

**Democracies and International Human Rights:
Why is There No Place for Migrant Workers?**

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ABSTRACT (120 words)

This paper explores why the signature record of the International Convention on the Protection of Rights of All Migrant Workers and Members and Their Families has been so poor, especially among the OECD democracies. It does so by examining two kinds of explanations. The first suggests that the international campaign to promote the treaty was weak. The second concerns the treaty design: states dislike this treaty because of its complexity, precision, and the lack of national security 'escape clauses.' This study finds that the strength of the international campaign does not correlate with participation in human rights treaties. But it also uncovers an inherent flaw in the design-based explanations and strongly suggests that we look elsewhere for the causes of the 'failure' of this treaty.

KEY WORDS: Migrant Workers
Refugees
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INTRODUCTION¹

International treaties on human rights – legally binding international policy agreements on the protection of individuals and groups – have grown steadily from the general declarations on the rights of all individuals to very specific provisions elaborating the rights in specific matters, such as racial discrimination or forced displacement across borders. But some of these treaties are signed and ratified at a higher rate than others.

Why do some international human treaties achieve more participation than others?

To investigate this question, I will consider the International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families (ICMW). After a decade of drafting, the ICMW was opened for signature in 1990. It entered into force in July 2003, following a five year-long promotional campaign. In December 2003, the ICMW was supplied with a ten-member ‘monitoring’ committee appointed by the states parties to the convention. At the time of writing, only twenty six countries have signed and ratified the ICMW.² In comparison, the average number of parties to six main international human rights treaties is 164 (Table 1 below). The Convention on the Rights of the Child, which was opened for signature in 1989 – one year earlier than the ICMW – has had a near-universal ratification record for a decade. So why do migrant worker rights trail behind the international rights of other ‘special’ groups? Why is the ICMW, in the words of one expert, ‘another story,’ and why are the prospects for ratification of the ICMW by receiving states, according to two others, ‘unlikely’ or ‘remote’?³

The current parties to the ICMW are primarily migrant-exporting states, such as Mexico and the Philippines, who see the convention as a vehicle to protect their citizens living and working abroad. All relevant migrant-receiving states – and here I focus on

advanced liberal democracies in the OECD club – have decided to stay away from this treaty. This is surely a problem as the majority of migrant workers live and work in these states. As two observers contend, ‘if only sending countries ratify, the Convention would lose its practical meaning.’⁴

The non-signature among OECD democracies appears puzzling bearing in mind that human rights are usually associated with liberal democratic governance and that many liberal democracies vigorously promote human rights internationally. In addition to Mexico, the only OECD country that has signed the ICMW is Turkey. Why, then, has the ICMW had only two signatures among OECD democracies, while comparable human rights treaties have achieved full participation in the same group (Table 1)?

In this paper, I will examine four explanations of the ‘failure’ of the ICMW: 1) the international campaign to promote the treaty was weak; the treaty is 2) too complex; 3) too precise; and 4) it encompasses no national security ‘escape clauses.’ The latter three propositions can be unified under a ‘treaty design’ rubric; the first can be seen as an ‘external’ explanation. All four explanations prominently figure in the recent reflections on the state of the ICMW.⁵

To adequately analyze these propositions, I will first situate them in the theories of IR and international law and then evaluate them by way of historical and comparative variation. A valid way to examine the causes of a treaty failure is to compare it to a successful case or cases in a similar domain. Similarly, a valid way to investigate the curious cases of ‘democratic non-signature’ of the ICMW is to compare it to treaties where the signature record among the same or similar group of states was high. In other words, this puzzle can be said to exist only if it can be established that another human

rights agreement, one that rests on similar elements and provisions to that stipulated in the ICMW, has been signed at a higher rate.

Substantively, the closest example is the 1951 Refugee Convention. To strengthen my comparison, I will also consider the politics of democratic non-signature in the ICMW's legal precursors: the ILO Convention Concerning Migration for Employment, 1949 (No. 97 or C97) and the ILO the Convention Concerning Migration in Abusive Conditions and the Promotion of Equality in Opportunity and Treatment of Migrant Workers, 1975 (No. 143 or C143). Both of these documents states, to a varying degree, that long- and short-term foreign workers constitute a special group of people in need for protection. Table 1 compares the signature and ratification record of these treaties to the six "principal" human rights treaties in the UN system as well as against a selection of treaties in the ILO system.

TABLE 1 ABOUT HERE

While the ILO Conventions, in terms of practical legal value, may be obsolete today, the historical comparison will allow me to deal with the obvious explanation behind the failure of the ICMW: a treaty on migrant worker rights imposes more costs on the migrant worker-receiving states which can explain their reluctance to sign it. But why did these states sign the ILO conventions? C97 was signed by countries like Britain, France and Germany, who were clearly on the receiving end of labour migration at the time of the signature in the early 1950s. Similarly, C143 achieved participation of Norway and Sweden in 1979 and 1982 respectively. The question then becomes: was the cost imposed by the ILO treaties lower than that by the ICMW? As indicated above,

some have considered the features of the treaty design – complexity, precision, and national security escape clauses – to deal with this question.

The inclusion of the ILO treaties as a point of reference serves another purpose. It is often said that the international and regional human rights regimes were much ‘weaker’ in the 1970s than in the 1990s.⁶ For one, the signature and ratification of six principal human rights treaties has increased over time. With respect to migrant worker rights precisely the opposite holds: support of internationally codified rights of migrant workers has significantly decreased. The participation in the ILO conventions has declined over the years and neither convention has achieved any signatures since the early 1980s.

From the perspective of international human rights campaigns this trend is somewhat puzzling. The ICMW’s entry into force in 2003 came after a noted promotional global campaign led by a ‘unique alliance’ of three UN agencies – the Office of the High Commissioner for Human Rights, the ILO, and the UNESCO, with the partaking of more than a dozen organizations dealing with migration and human rights. Yet, major migrant worker-receiving democracies are yet to sign, much less ratify, the convention. In contrast, no promotional campaign surrounded the comparatively successful ILO treaties. Thus, it appears that state promotion of human rights preceded transnational and non-governmental mobilization. This outcome runs contrary to most theoretical predictions.⁷

Related to this point is the above-mentioned issue of democratic non-signature. It is commonly expected that human rights promotion is most likely to succeed in countries with democratic institutions and heritages.⁸ But the ICMW record shows that it is precisely democracies who have ignored human rights promotion. This curious case

offers an opportunity correct to a major selection bias in the literature on the transnational and non-governmental promotion of human rights. As many have noted, scholarship has almost exclusively consider the successful cases of human rights promotion and regime formation.⁹ No doubt, in order to know when international human rights campaigns succeed and when they fail, we need to consider ‘failed’ campaigns as well.¹⁰

My aim in this paper is to probe the plausibility of the four propositions for explaining these cases, not to provide a broad test of these propositions as such. I do not contend that mine is a ‘most similar systems’ design, which means that the cases are identical save for the outcome – the signature record. Clearly, these treaties are very different and one mission of this paper is to assess these differences. Also, I believe there is a potential to learn a great deal about the determinants of treaty participation by looking at treaties ignored by a critical group of states. In addition, the “all things being equal” assumption under which the following discussion will operate, after all, is just that – an assumption; all other things are usually not equal. The strength of international human rights campaigns interacts with the treaty design features and together these interact with other factors that can ‘make or break’ treaties. Again, in this paper, I will examine only one set of explanations, while bracketing others.

With these important qualifiers in mind, I argue that all four propositions fail to account for the non-signature of the ICMW among OECD democracies. The strength of the promotional campaign is neither a necessary nor a sufficient condition for treaty participation. The necessary condition is the vulnerability of states to moral and material pressure. The remaining three propositions are theoretically flawed. All three are endogenous and thus of limited use in the attempt to account for the question why some

human rights treaties succeed while others fail. The quality of drafting does not make or break a treaty. The politics of drafting does. The factors that ultimately impede or facilitate the signature of human rights treaties among democracies – as well as the real human rights puzzles – lie in domestic politics.

