival migration: Failed governance and the crisis of displacement* (2013) 2.

21 The 1951 Convention was drafted explicitly to address the post-war refugee crisis in Europe; the 1967 Protocol eliminated its temporal restriction beyond 1 January 1951, and extended its universal coverage for the majority of its signatories. See P Weis *The Refugee Convention, 1951: The Travaux Préparatoires analyzed with a Commentary by Dr Paul Weis* (1990).

22 As with UN treaties, ILO conventions allow states some flexibility in tailoring their commitments to their unique legal and administrative systems, and degree of development. However, while certain conventions may permit partial ratification, states cannot make reservations to their commitments. This has discouraged ratification of ILO conventions in some cases. Some states also object to ILO's tripartite structure, which allows unions to play a key role in the organisation's governance. See G Battistella 'Migration and human rights: The uneasy but essential relationship' in De Guchteneire et al (eds) *Migration and human rights: The United Nations Convention on Migrant Workers' Rights* (2009).

23 49 of 187 ILO member states have ratified Convention 97, and 23 have ratified Convention 143. To date, 51 states are party to the ICRMW: Albania, Argentina, Algeria, Azerbaijan, Bangladesh, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Congo, East Timor, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guyana, Guinea, Honduras, Indonesia, Jamaica, Kyrgyzstan,

reference.<sup>24</sup> Though the ICRMW arguably creates no new rights beyond those already codified in existing treaties, it has by far the lowest ratification rate of any of the core international human rights instruments, and has gained the support of only Argentina amongst major countries of immigration.<sup>25</sup> The Refugee Convention, on the other hand, is one of the most widely ratified treaties in the United Nations system.

This disparity in the legal authority of the two Conventions suggests that the symbolic recognition of rights does not always coincide with the instrumental rationalities that are key to the application of international norms. Some rights have a price that states are not willing to pay,<sup>26</sup> whatever their formal necessity according to the Universal Declaration. Over the past century, standards for equality of treatment have developed in dialectical tension with economic and political imperatives, giving rise to a legal infrastructure at the international level that is increasingly sensitive to patterns of exclusion based on race and ethnicity, gender, age and disability.<sup>27</sup> Because national governments remain the primary guarantors of rights, however, struggles for recognition are generally realised within the boundaries of the nation-state, where efforts to protect the rights of non-citizens have often had difficulty gaining the support of government or civil society actors concerned with protecting the interests of domestic constituencies.<sup>28</sup> Thus, although international migration policies are driven by interests at every level, they have historically represented a blind spot with regard to the formal guarantees of liberal democracy.<sup>29</sup>

Lesotho, Libya, Madagascar, Mali, Mauritania, Mexico, Morocco, Mozambique, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Saint Vincent and the Grenadines, Syria, Tajikistan, Turkey, Uganda, Uruguay and Venezuela.

- 24 For example, two key human rights indexes barely mention the ICRMW, despite extensive discussion of the other core conventions. See HJ Steiner et al (eds) *International human rights in context: Law, politics, morals* (2008) where it appears twice in 1492 pages: in a list of Human Rights Treaties on 918 and in a table on 920; and L Henkin et al (eds) *Human rights* (2009), where it is completely absent, despite an extensive section entitled 'Refugees and extraterritorial application' 276-314.
- 25 It should be noted, however, that Burkina Faso, Ghana, Libya, Mexico, Mauritania, Morocco, Nigeria, Senegal and Turkey have become important states of transit and, in some cases, destination in recent years.
- 26 See M Ruhs *The price of rights: Regulating international migration* (2013).
- 27 For competing histories of the emergence of the contemporary human rights regime, see L Hunt *Inventing human rights: A history* (2008); and S Moyn *The last utopia* (2012).
- 28 See L Malkki 'Citizens of humanity: Internationalism and the imagined community of nations' (1994) 3 *Diaspora* 41; J Crush 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2001) 38 *International Migration* 103; JA Bustamante 'Immigrants' vulnerability as subjects of human rights' (2002) 36 *International Migration Review* 333. N Piper 'Rights of foreign workers and the politics of migration in South-East and East Asia' (2004) 42 *International Migration* 71; and D Cole 'The idea of humanity: Human rights and immigrants' rights' (2006) 37 *Columbia Human Rights Law Review* 627.
- 29 For three very different developments of this idea, see JH Carens *The ethics of immigration* (2013); L Bosniak *The citizen and the alien: Dilemmas of contemporary membership* (2006); and B Honig *Democracy and the foreigner* (2001).

This particular vulnerability of migrant workers to invisibility and exploitation has been evident to scholars and reformers for over a century.<sup>30</sup> The heyday of industrial capitalism wrought its own globalisation effects across the globe, as technological innovations, colonial expansion, and social upheaval generated unprecedented flows of people, goods, and capital throughout the world. In 1889, pioneer migration scholar EG Ravenstein observed that:

Bad or oppressive laws, heavy taxation, an unattractive climate, uncongenial social surroundings, and even compulsion (slave trade, transportation), all have produced and are still producing currents of migration, but none of these currents can compare in volume with that which arises from the desire inherent in most men [sic] to 'better' themselves in material respects.<sup>31</sup>

Between 1860 and 1914, as many as 80 million rural Europeans moved to cities within Europe, and 52 million moved to the Americas, Asia or Oceania.<sup>32</sup> Also significant in terms of sheer numbers during this period were an estimated 3.1 million Chinese and 1.3 million Indians, migrating to the Americas, Southeast Asia, and the Caribbean.<sup>33</sup> There were significant variations amongst the 'push' and 'pull' factors motivating these patterns of mobility, which often involved seasonal or temporary work, as well as the expansion or redirection of pre-existing labour markets.

Though the demand for workers and growing economic integration encouraged relatively open immigration regimes, techniques to identify and manage population movements were a preoccupation of emerging state bureaucracies throughout the 19th century. Parallel with the brutal importation of African slaves to the new world were regulated indenture and guestworker programmes, particularly for Asians recruited into the colonies. Particular histories gave rise to a variety of sociopolitical configurations across the global landscape. For example, despite continuous hostility towards foreign workers in France, weak labour politics contributed to a tradition of relatively open immigration policies and a fluctuating economic dependence on migrants,<sup>34</sup> while in Germany, the demand for surplus labour was met through regulations privileging certain ethnic groups.<sup>35</sup> Even the 'assisted laissez faire' invitations of settler societies such as the United States, South Africa and Australia were

30 See KJ Bade *Migration in European history* (2003); A McKeown 'Global migration, 1846-1940' (2004) 15 *Journal of World History* 155; and A Zolberg *A nation by design: Immigration policy in the fashioning of America* (2006).