DEFINITIONS

In this section, I will first make some definitional notes and then turn to three qualifiers. Migrants are usually classified by four ‘categories of entry’: permanent and family reunification-seeking migrants, migrant workers, undocumented or ‘illegal’ immigrants, and asylum-seeker.¹¹ The first category refers to foreigners who are accepted by the receiving states as settlers and future citizens. A ‘migrant worker,’ according to the ICMW, is a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national. Undocumented immigrants are those who have entered or have overstayed in the country illegally; that is, those who have no official permission to stay and/or work in the host country.¹²

Asylum-seekers are seen as involuntary immigrants fleeing persecution who, once granted asylum, are called refugees. By Article 1 of the Refugee Convention, a refugee is a person who left his/her country of nationality (or ‘habitual residence’) and ‘has well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion.’¹³ As indicated in Table 1, among the four migrant categories, refugees are the most protected from the point of view of international law: the 1951 Convention and the 1967 Protocol (which expands the

geographical and temporal scope of the Convention) are widely signed and ratified.

Without trying to add to the normative debate on whether recognition of new human rights, and groups rights at that, is necessary and/or desirable,¹⁴ I shall also reflect on why I see migrant worker rights as an important subject. For economic and demographic reasons, the demand for both skilled and ‘unskilled’ labour is looming not just in the OECD states, but elsewhere in the industrialized world. The extent of labour migration has grown dramatically in recent decades and ‘much’ of this type migration is temporary and/or undocumented.¹⁵ Estimates of economically active individuals in a foreign country range from 50 to 65 million. Their families account for another 40 to 50 million people. Migrant workers are by far the largest migrant group and they constitute approximately two percent of the world population.¹⁶

Labour migration has a major impact on economic development also. Remittances by migrant worker – estimated to be close to 80 billion dollars annually – bring 1.5 times more foreign currency to the developing world than official development assistance. In international trade monetary flows, remittances are second only to world petroleum exports. But unlike trade and capital flows, labour flows involve ‘certain rights’; policies that temporize or ignore this simple fact are ‘at best ambiguous and at worst misleading.’¹⁷ Because migrant worker rights raise particular ethical and legal dilemmas – who has the right to rights or simply to legal existence – they matter for domestic and, as this paper shows, international law and policy.

Finally, let me make three sets of qualifiers. First, the main unit of analysis in this paper is a ‘treaty,’ not a ‘regime.’ In international law, a regime refers the total body of law on a particular subject, which means that it can encompass multiple documents and

procedures at different levels of international governance.¹⁸ In this sense, it can be said that migration law is largely rooted in human rights law. This paper does not consider instruments that deal with foreign labour only in passing, or in bilateral instruments and ‘consultative processes,’ or even in regional treaties, such as the Council of Europe Convention on the Legal Status of Migrant Workers (1977). Because international regime on migrant worker rights refers to a set of policy prescriptions above and beyond the treaties examined here, one can only speculate if the ICMW’s lack of success as a treaty is indicative of a more general ‘failure’ to establish an international regime on migrant rights.¹⁹

Second, I am interested in the variation in the participation in the already existing international human rights treaties, not in the variation in the emergence of such treaties. Why the rights of other potentially vulnerable populations have not been addressed at the level of international treaties – indigenous peoples, internally displaced people, and gays and lesbians come to mind – makes for an interesting ‘non-regime’ counterfactual, but it is not the subject of this paper.

Third, I focus on the act of signing a treaty and put aside the further stages in the life of a treaty, such as ratification, implementation, and compliance. Signing in itself does not necessarily provide any impetus to comply with a treaty or develop a regime further. The question whether states comply with international human rights agreements and whether these agreements are effective in changing policy outcomes will not be entertained in this paper.²⁰ I understand that the practice of human rights is very different from the idea of human rights. I also acknowledge the essentially contested nature of this idea.²¹ Again, my paper is interested in the politics of international human rights treaties

and the question why some of them succeed while others ‘fail.’ Let me then turn to the first explanation – the role of international human rights campaigns.

CAMPAIGNS

The international promotion of human rights started in earnest with the Universal Declaration of Human Rights in 1948, which affirmed that all people are entitled to fundamental protection and provision of basic material needs. The international promotion of human rights subsequently found expression in additional treaties, put forward through the UN and other organizations. The vast majority of these contain no enforcement mechanism whatsoever because sovereign states, including liberal democracies, are unwilling to subject domestic laws to international supervision. As a region, Europe stands as an important exception. The human rights provisions in the institutions of the European Union (EU) and in the European Court of Human Rights (ECHR) enable individuals to launch claims against their governments.

The decisions by the ECHR cement international human rights into hard law, but, in terms of compliance, ‘soft law’ may be as important.²² Even though migrant rights are a relative newcomer to international law and despite the ‘failure’ some of their legal instruments, it can be argued that their impact on the development and implementation of national immigration policies is considerable.²³ Strictly speaking, states not parties to human rights conventions do not have treaty obligations but still have obligations under customary international law. The implications of this argument are outside the scope of this paper (and for this reason, it is fair to designate the ICMW as a ‘failure’ only in inverted quotation marks). The ILO, for example, sees the role of the ICMW and

Conventions 97 and 143 almost entirely in terms of soft law:

This body of international law provides the normative underpinning for both national migration policy and international cooperation in the field of migration, particularly labour migration. In addition to spelling out specific rights applicable to all migrants, these instruments provide an explicit agenda for international inter-state consultation and cooperation in the main areas of migration management.²⁴

Even if generally non-enforceable, human rights treaties matter a great deal in international politics. Governments care about their reputations and, in the rhetoric, they almost always offer support for and accept human rights. This acceptance has complex and wide-ranging implications. Human rights play a significant role in the foreign policy of liberal democracies. Almost all advanced industrial democracies have diplomatic and bureaucratic units that deal with human rights in international perspective. Foreign economic assistance is often made conditional on the performance in the domain of human rights and some democracies have cited human rights violations as *the* justification for the use of force abroad. But human rights arguably matter in international relations more generally. According to many, human rights promoted in the post-World War II period have come to constitute not only the meaning of democracy but also of ‘civilized’ and/or ‘legitimate’ statehood and governance.²⁵

Advanced liberal democracies play an important role. As human rights are usually associated with liberal democratic governance and because advanced liberal democracies command great authority and prestige, it can be argued that precisely these states have an unusual power in setting the agenda of ‘appropriate’ governance. Put otherwise, it is advanced liberal democracies who define the ‘appropriate’ social context in which *all* governments operate.²⁶

Another important factor in the promotion of human rights in world politics are the so-called transnational advocacy networks (TANs) – international actors bound together by shared values and dense exchanges of information and services. Two features of TANs are germane to this paper. First, TANs are usually based around campaigns.²⁷ Second, human rights are a domain densely populated by TANs.²⁸ It is indicative that there is ‘no global initiative pushing in an anti-human rights direction.’²⁹

In a nutshell, TANs perform two functions: first, they work tirelessly to document both mass and individual human rights violations. Second, they aggressively disseminate this information in order to exert pressure on public authorities to change their practices and/or punish the violators. In doing so, some TANs have been successful in changing policy outcomes.³⁰ To use a hackneyed example, once the governments of the Soviet Bloc committed to the Helsinki Process, they made themselves wide open to the evaluations and criticisms of their human rights record not only by the actors in the West, but also by their own opposition groups. By the ‘persistent shaming and lobbying efforts,’ the TANs greatly weakened the Soviet government and accelerated the reforms that eventually contributed to the end of the Cold War.³¹

Keck and Sikkink argue that the probability of success depends, among other things, on the network’s ‘density and strength’ - terms which together refer to organizational resources and capacities and to the regularity of information exchanges in the network.³² Success of promotional campaigns, therefore, directly depends on density and strength.