31 EG Ravenstein 'The laws of migration' (1889) 52 *Journal of the Royal Statistical Society* 286.

32 See C Strikwerda 'Tides of migration, currents of history: The state, economy, and the transatlantic movement of labor in the Nineteenth and Twentieth Centuries' (1999) 44 *International Review of Social History* 367.

33 R Sanjek 'Rethinking migration, ancient to future' (2003) 3 *Global Networks* 315.

34 G Noiriel *The French melting pot: Immigration, citizenship and national identity* (1996).

35 Restrictions against Jewish and Polish migrants were frequently subverted by farmers and industrialists intent on reducing labour costs. See Bade (n 30 above).

accompanied by racial exclusions and expectations of national assimilation, reflecting public investment in social reproduction.<sup>36</sup>

During the interwar period, the swelling of nationalism amidst interstate tensions initiated the adoption of identity documents, census technologies and an intensification of policing in most countries. This institutionalisation of state power implied the ethno-national branding of foreign-born populations through legal quotas, deportations and widespread stigma both in law and practice. Though the Treaty of Versailles created an intergovernmental infrastructure of peacekeeping and human rights institutions, the climate was not amenable to international coordination, and the League of Nations was hogtied from the start. In the Preamble to the ILO's 1919 Constitution, 'protection of the interests of workers when employed in countries other than their own' and 'recognition of the principle of equal remuneration for work of equal value' featured amongst the new organisation's key imperatives.<sup>37</sup> However, the ILO could not convince governments to address migration, and efforts by the International Federation of Trade Unions were no more successful. As argued by John Torpey, states seized a monopoly over 'the legitimate means of movement' in response to a growing international imperative to sort their own citizens – and exclude outsiders – in order to more effectively extract and mobilise resources within a congealing system of states.<sup>38</sup> As depicted vividly by Arendt, this process of consolidation culminated in the displacement of somewhere between 50 and 60 million refugees by the World War II, amounting to about 10 per cent of Europe's total population, as well as the murder of 11 million Jews, Gypsies, Slavs, homosexuals, people with disabilities and political dissidents.<sup>39</sup>

Prior to the 1951 Convention, refugee policies were generally conceived in relation to labour mobility. According to Katy Long:

While the focus on migration was to some extent dictated by the lack of prospects for return or local integration, it also reflected a broader cultural understanding that placed economic poverty at the centre of a European plan for 'emigration as development.'<sup>40</sup>

This 'broader cultural understanding' survived into the early years of the post-war period in the form of the Keynesian welfare state, which accompanied the expectation of full employment as a necessary feature of global prosperity. Seminal to this inclusive concept of rights was

36 See GL Neuman 'The lost century of American immigration law' (1993) 93 *Columbia Law Review* 1833; and M Ngai *Impossible subjects: Illegal aliens and the making of modern America* (2004).

37 ILO Constitution, Preamble.

38 J Torpey *The invention of the passport: Surveillance, citizenship, and the state* (2000).

39 See Bade (n 30 above) 204; M Mazower *Dark continent: Europe's twentieth century* (2000).

40 K Long 'When refugees stopped being migrants: Movement, labour and humanitarian protection' (2013) 1 *Migration Studies* 11.

TH Marshall's 1949 essay, 'Citizenship and social class', which considers social citizenship to be the crowning stage in the historical development of the modern state. Marshall identifies a first 'civic' phase with the 18th century revolutions establishing the individual right to property, personal liberty, and access to justice. The second stage enshrined 'political rights' through the expansion of the franchise to working men, former slaves and women over the course of the 19th and early 20th centuries. Marshall anticipated that the 'social rights' of the late 20th century would offer not only opportunities for economic improvement, but also a universal entitlement 'to a share in the full social heritage and to live the life of a civilized being according to the standards prevailing in the society'.<sup>41</sup>

This sensibility is evident in the 1948 Universal Declaration, which acknowledges the incapacity of a rights-bearing individual to exercise autonomy under circumstances of economic deprivation.<sup>42</sup> However, as the United States and the Soviet Union locked horns over the ideological grounds of the post-war world order, skirmishes over the form, content, and institutional stewardship of international norms gradually entrenched a conceptual opposition between civil and economic rights as a matter of political common sense.<sup>43</sup> In the shadow of the Holocaust, the egalitarian provocation of the Eastern bloc demanded a counter-vision of altruism that remained faithful to the liberal ideals of social contract and possessive individualism.<sup>44</sup> Thus, the 1951 Convention is an artifact of highly partisan disputes over refugee resettlement, particularly with regard to Russians resisting repatriation.<sup>45</sup> Its narrow scope was designed to recognise a particular kind of individual claim against a particular kind of state.

Even with such limited applicability, however, the architects of the refugee protection regime had difficulty convincing states to support the principle of *non-refoulement*, which cut to the defining principle of modern sovereignty: the power to control access to national territory. Such reluctance reflected ambivalence, even at that early stage, towards social citizenship as a principle of international human rights. In the polarising climate of the Cold War, a model of civil society grounded on the contractual exchange of individual rights and obligations stood in uneasy

41 TH Marshall *Citizenship and social class and other essays* (1950) 78.

42 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' Art 25(1) Universal Declaration of Human Rights, 1948.

43 See Long (n 40 above); R Karatani 'How history separated refugee and migrant regimes: In search of their institutional origins' (2005) 17 *International Journal of Refugee Law* 517.

44 CB Macpherson *The political theory of possessive individualism: From Hobbes to Locke* (2011).

45 For a detailed account of the circumstances giving rise to the contemporary refugee protection regime, See G Loescher *Beyond charity: International cooperation and the global refugee crisis* (1993).

tension with solidarity-based notions of collective good. Capitalist democracies distanced themselves from communism by adopting a notion of the 'good society' that approached social welfare as an enhancement of mutual self-interest. This valorisation of political freedom over economic security represented a disavowal of the socialist tradition of social reform, according to which the deprivations of the few jeopardise the well-being of the whole. The humanitarian obligations of refugee protection were thereby construed as a burden to be assumed as a form of charity, rather than an essential commitment to international stability.

The contingencies of the past are easily interpreted as the inevitable foundations of a familiar present.<sup>46</sup> This is why it is important to point out that, even as certain conceptual oppositions were congealing into the post-war infrastructure, alternative scenarios were also circulating within the international community. The ILO, in particular, approached the internationalist aspiration of peace and human development as a problem of distribution.<sup>47</sup> In 1946, the first of a series of conferences was convened to position the agency as a supranational authority for the identification, transportation and settlement of migrants and refugees.<sup>48</sup> Following two years of laborious consultations, this plan, involving a host of UN and specialised agencies, was the centrepiece of an international conference in Naples, Italy. The conference, however, was a disaster, its vision of international oversight incompatible with an emergent world order that was oriented by national interest.