The campaign for the Ratification of the ICMW was launched in March 1998. A Steering Committee was convened in Geneva by an NGO called Migrant Rights

International, which was founded four years earlier. The Committee nominally consists of eighteen organizations such as the ILO, UNESCO, Women's International League for Peace and Freedom and World Council of Churches. The campaign can hardly be characterized as dense and strong, at least in its first years. The campaign's own Coordinator writes that

[until] September 1996...the convention was only obtainable, often with difficulty, in the form of photocopies of the original 1990 General Assembly resolution. Until January 2001, there was not one person anywhere in the world, in any international organization, in any government, or any civil society group engaged with full-time responsibilities related to promoting this Convention.³³

Over time, however, the campaign managed to heighten the awareness of the issue and draw some attention to the plight of migrant workers. In 2001, it persuaded the UN General Assembly to approve a resolution proclaiming December 18 the 'International Day of Solidarity with Migrants' – an idea originally advanced by two Southeast Asian NGOs. In 2002, both the General Assembly of the Organization of American States and the European Parliament endorsed the ICMW. The establishment of a UN Special Rapporteur on migrant worker rights can perhaps be seen as its crowning achievement.³⁴

But as of this writing, the campaign failed to achieve what is ostensibly the main goal – a single signature among the major migrant-receiving states of the OECD, much less a ratification of the ICMW. In terms of signature and ratification of international treaties, migrant workers rights seem to have been closer to the agenda of the national governments, before the advent of advocacy networks.

The Refugee Convention was drafted, signed and ratified in the absence of campaigns by dense, well-funded, well-organized, morally authoritative, and

knowledgeable networks.³⁵ In terms of campaigns, the most prominent Western TANs in the 1950s were world peace and arms control groups, not human rights advocacy networks. Only in the late 1960s did human rights emerge as a campaign topic among TANs, and when they did, they took the more general forms of non-violence, economic justice, good governance, and environmental sustainability. Thus while the existence of TANs can be traced back to the foundation of the International Committee of the Red Cross in 1863, international *human rights* campaigns came to the forefront only in the mid-1970s.³⁶ The Refugee Convention was set up in the midst of the Cold War to deal with one aspect of the Cold War – political refugees from the East. For the West, refugees from the East were a symbolic proof of communism’s failure, which is why the United States and its allies worked so hard to build an international refugee regime. The Eastern bloc dismissed the UNHCR and the Refugee Convention as a capitalist ploy.³⁷ The signature and ratification ensued without any transnational interference.

The ILO, a body where workers and employers participate in drafting of conventions alongside and on an equal basis with state officials, is the oldest functioning international promoter of human rights in general and migrant rights in particular. Opened for signature in 1949, C97 is the oldest universal standard regulating migrant labour. The signature and ratification of C97 and the drafting of C143 coincided with a period of unprecedented recruitment of migrant workers in Europe and in North America. But by the time C143 was opened for signature in 1975, the economic climate shifted beyond recognition, which no doubt pushed these treaties to the backburner. Having said that, there is no evidence that TANs attempted to promote C97 and C143 at all.³⁸ Indicatively, almost all extant surveys on the status of these conventions note that many

states continue to be uninformed about migrant worker rights in general.

The density and strength of TANs do not correlate with the enthusiasm to sign treaties on migrant rights. As stated above, the extent scholarship on the domestic effects of international human rights norms has largely focused on success stories. For example, the contributions in volume edited by Risse, Ropp and Sikkink examine the ways in which Western TANs pressured non-Western authoritarian states. Two editors conclude that the ‘strength’ of TANs affects the probability changing the human rights record in the target state.³⁹

But my study suggests that the density and strength of TANs is neither necessary nor a sufficient condition for changing human rights practices. A far more important determinant of TAN-induced change seems to be the vulnerability of the target state to the combination of material and moral pressure. ‘Vulnerability arises both from the availability of leverage and the target’s sensitivity to leverage; if either is missing a campaign may fail.’⁴⁰ As targets in the campaign promoting the ICMW, OECD democracies are not vulnerable. They are neither the recipients of economic assistance from the supports of this campaign nor are they insecure about their international image.

Moral ‘shaming’, as a mechanism of TAN-induced change, might not work on liberal democracies. Could it be that human rights matter in foreign policy, but only when democracies and TANs use it to shame non-democracies? The ICMW appears to suggest that when democracies themselves are targets of shaming by TANs, campaigns tend to fail. In fact, because democracies are comparatively invulnerable to material pressure and moral shaming, it is possible that they can work to block network activities which are perceived as challenging to national security. Taran writes that some European

governments pressured ‘at least one European Union member state’ (probably Italy) to abstain from signing the ICMW.⁴¹ This finding, to say the least, seems odd and inconsistent with the literature on TANs; I will return to it in the conclusion. Doubtless, additional research is needed on transnational efforts to address human rights violations in liberal democracies. But in addition to the target vulnerability to campaigns, other factors affect the likelihood of states to sign human rights treaties. In the next sections, I will look at three features of the treaty design: complexity, precision and escape clauses.

COMPLEXITY AND PRECISION

As variables of treaty design, complexity and precision have considerable theoretical pedigree in IR and international law. While in no way completely orthogonal, they will be treated as analytically separate. For one, while most authors agree that complexity hinders the likelihood of signature, there is no consensus on the impact of precision.

Two-level game theory in IR suggests that complex and demanding treaties are more likely to fail at the ratification point because the governments are unable to generate sufficiently large win-sets.⁴² The same can be said about the signature point, as winning win-sets are usually needed even for this stage, especially in democracies. The ‘rational design’ school in IR lists ‘scope’ – or complexity – as one of the most important dimensions of institutional variation.⁴³ All else equal, the greater the scope of a treaty, the greater the potential loss of the autonomy its member states face. Complex treaties require extensive national consultation, which can slow down or outright prevent states

from signing treaties. Thus, the more complex the treaty, the lower the chance of signature and ratification.

The concept of precision has received substantial theoretical attention in international law as well as IR. In international law, it is often possible to make a convincing case both in favour and against the legality of a specific event or action. This is known as the indeterminacy of international law.⁴⁴ The so-called ‘managerial model’ argues that non-compliance occurs, among other things, because of ‘ambiguity and indeterminacy of treaty language.’⁴⁵ The ambiguity of treaty language stands out as a central explanatory variable in the managerial model: ‘countries cannot immediately comply with legal obligations they do not understand.’⁴⁶

The ‘fairness model’ posits that ‘fairness,’ as a precondition for ‘compliance,’ depends on transparency or the ‘determinacy condition.’⁴⁷ For Hathaway, the ambiguity and indeterminacy are ‘obvious and widely accepted sources of non-compliance.’⁴⁸ Arguably, these two could be regarded as elements of precision and related to the act of signing. Drawing on this approach, it can be said that the state will be more likely to sign the treaty, the more precise its stipulations.

But precision may also hinder the likelihood of signature. From a functionalist standpoint, Abbot and Snidal contend that states deliberately opt for ‘softer forms of legalization’ because soft law offers many benefits of hard law, but without many of its costs.⁴⁹ The authors, as well as the other members of the ‘legalization’ school of IR, maintain that a key difference between soft law and hard law lies in precision of legally-binding obligations. Precision ‘narrows the scope for reasonable interpretation.’⁵⁰ The EHRC is an example of an extremely precise, highly elaborated document; the rules of

Group of 7, in contrast, are extremely imprecise.⁵¹ Imprecise treaties will be pursued when ‘states are jealous of their autonomy and when the issues at hand challenge state autonomy.’⁵² Thus, the legalization school advances an alternative proposition: a state will be less likely to sign a treaty, the more precise its stipulations. The ‘flexibility’ variable, advanced by the ‘rational design’ school, can also be said to capture the precision of international treaties.⁵³

This alternative proposition can be distilled from IR theory on norms. For Legro, ‘specificity’ is determined by asking: ‘is there a laborious code that is overly complex or ill-defined or is it relatively simple and precise?’⁵⁴ From the standpoint of political psychology, Shannon argues that ‘norms are what states make of them’ and that motivated biases compel state leaders to interpret norms in such ways to justify future violations as socially acceptable. His hypothesis is the ‘more parameters a norm possesses, and the more ambiguous those parameters are, the easier it is for actors to interpret them favorably to justify violation.’⁵⁵ The assumption is that state leaders seek increased discretion over the matters of state sovereignty. The vagueness of the human rights provisions in legally-binding treaties allows the state to keep its freedom of action without attaching legal reservation to those treaties. For example, Forsythe finds that, in the making of the human rights sections of the UN Charter, the U.S. ‘resisted efforts to make [the] language more precise and judicially enforceable.’⁵⁶ Later I will consider national security escape clauses as one particular aspect of (im)precision. In short, several approaches treat precision as an obstacle to treaty-signature. Thus it is the vagueness of treaty provisions that makes the states more likely to sign.

Note that these propositions are applicable are by no means exclusive to liberal

democracies and human rights treaties. Yet, as the two level games theory suggests, liberal democracies in particular are concerned about the nature of treaty provisions. Thomas similarly suggest that liberal democratic states ‘will resist infringements o their domestic autonomy implied by enforceable human rights regimes, but may seek political advantage by supporting unenforceable norms favored by international allies or influential domestic constituencies.’⁵⁷ Again, this paper does not ask whether liberal democracies are genuinely interested in establishing robust human rights frameworks. Instead, it asks if and how the treaty design affects the decision to submit a signature.

Also note that the treatment of complexity and precision varies widely across literature, in accordance with the underlying theoretical assumptions as well as the nature of the research question. For example, in the rational design of institutions school, scope and flexibility are dependent, not independent variables. My operationalization and measurement of these treaty design variables will depart from some approaches.

I measure complexity on two dimensions. The ‘data’ comes from a close reading of the treaty text as well as from the authoritative secondhand commentaries.⁵⁸ First, I make a reference to the length of the treaty (i.e. the number of sections and articles). Second, I consider the ‘novelty’ of its provisions (Does it build on previous instruments?; i.e. Does the enumeration of specific rules provide anything new, as compared to repetition of already codified rights? Does the wording depart from established human rights language?). I propose a negative relationship between complexity and the likelihood of signature: a state may not be able or want to satisfy new and/or extensive constraints on its legal and political system.

Following Abbot et al, I attempt to capture precision by considering the possible

range of ‘issues of interpretation.’⁵⁹ If most of its ‘standards’ are meaningful only with reference to specific situations than a treaty is not precise. Because the centrality of the precision of the rules in an agreement may be more important than the precision per se, I focus on two questions which I think are central to any human rights document. I ask, first, whether a treaty provides a clear and precise definition of a vulnerable group and second, whether the rights accorded to the group or groups are well-differentiated. Here the data predominantly comes from commentaries.

Doubtless, mine is a naïve way of dealing with complexity and precision in international human rights treaties. This is a product, first, of a deliberate effort to build on the conceptualizations advanced in the theoretical frameworks discussed above. Second, it comes from a strong belief that *a* measurement is better than *no* measurement. Table 2 summarizes the results of a consideration of complexity and precision of the four treaties under study.

TABLE 2 ABOUT HERE

The refugee treaties can be regarded as moderate in terms of complexity and precision. Even though some refugee law existed in domestic legal systems of Western democracies, the Refugee Convention was a decidedly novel instrument when it was opened for signature. The only preceding human rights treaty on which it could build was the 1948 Universal Declaration – ‘a nonbinding aspirational document’ – which in turn makes the Refugee Convention the ‘first enumeration of human rights in a binding treaty.’⁶⁰ The main innovation was the introduction of a definition of a refugee, which hitherto did not exist in refugee law. Yet this definition was vague. Most famously,

‘persecution,’ the critical concept in the definition, is left unspecified in both treaties.⁶¹ The same goes for the concept of ‘protection’.⁶² The word ‘admission’ – common to all treaties surveyed – is open to various interpretations, which no doubt increases the freedom of action on the parts of the states.⁶³

In this comparison at least, the ICMW and ILO conventions come out as more, not less precise. To be sure, compared to the ICMW, C97 and C143 are seen as less precise. An ILO review on the status of ratification surveyed the non-participating governments about the conventions.⁶⁴ Among those who responded, a few governments noted that the ratification of one or both conventions is being studied, but most, OECD democracies included, cited three main obstacles to the ratification: 1) lack of precise definitions of rights of all migrant workers; 2) the states’ unwillingness to recognize the equality of opportunity between citizen and non-citizen workers; and 3) many obsolete provisions contained in the treaties (e.g. gender blindness).

The definition of ‘migrant worker’ provided in the ICMW is the most comprehensive.⁶⁵ The ICMW goes at some length to disaggregate and separate among categories of migrant workers and their families, such as seasonal and ‘frontier’ workers; seafarers and workers employed on foreign vessels and offshore installations; ‘itinerant workers’; self-employed workers and others (Articles 2, 58-63). And save for Nafziger and Bartel who argue that the definition renders the whole treaty ‘ambiguous,’ most commentators contend that the ICMW is in fact ‘too specific.’⁶⁶ All of these observations support the proposition that too much precision thwarts the likelihood of signature. This finding is not lost on policy-makers. The ILO has attempted to put forward recommendations and other non-binding documents at the expense of binding

conventions.⁶⁷ As Taran notes, numerous international initiatives have been made to introduce a ‘framework convention’ or a set of ‘principles’ in order to make standards on migrant worker rights ‘less strict and specific than those in the 1990 Convention.’⁶⁸

In terms of complexity, as Table 2 suggests, the ICMW and ILO are on balance more complex than the Refugee Convention. Arguably, the ILO conventions, which primarily deal with labour rights, advance several sets of standards unmatched by the ICMW.⁶⁹ But in general, the ICMW provides greater scope and coverage than any document of migrant worker rights (Ibid: 149, 184, 199-200). For example, in addition to listing the usual suspects among basic civil and political rights, such as preventing inhumane living conditions and degrading treatments (Articles 10-11, 25, 54), the ICMW also recognizes economic and social rights for documented migrants, such as the right to join labour unions (Articles 26, 40).

Judging by the number of articles, the ICMW is one of the longest human rights treaties in the UN system. According to Hune and Niessen,

[t]he great number of articles of the Convention covering many aspects of the situation of migrant workers necessitate that many governmental departments must be consulted before the ratification process can be started. This explains why it will take a long time before States can actually ratify.⁷⁰

Among the commentators surveyed above, there is a firm consensus that the ICMW is ‘too complex.’ Not only is this treaty rather lengthy, but its claims on the domestic legal system are most extensive of those discussed here. First, the ICMW explicitly codifies the rights of migrants in three out of four ‘categories of entry.’ Second, and most important while it admits that legal migrants have the legitimacy to claim more rights than undocumented migrants (Part IV), the ICMW extends basic human rights to *all*

migrant workers and their families, without distinction to the legality of their entry.⁷¹ To be sure, in terms of the treaty language, the ICMW is a ‘consolidation’ or a ‘reproduction’ of preceding legal treaties.⁷² In this sense, the ICMW creates no ‘new’ rights. But it comprehensively applies them on both ‘legals’ and ‘illegals.’ This fact alone greatly adds to its overall complexity.⁷³

One can tentatively conclude that complexity and precision are important factors in treaty-participation. Complex and specific treaties tend to hinder the likelihood of signature. The key ‘problem’ of the ICMW, so to speak, is that it stipulates too many rights for too many people. The inclusion of ‘illegals’ in particular is listed as the largest ‘substantive obstacle’ for the ratification of the convention among migrant-receiving democracies.⁷⁴ In her overview of international migrant rights treaties, Fitzpatrick suggests that ‘resistance to legal obligations that may impede enforcement measures to combat illegal migration...also deter ratification.’⁷⁵ In other words, perceptions that international legal obligations will impede the efforts to protect national security likely act as a detriment to the likelihood of signing a treaty and regime formation in general. For example, in discussing the ‘decidedly ambiguous’ formation of a regional human rights regime in the Western Hemisphere, Forsythe lists the U.S.’ security concerns as a major limiting factor.⁷⁶ But instead of considering perceptions as such, this study focuses on the treaty design and the presence of ‘escape clauses’ on national security.

NATIONAL SECURITY ESCAPE CLAUSES

After the Cold War, migration has been constructed and deconstructed as a new

security concern – political, economic, and societal.⁷⁷ With national security being increasingly defined as the ability of the government to control access to a given physical and cultural territory, international migration law has come under much scrutiny. Observers have noted that ‘[n]ational security is the Achilles’ heel of international law[;] [w]henver international law is created, the issue of national security gives some sort of loophole, often in the form of an explicit national security exception.’⁷⁸ According to Fisher et al, escape clauses are ‘essential prerequisites for states to agree to bind themselves to international commitments, including those relating to migration.’⁷⁹ Escape clauses thus increase the degrees of freedom for national policymakers.