It soon became evident that leaders in the United States and Western Europe had another model in mind. Two weeks later, the US Congress appropriated ten million dollars to encourage emigration from Europe, provided that 'none of the funds made available pursuant to the proviso should be allocated to any international organization which was in its membership any Communist-dominated or Communist-controlled country'.<sup>49</sup> In Brussels at the end of that year, a Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME) was agreed upon by representatives of 28 non-Communist governments, with a much more limited mandate: one year of intergovernmental operations and transportation services on a cost-reimbursable basis. According to Reiko Karatani, the most important

46 For a classic meditation on modernity as a retrospective reading of the past, see R Koselleck *Futures past: On the semantics of historical time* (1979).

47 During the 114th Session of the ILO Governing Body, in March 1951, the Director-General remarked that '[a]ction to promote a more judicious distribution of the world population was in my view an effective means of fighting the causes of war ...' See Karatani (n 43 above) 523.

48 These deliberations produced the Migration for Employment Convention 97 of 1949 and Recommendation 86, and led to conversations with the UN Secretariat culminating in the endorsement by the Economic and Social Council (ECOSOC) of a blueprint for the international coordination of migration flows. Karatani (n 43 above) 524-25.

49 Karatani (n 43 above) 536.

difference between the operational frameworks of these two proposals was the autonomy provided for national immigration regimes.<sup>50</sup> This allowed for the continuation of business-as-usual with regard to the variability of international migration flows, accommodating the economic interdependencies, restrictionist tendencies, and flexibilities of the past within an international framework that privileged development over the protection of rights.

The formation of the UN and the institutionalisation of refugee protection under an Office of the High Commissioner for Refugees (UNHCR) mark a decisive turning point in the international recognition of civil and political rights. However, the status of migrant workers within the international system remained underdetermined, we argue, not because their rights' claims were in doubt, but because their presence as non-citizens was in large part driven by an economic rationality of supply and demand which could not be reconciled with the logic of individual entitlement. Quite the contrary, in fact; this period was equally marked by vigorous debates regarding how states might best achieve 'the affluent society'.<sup>51</sup> As historian Mary Ann Glendon recounts, the Universal Declaration left room for choice amongst a range of means for realising this goal:

At the national level, welfare principles are sometimes framed as obligations of society and the state rather than entitlements of individuals. With hindsight, it is perhaps regrettable that the framers, in dealing with these provisions, did not adopt the obligation model. To couch the social security and welfare principles in terms of a common responsibility might have resonated better than rights in most of the world's cultures and would still have left room for experiments with different mixes of private and public approaches.<sup>52</sup>

While some consensus was reached regarding aspirational standards of human dignity, the more contentious question of economic justice was deferred indefinitely towards a future of global peace and prosperity. Many leading economists were confident that this would come soon, provided

50 Karatani (n 43 above). 538. 'Experts summarised the PICMME as "a multilateral institution outside of the United Nations, with an American Director, and a board composed entirely of democratic nations friendly to the United States."' PICMME would go through a number of name changes as its mandate expanded, becoming the Intergovernmental Committee for European Migration (ICEM) in 1952, the Intergovernmental Committee for Migration (ICM) in 1980, and the International Organisation for Migration (IOM) in 1989.

51 See JK Galbraith *The affluent society* (1958). For a balanced account of postwar debates over 'self-adjusting markets' see E Helleiner *Forgotten foundations of Bretton Woods: International development and the making of the postwar order* (2014).

52 MA Glendon *A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 189.

that states were free to manage their national economies with minimal interference.<sup>53</sup> According to convergence theory – and the sociology of modernisation on which it was based – wealthier countries shared certain features of sociopolitical organisation: the mass production and consumption of manufactured commodities, the rapid proliferation of media technologies, neocorporatism, and a social safety net. Variations in relative socioeconomic stability were considered the effect of inevitable business cycles that could be contained through built-in countercyclical policies such as unemployment insurance and currency stabilisation. Disparities between ‘first, second and third worlds’,<sup>54</sup> on the other hand, were explained in evolutionary terms as the effect of inadequate property and contract law, volatile class relations, and underdeveloped industrial infrastructure, all features which could be remedied by political reform and successive ‘stages of growth’.<sup>55</sup>

Less widely recognised was the degree to which the terms of participation in global markets were skewed in favour of countries with a growing population that could afford to consume what it produced, a state of affairs made possible by a political compromise with labour and the externalisation of inflationary pressures.<sup>56</sup> Nor was there widespread awareness that the dramatic postwar expansion of the global economy was fueled by a steady stream of migrants into the labour-hungry sectors of the industrialised world. The rapid reconstruction of Europe under the Marshall Plan demanded colonial subjects and guestworkers from the Mediterranean and Eastern Europe; in the United States, Mexican *braceros* carried the agricultural sector; Canada and Australia took advantage of European refugees to fill labour shortages; while South African industrialisation relied on migrants from throughout southern and central Africa.<sup>57</sup> The inequalities in income and opportunities driving this ample labour supply were not mitigated by the independence of former colonies, which in most cases continued to depend on trade relations with the former metropole. Eventually, a counter-narrative emerged attributing the

53 WW Rostow *The stages of economic growth: A non-Communist manifesto* (1960); S Gindin & L Panitch *The making of global capitalism: The political economy of American empire* (2012).

54 P Worsley *The three worlds: Culture and world development* (1984).

55 B Jessop *The capitalist state* (1982).

56 R Gilpin *Global political economy: Understanding the international economic order* (2001) 365-66.

57 See R Hansen ‘Migration to Europe since 1945: Its history and its lessons’ in S Spencer (ed) *The politics of migration: Managing opportunity, conflict and change* (2003); DG Gutiérrez ‘Migration, emergent ethnicity, and the ‘third space’: The shifting politics of nationalism in Greater Mexico’ (1999) 86 *Journal of American History* 481; P Ongley & D Pearson ‘Post-1945 international migration: New Zealand, Australia and Canada compared’ (1995) 29 *International Migration Review* 765; and F Wilson ‘International migration in Southern Africa’ (1976) 10 *International Migration Review* 451.

modernisation standard of the 'convergence club' to the comparatively lower cost of natural and human resources from the Global South.<sup>58</sup>

For roughly three prosperous decades, the Western countries produced enough wealth to accept limited numbers of asylum seekers without an overt guarantee of socio-economic benefit. In a sense, this might be considered a strategic exchange, insofar as the political advantages of asylum policies reinforced Cold War commitments.<sup>59</sup> These commitments were further codified in the segregation of 'social, economic, and cultural rights' from 'civil and political rights' into separate Covenants,<sup>60</sup> both drafted in 1954 and adopted in 1966, with extensive reservations in which states positioned themselves along the geopolitical divide. In 1967, a Protocol was adopted to expand the spatiotemporal reach of the Refugee Convention, if not its criteria for eligibility, permitting states to conduct foreign policy through targeted admissions. At the same time, governments continued to improve the legibility of social processes in order to facilitate both governance and control.<sup>61</sup> Cold War sensitivities motivated the adoption of stringent border controls in late colonial and post-colonial territories such as South Asia, Malaysia and Hong Kong.<sup>62</sup> In occupied Japan, a domestic labour surplus and entrenched discrimination, under perceived threat from the Korean War, led to the deportation and indefinite detention of more than two million long-term residents of Korean descent.<sup>63</sup>

Thus, both refugee movements and labour migrations during *les trentes glorieuses*<sup>64</sup> were shaped by the increasing militarisation of relations between 'the West and the rest' under the pressure of disappointing

- 58 G Arrighi et al 'Industrial convergence, globalization, and the persistence of the North-South Divide' (2003) 38 *Studies in Comparative International Development* 3.
- 59 Receiving countries could use population flows 'to discredit both the government or country of origin and to bolster the image of countries granting them asylum.' In other situations, Cold Warriors could 'take advantage of refugee movements by arming and training some of the people concerned and using them to destabilize the government within their homeland'. J Mertus 'The state and the post-Cold War refugee regime: Models, new questions' (1998) 10 *International Journal of Refugee Law* 321, citing UNHCR *The world's refugees: In search of solutions* (1995) 30 37.
- 60 See A Kirkup & T Evans 'The myth of Western opposition to economic, social, and cultural rights? A reply to Whelan and Donnelly' (2009) 31 *Human Rights Quarterly* 221.
- 61 J Scott *Seeing like a state: How certain schemes to improve the human condition have failed* (1998).
- 62 T Mahmud 'Colonial cartographies, postcolonial borders, and enduring failures of international law: The unending wars along the Afghanistan-Pakistan frontier' (2011) 36 *Brooklyn Journal of International Law* 1; A Kuar 'Labor crossings in Southeast Asia: Linking historical and contemporary labor migration' (2009) 11 *New Zealand Journal of Asian Studies* 276; and A Mckeown *Melancholy order: Asian migration and the globalization of borders* (2008).
- 63 T Morris-Suzuki 'The wilder shores of power: Migration, border controls and democracy in postwar Japan' (2006) 86 *Thesis Eleven* 6.
- 64 The term coined by French demographer Jean Fourastié to describe the years between 1945 and 1975, during which the citizens of the world's industrial centers enjoyed high productivity, average wages, rates of consumption, and state-subsidised social benefits. See J Fourastié *Les trentes glorieuses, ou la révolution invisible de 1946 à 1975* (1979).

development outcomes. In 1965, the replacement of nationality-based entry quotas in the United States shifted the demographic mix decisively towards migrants from Latin America and Asia, where industrialisation and 'proxy wars' were disrupting local ways of life.<sup>65</sup> After generations of depending on undocumented workers to buffer labour market fluctuations, a mechanism was in place to grant legal recognition to those who could meet certain criteria. In 1969, the newly-formed Organisation of African Unity (OAU) adopted a refugee convention tailored to the post-colonial struggles roiling the region, expanding the definition of 'well-founded fear of persecution' to include persons displaced by 'external aggression, occupation, foreign domination or events seriously disturbing public order'.<sup>66</sup> Throughout the world, debates over the paradox of the deserving migrant were marked by political, class, and racial considerations, whatever the rationale for admission.

These cross-cutting grounds of difference generated friction within and between countries, giving rise to a multitude of political movements across the ideological spectrum. While most of this activity took place locally, it galvanised existing international networks to make emergency interventions and become involved in policy discussions at the international level. Less powerful states also adopted advocacy strategies within the UN, building coalitions within the General Assembly to push for more favourable aid programmes, terms of trade and foreign investment. The oil embargo of 1973 represented an opportunity for the Group of 77 – comprised of developing and newly independent post-colonial states, many with significant oil reserves – to make headway in these efforts. In 1974, the UN General Assembly adopted the Charter of the Economic Rights and Duties of All States, recognising structural inequalities in international markets – just as thirty years of industrial expansion came to an end, triggering new restrictions on labour migration.

### **3 Global governance or migration management? Why conventions matter**

Rights are made in times of crisis, insofar as they are posited as a remedy for violence or exclusion. Understood in this way, rights are a creative response to a failure of law, when a critical mass of stakeholders finds that

65 See OA Westad *The global Cold War: Third world interventions and the making of our times* (2007).

66 Adopted by the Organisation of African Unity in 1969, the Convention Governing the Specific Aspects of Refugee Problems in Africa applies to 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'. The Convention acknowledged that most refugee movement is populous, not individual, and provided for permanent settlement, as well as burden-sharing amongst member states.

the existing normative framework is inadequate to the ethical challenge at hand. The human rights system was assembled during such a moment, and has been adapting ever since in response to transformations in the organisation and dynamics of power amongst states, economic actors and civil society. To point out the historical particularity of international norms is not to dismiss their significance or legitimacy, but to interrogate their common-sense appearance as first principles expressing a categorical imperative. Insofar as social norms operate as a set of received customs and beliefs, they assert a certain *a priori* authority with respect to the messiness of everyday life. Yet we argue that culture is better understood as a dynamic process of symbolic and material production, through which people collectively make meaningful worlds and the institutions that sustain them. As one such cultural expression, the law is constantly being contested and reinterpreted as a moral project that is also deeply political.<sup>67</sup>

Thus, human rights work is as much practice as principle: formulated through a ritual performance of compromise, international norms can only be realised through the participation of a wide range of social actors. This perspective shares common ground with scholars who emphasise the cultural embeddedness of states within a 'world society', in which human rights principles are disseminated through communications amongst local institutions and through cross-border networks.<sup>68</sup> Some proponents of this approach emphasise the socialising effects of world public forums and inter-governmental organisations, pointing out that states participating in international meetings are more open to ratification.<sup>69</sup> Others working within this paradigm contend that support for international treaties ripens through less structured normative mechanisms, in response to a range of political pressures.<sup>70</sup> A key insight of this scholarship is the critical role of non-governmental organisations, activists and community leaders as critical knowledge brokers: translating transnational ideals into local strategies, articulating expectations, and pressuring states to 'deliver' on human rights obligations.<sup>71</sup>

67 See J Hoover 'Towards a politics for human rights: Ambiguous humanity and democratizing rights' (2013) 39 *Philosophy and Social Criticism* 935; and M Goodale 'Ethical theory as social practice' (2006) 108 *American Anthropologist* 25.