Rosendorff and Milner define an escape clause as ‘any provision of an international agreement that allows a country to suspend the concessions it previously negotiated without violating or abrogating the terms of the agreement’ and argue that such provisions facilitate agreement by allowing states to suspend their obligations.⁸⁰ They arguably increase the flexibility of international agreements, while decreasing their credibility. In this respect, the concept of escape clauses closely relates to precision. Thus, the greater the number and centrality of national security ‘escape clauses’, the greater the likelihood of treaty-participation.

In the 1996 survey on the non-ratification of the ILO conventions, states listed Articles 6, 8, 10, 14a as problematic because they potentially compromise ‘national security.’⁸¹ It is expected that states would find similar provisions in the ICMW equally ‘problematic,’ if surveyed.

The language in the ICMW refers of the issues of national sovereignty and *ordre public* on numerous other occasions.⁸² The convention also acknowledges the need to

combat illegal or clandestine migration by Article 68. But from the point of view of national security, it contains no ‘escape clauses’ which allow ‘national security’ or ‘public order’ to take precedence over ‘rights.’⁸³ For example, a sole reference to ‘state sovereignty’ was relegated to Article 79 in Part VIII.

The Refugee Convention (RC), in contrast, stands out in terms of the number and centrality of national security escape clauses. In theory, it impinges on state sovereignty in several important areas. Refugee protection typically includes the rights of physical protection, minimal services, and, importantly, *non-refoulement* – the prohibition against involuntary repatriation (a basic norm of non-return of the refugee to the country of persecution). States members to the RC cannot refuse admission to asylum-seekers, let alone send them back to the country of persecution. This right is a major limit on ‘sovereign prerogative’ and stands as the ‘foundation of virtually all refugee protection.’⁸⁴ Once refugee status is granted, states are very unlikely to withdraw it and far more likely to turn refugees into permanent residents after a relatively brief period of time.⁸⁵

However, there are two important caveats to the duty of *non-refoulement*. By Article 33 (2) of the RC, states can return the refugee when ‘there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’ War criminals obviously do not qualify for refugee status. Here, national security stands as an ‘exception to the exception.’ This caveat was originally included to address a prominent national security concern at that time of drafting: communist infiltration. Like the nature of ‘well-grounded fear,’ the nature of

‘danger’ to national security’ has allowed for varying interpretations, most of which have gone in the favour of states.⁸⁶

The second escape clause concerns the freedom of movement. Article 26 of the RC allows states to restrict refugees’ right of movement within the host country if there are ‘compelling reasons of national security or public order[.]’ Public order (*ordre public*) is a particularly vague term, which refers to the policing powers to ensure the orderly functioning of society.⁸⁷ For the sovereign state, the vagueness of these critical terms itself provides an important escape clause or a way to suspend the concessions it accepted.

But the centrality of national security concerns in the RC can be best appreciated at the level of asylum-granting. The final answer to the question ‘who is a refugee?’ is given by state officials, even though, theoretically, it is the responsibility of an individual asylum-seeker to ‘credibly’ establish her claim before legal and/or bureaucratic institutions of a host government.⁸⁸ A definition of asylum does not exist in international refugee law. It is the receiving state who adjudicates, on a case-by-case basis, what is an instance of persecution and what is not and which human rights violations deserve asylum and which do not. Thus, the right to asylum is more the right of the state to grant it than of an asylum-seeker to claim it. More often than not, the decision whether the asylum-seeker’s fear of being prosecuted is ‘well-founded’ is determined by political considerations of the day. Governments have traditionally defined refugees on the basis of the prevalent political interests. For example, in the Cold War, the asylum-seekers from the East were understood differently from those arriving from the South.

In addition to national security loopholes, states have used a variety of legal and

procedural mechanisms to increase their freedom of action. Two are germane to this discussion. First, *non-refoulement* is not a guarantee to asylum and the right associated with permanent residence.⁸⁹ The majority of asylum-seekers are thus provided temporary protection only. Some of those ‘temporary’ or ‘de facto’ refugees are sent back home once the ‘hostilities’ cease, but more than many continue to be ‘warehoused.’ These people are often confined to camps or segregated settlements without being given rights under the RC.

This response is usually applied during the so-called ‘asylum crises.’ In these situations, the receiving states argue that the RC was never devised to deal with mass flows from humanitarian crises or as a selection mechanism in immigration policies.⁹⁰ Article 9 of the RC, which allows for ‘provisional measures’ against refugees in ‘grave and exceptional circumstances,’ proved a useful safeguard for states. By this article, refugees can only be given temporary protection (which, by definition, restricts *non-refoulement*) and many migrants who are denied asylum are allowed to stay in the host country with a possibility to adjusting their status in the future.⁹¹ A related and a successful asylum-denying tactic used by receiving states concerns the so-called ‘safe third countries.’ In this practice, asylum-seeker must apply for the protection in the first ‘functional’ state in which she arrives. On these grounds, most temporary refugees are warehoused closer to their home state.

Second, *non-refoulement* applies only in the matters of expulsion or return, it does not mandate nonrejection at the port of entry. In fact, states tend to tighten a visa requirements (and increase carrier sanctions) towards refugee-generating countries. The so-called ‘pushbacks’ of asylum-seekers occur often in ‘asylum crises.’ In the US, the

Supreme Court controversially rejected the *non-refoulement* obligation for Haitian asylum-seekers in 1993.⁹² None of these practices can be conceptually reconciled with the protective premises of the RC, but they summarily supportive of the proposition that states seek to maximize their sovereignty in migration matters.

The sources, patterns, and intensity of global migration have changed and the practice of asylum-granting has become more burdensome than ever. Many predict that time-limited protection of asylum-seekers is likely to become institutionalized via regional and international agreements. States are quick to point out that the RC was meant to tackle specific issues of political persecution that arose from the World War II and the Cold War; it was never met deal with the changing patterns of forced population movements.⁹³ An old saw goes that it is unlikely that many governments would sign the 1951 convention today. As evidence, one can cite a failed attempt to draft a UN treaty on territorial asylum in 1977.⁹⁴

But while these practices clearly erode the spirit and question the relevance of the RC, they exemplify the flexibility that continues to give a lease of life on the international refugee regime writ large. Notwithstanding gaps, contradictions and even rollbacks in the protection of the persecuted, international refugee regime appears well-entrenched among democracies. The RC has spawned a sizable body of administrative and judicial mechanisms at the national level. In addition, states continue to offer recommitment, rhetorically, to the RC and its Protocol.⁹⁵

In international refugee law, discretion, not consistency, continues to be the order of the day. But presumably, the same could apply to migrant worker regime – states could continue to practice discrimination in spite of the ratification of the ICMW. The

point is, however, that the RC, is very sensitive to national security concerns, which may account for the difference in human rights regime formation between two groups of migrants.⁹⁶

THE POLITICS OF DRAFTING

As far as the international human rights examined here are concerned, the design-based propositions – complexity, precision, and escape clauses – appear to fare well in the attempt to explain treaty-participation in the domain of migrant rights. I cautiously say “appear” because these three propositions may share a major theoretical flaw.

As independent variables, complexity, precision and national security escape clauses are endogenous and thus misleading or at least highly contentious. Endogeneity refers to the reversal of the causal direction between the dependent and independent variables.⁹⁷ In my case, the signature to a treaty may be endogenous to the prior decision by state actors to include complexity, precision, and escape clauses in a treaty. By examining these three variables as causes for the non-signature of the ICMW, we are barking at the wrong tree.