68 See K Tsutsui & CM Wotipka 'Global civil society and the international human rights movement: Participation in human rights international nongovernmental organizations' (2004) 83 *Social Forces* 587; and E Hafner-Burton et al 'International human rights law and the politics of legitimacy: Repressive states and human rights treaties' (2008) 23 *International Sociology* 115.

69 See J Boli & GM Thomas (eds) *Constructing world culture: International non-governmental organizations since 1875* (1999).

70 WM Cole 'Sovereignty relinquished? Explaining commitment to the international human rights covenants, 1966-1999' (2005) 70 *American Sociological Review* 472.

71 See S Engle Merry 'Transnational human rights and local activism: Mapping the middle' (2006) 108 *American Anthropologist* 38; and A Kuper (ed) *Global responsibilities: Who must deliver on human rights?* (2005); and A Riles *The network inside out* (2000).

NGOs have long mobilised support for international instruments, both through national representatives and as part of international networks.<sup>72</sup> They were involved in drafting the Universal Declaration, the 1951 Refugee Convention, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. In each of these cases, advocacy at the UN was to a significant extent the outgrowth of social movements at the domestic level, where struggles over civil rights, gender equality and political oppression were drawing concessions from some governments, and brutal crackdowns from others. This was particularly the case in the United States, Latin America and Africa, where multiplier effects of parallel struggles across the world were mobilised, often to great effect, through international collaboration, but the focus was on changing law and practice at home.<sup>73</sup>

The anomalous position of the migrant worker as a subject of rights, however, presented a unique set of challenges that marked the ICRMW from the start. First, local and national organisations were more likely to champion the rights of migrants as workers, women, children, persons of colour, or even refugees, than attend to the special problems associated with working as a migrant. While some activists were grappling with nationality and immigration-based discrimination during the 1970s, they were politically marginalised and had difficulty gaining the support of unions and civil rights groups. Most migrants' rights advocacy in the US and Europe took the form of community organising and legal representation, and there was little funding for travel to meetings.<sup>74</sup> Thus, the development of the Convention was by and large a state-led effort, initially involving only a few faith-based organisations.<sup>75</sup> Second, the conflicting interests being mediated by this Convention were not primarily located within the confines of the nation-state, but were themselves international, overlapping with sensitive questions of foreign policy and

- 72 Trade unions, and religious and women's organisations have maintained international infrastructures since the 19th century, and have been central to labour, abolitionist, suffrage, and public health movements, as well as the establishment of social protections within modern state bureaucracies. See M van der Linden 'The promise and challenges of global labor history' (2013) 82 *International Labor and Working-Class History* 57; LJ Rupp *Worlds of women: The making of an international women's movement* (1997); A Hochschild *King Leopold's Ghost: A story of greed, terror, and heroism in Colonial Africa* (1998); and A Rice et al *Liberating sojourn: Frederick Douglass and transatlantic reform* (1999).
- 73 See M Dudziak *Cold War civil rights: Race and the image of American democracy* (2000); A Escobar & SE Alvarez (eds) *The making of social movements in Latin America: Identity, strategy, and democracy* (1992); and JL & J Comaroff (eds) *Civil society and the political imagination in Africa* (1999).
- 74 See M Garcia *From the jaws of victory: The triumph and tragedy of Cesar Chavez and the Farm Worker Movement* (2014); and C Lloyd 'Anti-racism, social movements and civil society' in F Anthias & C Lloyd (eds) *Rethinking anti-racisms* (2002).
- 75 M Grange & M D'Auchamp 'Role of civil society in campaigning for and using the ICRMW' in De Guchteneire et al (n 22 above) 71-74.

trade. Third, those conflicting interests straddled a North-South divide fraught with socio-economic inequality and historical resentment, during a period of world-changing 'crises' and structural adjustments that would significantly increase international mobility.

Recommendations for a comprehensive migrants' rights treaty began to circulate through the UN system just as inflation was becoming apparent in Europe and North America, and attitudes were souring towards migrants.<sup>76</sup> In December 1978, the General Assembly passed a resolution initiating consultations with member states, and half of them would eventually participate at some stage in the drafting of the Convention. Yet Arendt's paradox would stymie the process for a decade.<sup>77</sup> The two countries to take the lead in mobilising this project, Mexico and Morocco, were both prominent members of the Group of 77, with significant expatriate populations working in two powerful countries, the United States and France. Their concerns with protecting the rights of nationals living abroad were resisted by Western countries facing industrial decline, which in many cases meant dismantling commitments to social citizenship for their own citizens. Beyond the condemnation of discrimination on one hand, and illegal entry on the other, these groups were locked in an uncomfortable symbiosis, as resource-poor countries became increasingly dependent on remittances, and employers in countries of destination exhibited a growing demand for cheap, flexible, undocumented labour.<sup>78</sup> Mediating this deadlock were Mediterranean and Scandinavian countries,<sup>79</sup> which confronted fewer migration pressures during that period.

The text that was adopted on 18 December 1990 marked a milestone in establishing fundamental rights for all migrant workers, yet limited family reunification, liberty of movement and participation in public affairs only to lawful permanent residents.<sup>80</sup> Many observers were dissatisfied with this compromise. In a special issue of *International Migration Review* published shortly afterward, migrants' rights advocate Linda Bosniak wrote that, despite fairly rigorous anti-discrimination standards, the lack of mandatory regularisation for unauthorised workers effectively undermines the employment rights that are otherwise guaranteed, due to the fear of deportation. 'In other words, under the terms

76 See R Böhning 'The ILO and the new UN Convention on Migrant Workers: The past and future' (1991) 25 *International Migration Review* 698; Battistella in De Guchteneire et al (n 22 above) 50-54.

77 A Pécoud & P de Guchteneire *An investigation of the obstacles to the UN Convention on Migrant Worker's Rights* (2004) 5-7.

78 Battistella in De Guchteneire et al (n 22 above) 47.

79 'MESCA' countries included Finland, Greece, Italy, Portugal, Spain and Sweden, later joined by Norway.

80 For a comprehensive overview of the ICRMW, see R Cholewinski *Migrant workers in international human rights law: Their protection in countries of employment* (1997).

of the Convention, the undocumented continue to enjoy institutionally sanctioned second- (or third-) class status.<sup>81</sup> In the same issue, refugee advocate Peter van Krieken lamented that the inclusion of irregular migrants would doom the Convention to political failure.<sup>82</sup> In yet another contribution, activists Jan Niessen and Patrick Taran emphasised that both the strengths and weakness of any international convention are realised through ratification and implementation, activities that require the vigilant participation of NGOs.<sup>83</sup> All three of these predictions would bear out during the ratification phase and beyond.

As anticipated by Niessen and Taran, without robust civil society involvement, ratifications in the early years following the adoption of the ICRMW accumulated at a disappointing pace. No intergovernmental agency made an effort to promote it, and it was initially even difficult to obtain a copy of the text itself.<sup>84</sup> By the mid-1990s, however, NGOs were exploding in number and strength at every level, impelled by new communications technologies and the fissures created by the downsizing state. Some were the beneficiaries of 'privatized' public services; others were stepping up to shoulder the burden of widening gaps in care and political representation. This surge in advocacy motivated ECOSOC to make consultative status available to national and regional NGOs in 1996, and between 1980 and 2010, the number of organisations able to participate formally in UN activities grew from 300 to 3000.<sup>85</sup> Indeed, the current prevalence of human rights discourse within both domestic and international politics can be attributed to this proliferation of transnational advocacy networks, what we have elsewhere called 'globalization from the bottom up'.<sup>86</sup>

The same dynamics that expanded opportunities for participation in governance processes also accelerated and diversified international migration and with it, a migrants' rights movement committed to exposing the structural vulnerability of non-citizens.<sup>87</sup> The emergence of Asia as a leading site for the outsourcing of supply chains led to a particularly vital advocacy presence, bringing attention to the abusive recruitment practices, poor labour conditions, and sex trafficking that accompanied the

81 LS Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention' (1991) 25 *International Migration Review* 737.

82 P van Krieken 'Migrants' rights and the law of the sea: Further efforts to ensure universal participation' (2007) 45 *International Migration Review* 209.

83 J Niessen & PA Taran 'Using the new Migrant Workers' Rights Convention' (1991) 25 *International Migration Review* 859.

84 See P Taran 'Human rights of migrants: Challenges of the new decade' (2001) 38 *International Migration* 7.

85 Grange & D'Auchamp in De Guchteneire et al (n 22 above) 72.

86 N Piper & J Grugel 'Global migration governance, social movements and the difficulties of promoting migrant rights' in CU Schierup et al (eds) *Migration, precarisation and the democratic deficit in global governance* (2014).

87 J Grugel & N Piper *Critical perspectives on global governance: Rights and regulation in governing regimes* (2007).

celebrated growth of the 'Asian tigers'. The absence of any regional human rights mechanism encouraged activists to focus their efforts at the international level, where they joined forces with allies from other regions in a global ratification campaign.<sup>88</sup> NGOs translated the Convention into various languages, produced materials for targeted audiences, and established a website. They formed working groups and played a visible role in major global events, cultivating sophisticated relationships with a range of institutional actors.<sup>89</sup> These efforts led to the designation of a Special Rapporteur on the human rights of migrants, established in 1999, and the formation of a hybrid Steering Committee for ratification, composed of both NGOs and intergovernmental organisations. The Global Steering Committee published a campaigner's handbook that was circulated widely, and coordinated panel events on migration issues at national and regional levels.<sup>90</sup> It was largely due to these strategic efforts that the Convention entered into force in 2003, 13 years after its adoption.<sup>91</sup>

Unlike other Conventions, however, which have been widely accepted at this stage, advocacy surrounding the ICRMW remains an uphill battle. For a few years, it appeared as though the tide had turned, as both UN agencies and major multi-issue human rights organisations began committing resources to migrants' rights work. International Migrants Day became a rallying cry in countries where coalitions were just beginning to form,<sup>92</sup> and national campaigns were launched throughout Europe, building particular momentum in Spain, Belgium, Italy and Ireland, countries of immigration that had sent workers abroad only a

88 N Piper 'Democratising migration from the bottom up: The rise of the global migrant rights movement' (2015) 12 *Globalizations* 788.

89 Representatives of migrants' rights organisations participated in the 1994 International Conference for Population and Development in Cairo; the 1995 World Summit on Social Development in Copenhagen and Fourth World Conference on Women in Beijing; and the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in 2001.

90 Only nine states had ratified the ICRMW in the first eight years after adoption. The remaining 11 ratifications necessary for entry into force took place following the creation of the Steering Committee in 1998. G Gencianos 'International civil society cooperation on migrants' rights: Perspectives from an NGO network' (2004) 6 *European Journal of Migration and Law* 147.

91 In a study of the obstacles and opportunities for ratification of the ICRMW in the Asia Pacific, the first commissioned by UNESCO in a series of regional studies, Piper identified migrant associations as the actors most crucial to successful ratification. See N Piper 'Obstacles to, and opportunities for, ratification of the ICRMW in Asia' in De Guchteneire et al (n 22 above).

92 The UN General Assembly declared the day of the ICRMW's adoption, December 18, to be International Migrants' Day on 18 December 2000. An additional factor in assuring the rise in ratifications was the formation of the Global Migration Group, comprised of the heads of international agencies involved in migration-related activities (for a full list, see <http://www.globalmigrationgroup.org> (accessed 26 October 2017)). Set up in 2006 on the recommendation of the GCIM, this Group proactively engaged in the promotion of the ICRMW, a novelty on the part of the UN that had so far been rather reticent on spreading the news and relevance of this Convention. Following entry into force, the number of ratifications doubled in only six years. However, these were exclusively resource-poor origin states.

generation ago. Migration became a front-page issue around the world, and an increasingly pressing concern amongst a broader swath of governments and institutions, both public and private. Two high-profile consultations were announced by the UN: the Global Commission on International Migration (GCIM), a fact-finding panel of experts that convened between 2003 and 2005; and the High-Level Dialogue on Migration and Development in 2006, which would lead to the annual Global Forum for Migration and Development (GFMD).