States might sign a treaty because the matters of institutional design compel them to do so. But they can be equally likely to sign because they themselves are responsible for that institutional design. In this conception, international treaties reflect rather than affect states’ interest in pursuing a particular course of action. The decision to sign a treaty is endogenous to expectations about future developments, i.e. “compliance”, in a given matter.⁹⁸ Simply put, the design-based propositions are flawed because conditions

that lead to the “too complex, too specific, no security loopholes” design co-vary with the design itself. We have a strong theoretical reason to disagree with Cholewinski’s observation on the ICMW that “[t]echnical questions alone...may prevent many states from speedily accepting its provisions.”⁹⁹

Multilateral treaties, such as the ICMW, are the product of negotiations between states. Each state brings its own political interests to the negotiating table and the resultant treaty generally reflects the compromise over different political interests of states. The institutional design is in the hands of states: if a treaty contains no national security escape clauses, it is because the key negotiators did not agree to include them. Although the practical options may be limited, the centrality and number of national security escape clauses, like the degree of complexity and precision, are manipulable conditions. The institutional design is a product of negotiation and compromise. For this reason, complexity, precision and escape clauses should be seen as intervening, not causal variables.¹⁰⁰ As such, they cannot be regarded as key conditions for the likelihood of signature of human rights treaties among democracies. Poor drafting does not make or break treaties.

But what does? The simple (and simple-minded) answer is the ‘national interest.’ A brief look at the politics of drafting is instructive in this regard. As with all treaties, the ICMW was drafted because of a perceived need to manage an issue of shared concern among international actors. The analyses of the *travaux préparatoires* and other pre-negotiation records suggest that the ICMW was largely made by developing states, for developing states.

As stated earlier, for most migrant-sending states – that is, developing states –

treaties on migrant worker rights are regarded as a tool for protecting their citizens who work abroad. With the ICMW, developing states – who have more bargaining power in New York than Geneva – preferred to place a comprehensive international treaty on migrant worker rights in the UN, rather than in the ILO system.¹⁰¹ Apart from a greater ‘visibility’ and the opportunity to expand on human rights in a new document, developing states also sought to exclude employer organizations from the drafting process – an objective far more easily pursued outside the ILO framework.¹⁰²

According to Lönnroth, the drafting of the ICMW was marked by ‘mistrust and hostility.’¹⁰³ Decisions were made by consensus among three key blocs of states. The strongest bloc was led by Group of 77 (G-77), which normally represents the interests of developing states. This bloc wanted to use ‘the negotiations and the drafting of the ICMW as a tool to condemn some states of employment and their discriminatory use of migrant labor.’¹⁰⁴ Human rights, in other words, were not a priority. Formerly socialist countries generally supported the position of this bloc.

Opposite G-77, in terms of interests, there was a ‘Northern’ bloc of major receiving states – Australia, Canada, Denmark, Germany, Japan, the Netherlands, and the USA. This group pushed for a more ‘flexible’ convention.¹⁰⁵ Above all, these states demanded more ‘sovereignty over admission’ and more respect of the distinctiveness of national immigration control policies.¹⁰⁶ The third relevant bloc was a coalition of ‘European sympathizers’ interested in a more extensive promotion of human rights – Finland, Greece, Italy, Norway, Portugal, Spain and Sweden.¹⁰⁷ The ILO supported, with minimal input, this bloc.¹⁰⁸

The numerically superior G-77 dominated the negotiation processes. It ignored the demands of the Northern bloc for more sensitivity to ‘sovereignty over admission,’ which is reflected in the comparative lack of national security escape clauses. In addition, contrary to the explicit wishes of the migrant-receiving democracies, the Preamble of the ICMW does not contain a ‘state sovereignty’ provision permitting states parties to control and restrict migrant worker admission criteria.¹⁰⁹ But what turned out to be the fundamental deal-breaker was G-77’s insistence on conferring special protection to ‘illegals.’ The negotiation record suggests that both the Northern bloc and European sympathizers objected and preferred a shallow treatment of this migrant group – perhaps some symbolic recognition, but certainly no legal protection as such. The receiving states argued that granting rights to “illegals” would almost certainly give an impetus to illegal immigration, including human trafficking and smuggling. Even while the drafting was in progress, at least four migrant-importing democracies – Australia, Germany, Japan, and the USA – implicitly stated that they were ‘unlikely to ratify’ the convention because of the inclusion of ‘illegals’ in the treaty language.¹¹⁰

For many states outside the G-77-dominated bloc, the ICMW’s aim of extending rights to undocumented migrants while at the same time offering provisions for combating illegal migration was a mission impossible.¹¹¹ G-77 simply used their greater bargaining power to ignore these concerns. In the process, it alienated not only the major receiving states, but also the coalition of European sympathizers, who were more than interested in the success of the ICMW.

The different national interests in the ICMW are obvious. Even by the virtue of being ‘open to signature,’ international migrant rights treaties ask states to acknowledge

rights of non-citizens. In most receiving countries, migration is not only a politically sensitive issue, but – as I suggested earlier – a matter of national security. Thus even if migrants are necessary for the domestic labour market, they might be politically too costly. The issue of ‘illegals’ made things more complicated for receiving states.

Theoretically speaking, the ICMW is much ‘deeper’ for the receiving states than for sending states. Downs, Rocke and Barsoum define ‘depth’ as the ‘extent to which [the treaty] requires states to depart from what they would have done in its absence.’¹¹² By asking what change, if any, would have been made in the absence of agreement, this variable controls the degree of change from the status quo. ‘Deep’ cooperation is more costly because it requires more enforcement. As the authors note, a high rate of compliance in the relative absence of enforcement mechanisms should not imply an irrelevance of enforcement as such.¹¹³ Instead, a high rate of compliance with an international agreement can be explained by the lack of any depth of that agreement.

Assuming the linear and symbolic relationship between the signature and compliance, one can argue that the low rate of signature of the ICMW can be explained by a high depth of the agreement. States are more likely to sign shallow treaties with lower compliance costs. The democratic non-signature, accordingly, stems from the variable impact of the ICMW’s depth: migrant-receiving states were asked to bear much greater compliance costs, so they rejected it the treaty. This conclusion is neither surprising nor particularly interesting. In a sense, it is not at all puzzling that the treaty failed among migrant-receiving OECD democracies. More sensitivity to the potentially disproportional costs of the ICMW in the drafting phase would have increased the chances of its success. The G-77 decision to ignore the demands of the critical group of

states appears to have put a rather squat ceiling on the signature record of the ICMW from the outset and thus thwarted the development of a migrant worker rights regime. In the conclusion, let me summarize the points made above. Then, I will consider further research avenues.

CONCLUSION

The ICMW guarantees the full range of internationally recognized human rights to all migrant workers, but the extension of human rights law into the field of migrant labour has not been effective in terms regime formation. OECD democracies have not shown any enthusiasm for signing the ICMW. The result is a ‘symbolic recognition – but no more – of the extension of the general regime of human rights of migrants.’¹¹⁴

A systematic look at the pre-treaty stage can give us an understanding of the politics of treaty drafting, which shed some light on why some treaties succeed and other fail.¹¹⁵ As I noted above, states carried uneven negotiating weight and pursued different agendas in the drafting process of the ICMW. The available evidence suggests that the convention was essentially a pet project of some members of G-77. This voting bloc used its majority to ‘steamroll’ its version of the convention through the drafting process. Their tactics alienated the receiving states and removed any stakes they might have had in the treaty. This simple observation can explain not only the institutional design of the treaty but also its ‘failure’ among liberal democracies. Had the drafting process been more inclusive and, in particular, more sensitive to the preferences of receiving states, the signature record of the ICMW would have probably been less paltry.¹¹⁶ As mentioned

above, the failure of the ICMW has sparked an international initiative towards a more tempered ‘general framework’ on migrant worker rights.

The weakness of the promotional campaign is not the reason why the ICMW ‘failed.’ As I have argued, the strength and density of TANs do not correlate with high treaty-participation among democracies, at least not in the cases examined above. The vulnerability of the target state appears to be a stronger determinant of the campaign success. Liberal democratic states cannot be easily shamed about their home human rights record. And without powerful liberal democracies on board, TAN-based campaigns lack the necessary strength to shame non-democratic regimes and change their domestic policies.

I have also argued that the nature of the treaty design did not cause the democratic non-signature of the ICMW. Complexity, precision, and national security escape clauses are at best intervening, but certainly not causal variables. By and large, these three conditions are subject to alteration by treaty drafters. Given the potential endogeneity, estimating the effects of each on the likelihood of signature tells us little. If the ICMW is too complex, too specific or lacking in national security loopholes, it is because the states opted for this particular design. But the treaty design, while endogenous, should not be treated as epiphenomenal. It is simply an analytical issue of the second order.