This attention to the role of migration in the global economy was long overdue, yet it accompanied a gradual withdrawal from the goal of ratification.<sup>93</sup> The final GCIM report, for example, generally recommended better implementation of human rights instruments but fell short of championing the campaign. It also reported, erroneously, that ‘a number of countries have stated that they are unwilling to ratify the 1990 Convention because it provides migrants (especially those who have moved in an irregular manner) with rights that are not to be found in other treaties, and because it generally disallows differentiation between migrants who have moved in a regular or irregular manner’.<sup>94</sup> Similarly, in his report for the High-Level Dialogue, former UN Secretary-General Kofi Annan designated the ICRMW as a core human rights treaty without calling on states to ratify it.

The unpopularity of the Convention reflects the pattern, which has characterised the UN system since its inception, of addressing rights and economics as separate spheres of concern. Yet the success of NGOs in promoting migrants’ rights as a cross-cutting concern also suggests significant changes in processes of policy formation and governance. As NGOs insinuate themselves within decision-making and implementation processes, they become increasingly necessary to the maintenance of the system itself.<sup>95</sup> Thus, the awakening of interest in international migration over the last decade may also reflect this shift from state-centric governance towards network models of mutual responsibility. This trend can be discerned as early as 1998, in the ILO’s Declaration on Fundamental Principles and Rights at Work, which was widely criticised for lacking reference to a minimum wage. At the World Economic Forum in 1999, Secretary-General Kofi Annan announced the Global Compact, a wide-reaching effort to formalise voluntary private sector participation within the UN system. A Special Representative of the Secretary-General

93 See ‘International migration and development’ UN General Assembly (18 May 2006) UN Doc A/60/871 (2006).

94 GCIM *Migration in an interconnected world: New directions for action* (2005) 57.

95 PJ Taylor ‘The state as container: Territoriality in the modern world-system’ (1994) 18 *Progress in Human Geography* 151; B Anderson *Imagined communities* (1983); Rogers Brubaker *Nationalism reframed: Nationhood and the national question in the new Europe* (1996).

on Business and Human Rights was also appointed in 2005 to monitor progress.<sup>96</sup> Along these lines, labour migration researchers have increasingly focused on global supply chains, while international policies are focused on the ‘management’ of labour markets rather than the protection of workers. These developments indicate both the political influence of economic actors in the post-industrial West, and a desire for greater traction in the Global South, where the informal sector is predominant and governments are preoccupied with attracting international investment.

Within this increasingly privatised policy environment, advocacy activities, and the research describing them have also taken on the characteristics of business transactions. Advocates are described by scholars as ‘norm entrepreneurs’, who try to expand the human rights agenda by strategically mobilising claims within shifting fields of action.<sup>97</sup> Such claims may promote human rights standards for new social practices, or identify new bearers to already existing rights.<sup>98</sup> According to Martha Finnemore and Kathryn Sikkink, this is a process that evolves through stages. First, norms emerge, as norm entrepreneurs call attention to a new or unnoticed human rights violation, and persuade states to promote it. When a critical mass of states have been persuaded to adopt the norm, a ‘tipping point’ is reached, leading to a ‘norm cascade’, as other states are convinced or pressured into accepting it as well. In order for a norm to get to this stage, it usually must become institutionalised in rules and organisational practices, through which socialisation and peer pressure become the dominant mechanisms for ensuring compliance. The last stage is *internalisation*, which signifies that the norm is no longer controversial but has reached a taken-for-granted character, after which conformity can be assumed.<sup>99</sup> According to this theory, rights advocacy is most influential in the first stage of norm emergence, by calling attention to a specific problem through the strategic construction of cognitive frames. At the present stage, the Convention has not yet reached its tipping point, with only 51 ratifications and 38 signatures. Only a critical mass of major destination countries would trigger a norm cascade, yet none have yet committed their support except for Argentina.

Not surprisingly, research has found that new norms are more persuasive if they ‘fit’ rather than ‘clash’ with already existing ones.<sup>100</sup> For example, Keck and Sikkink have found that norms that are more likely to

96 International relations scholar John Ruggie served as the first Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. See his final report, ‘Guiding principles on business and human rights: Implementing the United Nations “protect, respect and remedy” Framework’ Human Rights Council (21 March 2011) UN Doc A/HRC/17/31 (2011).

97 S Tarrow *Power in movement: Social movements and contentious politics* (1994).

98 A Brysk *Human rights and private wrongs: Constructing global civil society* (2005) 3.

99 M Finnemore & K Sikkink ‘International norm dynamics and political change’ (1998) 52 *International Organization* 887.

100 A Björkdahl *From idea to norm: Promoting conflict prevention* (2002).

have an impact are those that are either concerned with preventing especially vulnerable groups from bodily harm, or those that promote legal equality of opportunity.<sup>101</sup> Others claim that norms resonating with core ideologies are likely to be accepted.<sup>102</sup> Tanya Basok builds on this observation in her distinction between *hegemonic* and *counter-hegemonic* human rights.<sup>103</sup> While the former are consistent with liberalism's focus on individual freedom, formal equality, and the integrity of the nation-state, and thus enjoy wide recognition, the latter challenge these core concepts and are hence subject to greater controversy and dispute. In her opinion, migrants' rights represent a counter-hegemonic discourse insofar as they extend recognition to undocumented non-citizens, thereby challenging the norm of sovereignty. This may present difficulties for advocacy groups, who for instrumental reasons may have to draw on arguments that do not fit their intentions in order to reassure states.<sup>104</sup>

Some scholars are understandably pessimistic about the capacity for advocacy organisations to counteract the normative pressures of contemporary institutions. Sangeet Kamat argues that limitations to intervention are built into the category of 'civil society' itself, which implies a privatised notion of public interest through which democracy is being redefined as the plural expression of diverse constituencies, rather than a check on the unequal distribution of power.<sup>105</sup> Kamat describes the ways in which NGOs, forced by funders to adopt corporate modes of operation and subcontracted to provide state services, are discouraged from challenging transnational enterprises and the structure of the global economic system, while those that do so are effectively excluded from policy forums. She objects to the promotion of civil society participation by international institutions, on the one hand, and a lack of attention to their capacity to represent the public interest, on the other.

As a result, business and industry associations are now equally a part of 'NGO representation' in international policy forums, making it impossible for progressive NGOs to build a common alliance against corporate interests.<sup>106</sup>

This dynamic of procedural absorption has in fact been observable during the annual meetings of the GFMD. This 'informal, non-binding, voluntary and government-led process' is limited to state and UN agency

101 Finnemore & Sikkink (n 99 above) 898.

102 A Brysk (n 98 above) 22.

103 T Basok 'Counter-hegemonic human rights discourses and migrant rights activism in the US and Canada' (2009) 50 *International Journal of Comparative Sociology* 179.

104 Basok (n 103 above) 185-188. This resonates with the way that Amnesty International introduces new issues on the human rights agenda, by initially associating it with approved human rights themes, then developing it into an issue on its own – always careful to keep its framing non-confrontational. See EB Rodio & HP Schmitz 'Beyond norms and interests: Understanding the evolution of transnational human rights activism' (2010) 14 *The International Journal of Human Rights* 442.

105 S Kamat 'The privatization of public interest: Theorizing NGO discourse in a neoliberal Era' (2004) 11 *Review of International Political Economy* 170.

106 Kamat (n 105 above) 165-66.

representatives. However, a parallel ‘Civil Society Days’ forum invites participants from all walks of ‘civil society’ life: private business, foundations, trade unions, diaspora associations, research institutes or think tanks, academia – and migrants’ rights activists. Yet some migrants’ rights activists, skeptical regarding the impact of this exercise, have nevertheless taken advantage of the global visibility of the event to organise a series of alternative parallel conferences – People’s Global Action on Migration, Development and Human Rights – at which they have voiced concerns regarding the emerging management and security-oriented framework that appears to be emerging from the GFMD process. Central to their critique has been the observation that, despite lip service, migrants’ rights have been subsumed by measures to maximise the economic benefits of migration. Furthermore, counter-terrorism and sophisticated technologies of surveillance have motivated the international coordination of policing in ways that permit the mobility of some populations while restricting it for others. Advocates are concerned that the goals of ‘orderly migration’ articulated within the discourse of ‘migration management’ entail an intensification of detention, deportation, and the legal segregation of temporary workers without full rights or possibilities for integration within the countries demanding their labour.<sup>107</sup> Pithily put by Zygmunt Bauman: ‘traveling for profit is encouraged; traveling for survival is condemned.’<sup>108</sup>

#### 4 Trading rights for survival? Sharing risk in a fractal world

From a contemporary standpoint, many of Arendt’s fears have proven quite prescient. She found most troubling the prospect of prosperous, post-war societies stratified by citizenship status, in which laws would not apply equally to everyone. She anticipated that global pressures would ensure a growing number of people that cannot claim membership in the political community. By depriving them of the ‘right to have rights’, modern social institutions risked undermining their own legitimacy, endangering the foundations of modern democracy itself.<sup>109</sup> Over the past 30 years, the socio-economic constellation of forces that we call globalisation has

107 These trends are evident worldwide. See L Amoore ‘Biometric borders: Governing mobilities in the war on terror’ (2006) 25 *Political Geography* 336; F Trauner & S Deimel ‘The impact of EU migration policies on African countries: The case of Mali’ (2013) 51 *International Migration* 20; and H Venters et al ‘Into the abyss: Mortality and morbidity among detained immigrants’ (2009) 31 *Human Rights Quarterly* 474.

108 Z Bauman *Society under siege* (2002) 84.

109 For a range of theoretical perspectives on the contemporary implications of Arendt’s argument, see G Agamben *Homo sacer* (1995); S Benhabib *The rights of others: Aliens, residents and citizens* (2004); and A Shachar ‘Citizenship and the “right to have rights”’ (2014) 18 *Citizenship Studies* 114.

shaped a world order of increasing interdependence and precariousness, altering the landscapes in which people live and work.<sup>110</sup> Urban centres from Toronto to Sao Paulo, Dublin to Bangkok are teeming with men, women, and children from other countries, other worlds, and so are rural fields and factories, suburban homes, hotels and hospitals. Insofar as they carry the passport of their country of origin, most of today's migrants may not be stateless. However, current trends of global mobility imply a comparable scenario, in which many non-citizens are unable to exercise full political, social and cultural rights within the countries where they live.

NGO monitoring plays a critical role in preserving the aspiration of human rights as a rationale for inclusion against an international ordering principle of differentiation and exclusion. The latter trend is less conspiracy, we suggest, than an orchestrated attempt to deal with the overwhelming complexity of a world riven by the crises and contradictions of late capitalism. As the unimpeded circulation of finance and commodities becomes increasingly vital to the functioning of the global economy, so too does the regulation of human capital and the containment of threat, as part of an integrated strategy of risk-management that renders mobility an increasingly privileged asset under circumstances of persistent inequality.<sup>111</sup> Social movement scholars describe the role of activist networks in this 'rescaling' of public and private spheres, amplifying the effects of particular interventions by pooling resources and facilitating communications that can generate new solutions to existing problems.<sup>112</sup> Such forms of collective action are a key mechanism for voicing counter-hegemonic discourse, by providing opportunities to negotiate conflict through the identification of common interests.<sup>113</sup> International advocacy not only provides a platform for the exchange of ideas; it also produces new knowledge oriented towards alternative horizons. Indeed, it demonstrates a form of citizenship that has broken free of the nation, through the practice of a trans-territorial politics operating both within and across forums of governance.

If civil society today is awash in neoliberal pluralism, on the one hand, which exchanges the critique of power for a celebration of diversity, and a nationalistic populism, on the other, which retreats into xenophobic nostalgia, perhaps some activists are building a third way, guided by a vision of participatory democracy that is as multiple, overlapping and

110 See S Castles et al *The age of migration: International population movements in the modern world* (2013); S Sassen *Territory, authority, and rights* (2006); and D Held et al *Global transformations: Politics, economics, and culture* (1999).

111 See N De Genova & N Peutz (eds) *The deportation regime: Sovereignty, space, and the freedom of movement* (2010); and R Shamir 'Without borders? Notes on globalization as a mobility regime' (2005) 23 *Sociological Theory* 197.

112 For a detailed review of the existing literature, see J Bendell & A Ellersiek 'Noble network: Advocacy for global justice and the "network effect"' (2009).

113 M Diani 'Introduction: Social movements, contentious actions, and social networks: From metaphor to substance?' in M Diani & D McAdam (eds) *Social movements and networks: Relational approaches to collective action* (2003) 1-18.

fractal as the world we live in. According to Linda Bosniak, Marshall's aspiration of social citizenship survives through such engagements, as ethical projects adapted to the reconfiguring powers of globalisation. Bosniak's argument is less a proposal than a statement of social fact: many migrants are already living this reality.

[A]s ties increase across national borders, people are increasingly taking on commitments and identities that exceed the bounds of the national society and its members. Globalization, in this account, reconstitutes us in the deepest personal ways; it has important imaginative and emotional and moral effects on all of us.<sup>114</sup>

This implies that the strange mix of enthusiasm, hostility and disregard inspired by the ICRMW reflects its unique capacity amongst UN treaties to surface the defining challenge to governance of our times.

114 Bosniak (n 8 above) 485.