While we might give a partial explanation on how migrant workers became recognized as an issue deserving a UN treaty by looking at the pre-treaty negotiations, we will never be able to explain it fully and thus account for the democratic non-signature of this treaty among democracies. Because all government actions, such as the drafting or signature of international conventions, reflect balances of domestic interests and

identities, a domestic theory of politics is required. In this sense, Donnelly is entirely correct in his observation that

[t]he struggle for international human rights is, in the end, a series of national struggles... The study of human rights must in the final analysis rest most heavily on the study of comparative politics, not international politics.¹¹⁷

In the case of migrant workers, a genuine puzzle thus exists only at the domestic level. The politics of drafting suggests that the ICMW was negotiated by the developing, migrant-sending states alone. The treaty was designed by one group of states and attempted to be imposed on the rest. It is not puzzling that states who had little say in drafting decided to shun the treaty. But as I indicated above, several European states – some of whom are major migrant-receivers – were quite sympathetic to the ICMW. Italy, as I suggested earlier, was reportedly on the verge of signing the ICMW before it was pressured by other migrant-receiving democracies to do otherwise. Similarly, it is puzzling that the ILO conventions achieved a variable signature and ratification record *within* the same group of migrant-receiving states. What led, for example, Italy, Norway, and Sweden to sign C143? What led, say, Greece, Finland, and Spain not to sign it?

Two sets of theories stand as possible sources of answers to this puzzle. Above, I noted how liberal democratic states had an ‘interest’ to protect their society and economy against ‘illegal’ migrant workers. The national interest is a product of exchange and collective action among domestic groups who operate under various domestic constraints. Milner, to use one example, demonstrates how policy choices can be regarded as a result of the strategic game among domestic actors. Using institutions and information as key variables, she offers several hypotheses on the likelihood of signature and/or ratification

of international treaties. In her study of the determinants of immigration policy in three OECD states, Money models the relationship between the geographical concentration of foreign labour and the institutional dynamics.¹¹⁸

The second set of theories focuses on identity. What we want always depends on who we are. Typically, states will pursue those courses of action that are most resonant with their identities.¹¹⁹ Because identities are multiple and malleable, they cannot be assumed away and otherwise ‘fixed.’ Rather, they must be recovered empirically by a deeper look at domestic politics. Looking at Japan, Gurowitz provides an account on how domestic and international norms interact to together shape immigration and citizenship policy of that country. Kushner and Knox employ a rich social-historical approach to track local experiences of the reception of refugees in Hampshire over the past century. They then turn to several propositions on how local responses link with national and global processes to determine British immigration policy. Both Chavez and Maher consider the U.S. case and demonstrate how discourse analysis can profitably be employed in the study of national policies on migrant rights writ large. Chavez’s account in particular, shows how media consistently negatively frames illegal immigration, but compassionately deals with refugees.¹²⁰ To be sure, these two sets of domestic theories do not necessarily exclude each other. Meyers provides a comprehensive theory of immigration policy in four OECD democracies that considers both interest- and identity-based variables.¹²¹

Let me mention one last avenue for further research. In the study of the effects of TANs, an equally important factor concerns the so-called ‘issue characteristic.’ In contrast to the campaigns that focus on the rights of personal integrity, the issue of

migrant workers belongs to those of ‘legal equality of opportunity.’¹²² Keck and Sikkink expect campaigns on these issues should be most successful in liberal democracies.¹²³

And in the past, TANs have certainly been effective on some issues of this type – slavery, woman suffrage, and apartheid.¹²⁴ But why did they fail in the case of migrant workers?

At this level of analysis, it is impossible to determine why. A part of the answer lies in the endogeneity of the ‘issue characteristic’ variable. In bargaining theory, which is of considerable interest to those studying the politics of drafting, this variable is seen as exogenous – it is contingent on ‘available alternatives, commitment and control (the degree to which one side can unilaterally achieve its preferred outcome).’¹²⁵ But at least to some extent, issue characteristic is manipulable.

In the case of the ICMW, it can refer to the ability of TAN’s to successfully *frame* migrant worker rights as the issue of legal equality of opportunity is critical.¹²⁶ For instance, Klotz argues that transnational activities succeed when their ethical agendas ‘mesh or ‘nest’ well with other normative agendas.’¹²⁷ Bob similarly contends that campaigns are more likely to succeed if they are ‘able to “pitch” themselves to international audiences and ‘match’ their grievances to recognized abuses.’¹²⁸ To that end, framing migrant rights as human rights, rather than rights of non-citizens or ‘illegals’ is critical for achieving that legal equality of opportunity. So far, the matching of the oppression of migrants to human rights violations has been rather weak.

Framing is an enormous and important topic which has not been adequately theorized in the scholarship on TANs, negotiations and international institutions. But at least it is clear that – for a more nuanced and broader picture – one needs to consider ‘domestic political contexts.’¹²⁹ It is often argued that liberal democracies will be more

likely to adhere to international legal obligations because their domestic groups are free to act and lobby.¹³⁰ Ostensibly, signing a treaty has a domino effect: a signature creates domestic pressure for ratification and ratification, in turn, creates domestic pressure for implementation and compliance. In liberal democracies, ‘once a treaty is consented to, it creates an obligation that must be obeyed.’¹³¹ But surely this freedom of action also means that domestic groups can resist signing of treaties if they run contrary to ‘what they want.’ Because of regular opportunities to remove them from office, democratic governments are more likely to be responsive to constituents’ demands. The question is under what conditions are migrant worker rights dissonant with what constituents want?

This question opens up a new research agenda altogether, but the interest-based explanation is that human rights regimes are more difficult in a domain characterized by widely perceived domestic distribution conflicts. According to Hune and Niessen, migrant-receiving states perceived the ICMW as an ‘instrument for liberal immigration policies,’ which they find unacceptable in ‘a time of great economic, social and political instability.’¹³² But the word ‘perception’ implies that the domestic costs of signing the ICMW are a matter of framing. Again, it is puzzling why Italy almost signed the treaty. Was the issue of migrant worker rights framed so differently in Italy?

This examination of framing could go in two general directions. On the one hand, one would look at the ways in which activists nest migrant worker rights within human rights discourse in the target states. On the other hand, one would consider how opposition groups ignore, temporize, and/or resist this nesting. Again, for a full picture, we need a theory of domestic politics – an account of identities and interests of both proponents and opposition and their representations of the perceived distribution conflicts

over the extension of human rights to migrant workers. Put otherwise, the quintessentially political question ‘who has the right to have rights?’ needs to be answered at the level of domestic politics before we could move on to its diverse answers at the level of international human rights treaties and regimes.

NOTES

¹ For valuable comments and criticisms, thanks go to Donald Sylvan, Jennifer Mitzen, Alexander Thompson, Yoram Haftel as well as Jim DeLaet, Amanda Metskas, and Amanda Rosen. Errors remain the province of the author.

² In 1990, the UN reportedly predicted that twenty states would ratify it by 1992. Roger Böhning, 'The ILO Convention and the New UN Convention in Migrant Workers, The Past and Future', *International Migration Review*, Vol.25, No.4 (1991), pp.698-709, at p.705, n.5.

³ Patrick Taran, 'Status and Prospects for the UN Convention on Migrant Rights', *European Journal of Migration and Law*, Vol.2, No.2 (2000), pp.85-100, p.88; Virginia Leary, 'Labour Migration', in Alexander Aleinikoff T., and Vincent Chetail (eds.), *Migration and International Legal Norms* (The Hague: T.M.C. Asser, 2003), pp.227-240, p.238; Yash Ghai, 'Migrant Workers, Markets, and the Law,' in Wang Gungwu (ed.), *Global History and Migrations* (Boulder, CO: Westview: 1997), pp.145-182, p.177.

⁴ Shirley Hune and Jan Niessen, "Ratifying the UN Migrant Workers Convention: Current Difficulties and Prospects," *Netherlands Quarterly of Human Rights* 12 (1994), pp.393-414, at p.401.

⁵ Joan Fitzpatrick, 'The Human Rights of Migrants,' in Aleinikoff and Chetail (note 2), 169-184, at p.177; Patrick Taran, 'Human Rights of Migrants: Challenges of the New Decade', *International Migration* Vol.38, No.6 (2000), pp.8-45, at pp.18-22, 36; Hune and Niessen (note 3), pp.399, 402; Ryszard Cholwinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press Oxford, 1997), pp.138, 202. Heikki Mattila, 'Protection of Migrants' Human Rights: Principles and Practice,' *International Migration* Vol.38, No.6 (2000), pp.53-69, at p.59.

⁶ Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (New York: Cambridge University Press, 1999), p.264.

⁷ Hans-Peter Schmitz and Kathryn Sikkink, 'International Human Rights,' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds.), *Handbook of International Relations* (New York: Sage, 2002), pp.517-537, at p.531.

⁸ Ibid.; Margaret Keck and Kathryn Sikkink, *Activist Beyond Borders: Advocacy Networks in International Politics*. (Ithaca, NY: Cornell University Press, 1998), p.206; Karen Mingst, and Margaret Karns, *The United Nations in the post-Cold War Era* (Boulder, CO: Westview Press, 2000), p.47.

⁹ Thomas Risse, 'Constructivism and International Institutions: Toward Conversations Across Paradigms,' in Ira Katznelson and Helen V. Milner (eds.), *Political Science: The State of the Discipline* (New York: WW Norton and Co., 2002), pp.597-629, at p.613. Andreas Hasenclever, Peter Mayer, and Volker Rittberger, *Theories of International Regimes* (Cambridge, MA: Cambridge University Press, 1997), p.79. Paul Kowert and Jeffrey Legro, 'Norms, Identity and their Limits: A Theoretical Reprise,' in Peter Katzenstein (ed.), *The Culture of National Security* (New York: Columbia University Press, 1996), pp.451-497, at p.485.

¹⁰ Keck and Sikkink observe: 'for every voice that is amplified [by campaigns], many others are ignored.' Keck and Sikkink, (note 7), p.x.

¹¹ Peter Stalker, "Migration Trends and Migration Policy in Europe," *International Migration* Vol.40, No.2 (2002), pp.151-176 at p.152. Ethan Meyers, *International Immigration Policy: A Theoretical and Comparative Analysis* (London: Palgrave Macmillan, 2004), p.26.

¹² Most studies of immigration simply ignore undocumented immigrants. In lieu of a more general 'immigrant,' the term 'legal resident alien' is sometimes used because it effectively excludes illegal immigrants as well as short-term visitors, such as tourists. See, e.g., Jeannette Money, *Fences and Neighbors: The Political Geography of Immigration Control* (Ithaca, NY: Cornell University Press, 1999), p.22.

¹³ Of course, there has been no universally accepted categorization of international migrants. In the 'age of migration', these classifications are becoming more arbitrary than ever. Goodwin-Gill notes that 'International refugee law...provides no logical, judicious or coherent explanation for why the refugee from persecution deserves a 'better deal' than the refugee from want.' Guy Goodwin-Gill, 'Migration: International Law and Human Rights,' in Bimal Ghosh (ed.), *Managing Migration: Time for A New International Regime?* (Oxford: Oxford University Press, 2000), pp.160-89, at p.160. The distinction between economic immigrants and asylum seekers, which is sometimes literally a matter of life and death,

is extremely subjective. Also, immigrants themselves rarely know whether they will settle permanently. And even if a migrant labourer goes back home, her family may decide to stay.

¹⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2003), pp.211, 217, 221.

¹⁵ Stalker (note 10), p.161.

¹⁶ ILO, 'The UN International Convention on the Protection of the Rights of All Migrant Workers and Member of their Families Enters into Force Today,' News release, ILO Online, July 1, 2003 [Retrieved on September 8, 2003].

¹⁷ Martin Ruhs and Ha-Joon Chang, 'The Ethnic of Labour Immigration Policy,' *International Organization* Vol.58, No.1 (Winter 2004), pp.69-102, at p.70. Adam Smith probably had this in mind when he remarked that 'a man is of all sorts of luggage the most difficult to be transported.'

¹⁸ As the bibliography attests, the term 'regime' is a popular concept among practitioners, lawyers, and social scientists alike. For definitions, see Hasenclever et al (note 8), pp.8-22, Risse (note 8), p.604, and Barbara Koremenos, Charles Lipson, and Duncan Snidal, 'The Rational Design of International Institutions', *International Organization* Vol.55, No.4 (2001), pp.761-800, at p.762. Sometimes 'regimes' and 'treaties' are used interchangeably Schmitz and Sikkink (note 6), p.521.

¹⁹ For more on international migration regime, see Aleinikoff and Chetail (note 2).

²⁰ There are several excellent studies in this direction. See Oona Hathaway, 'Do Human Rights Treaties Make a Difference', *Yale Law Journal* 111, (June 2002), pp.1937-1962, and Linda Camp Keith, 'The UN International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behaviour,' *Journal of Peace Research* Vol.36. No.1 (1999), pp.95-118. For case study-based approaches to the question of the impact of international norms and norm-promoting institutions on human rights behaviour, see Risse et al (note 5); Sandra Gubin, 'Between Regimes and Realism – Transnational Agenda Setting: Soviet Compliance With CSCE Human Rights Norms', *Human Rights Quarterly* Vol.17, No.2 (1995), 278-302; Amy Gurowitz, 'Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State', *World Politics*, Vol.51, No.3 (1999), pp.413-445; Kevin Hardigan, 'Marching Humanitarian Norms with Cold, Hard Interests: the Making of Refugee Policies in Mexico and Honduras, 1980-89', *International Organization* Vol.46, No.3 (Summer 1992), pp.709-730. Katharine Moon, 'Migrant Workers' Movement in Japan and South Korea', in Craig Murphy, ed. *Egalitarian Politics in the Age of Globalization* (New York: Palgrave 2002) pp.174-204.

²¹ I do not dispute that these regimes emerged in a historical and ideological context. The international promotion of 'universal' human rights is often seen as nothing but the imposition of Western values onto non-Western states. Much ink has been spilt in human rights theory on the questions of the origins, substance, and the priority of specific human rights, mostly in the form of the debate between relativists and universalists. Again, this paper is *not* interested in the question if human rights, conceptually or institutionally, present an effective strategy for representation, organization, resistance and emancipation.

²² Kenneth Abbot and Duncan Snidal, 'Hard and Soft Law in International Governance,' *International Organization* Vol.54, No.3 (Summer 2000), pp. 421-456; Dinah Shelton (ed.), *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000).

²³ IOM Overview, in cited in Thomas Schindlmayr, "Sovereignty, Legal Regimes and International Migration," *International Migration* Vol.41, No.2 (2003), pp.109-123, at p.117.

David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship*. (Baltimore: Johns Hopkins University Press, 1996).

²⁴ ILO, 'Migrant Workers, Protection Of Human Rights In The Context Of HIV/AIDS, And Indigenous Issues', Available at <http://www.nswp.org/mobility/ilo-200404.html> [Retrieved on April 4, 2003].

²⁵ Hathaway (note 19), pp.1950-2, Donnelly (note 13), p.38-9, 186; Risse et al (note 5), p.266, Keck and Sikkink (note 7), p.29; Schindlmayr (note 22); Mervyn Frost, 'Migrants, Civil Society and Sovereign States: Investigating an Ethical Hierarchy', *Political Studies* Vol.48, No.5 (December 1998), pp.871-86, at pp.871-2. But compare with Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford: Oxford University Press, 1999).

²⁶ The assumption is that human rights exists as widely shared ('intersubjective') beliefs and that conflicts over human rights involve the social identities of actors. The implication is that beliefs and identities determine actor interests and the nature and outcomes of interaction in world politics. For elaborations of this position in IR theory, see, e.g., Risse 2002 (note 8). The causal mechanisms through which the

'appropriate' social context is defined differ. Structuralist sociological accounts stipulate that the dispersal of Western cultural standards works through imitation, mimicry, and isomorphism. See John Boli and George M. Thomas (eds.), *Constructing World Culture: International Nongovernment Organizations Since 1875* (Palo Alto: Stanford University Press, 1999). More agency-based approaches argue that states learn through the socialization and persuasion of relevant elites. See, for example, Risse et al (note 5).

²⁷ Keck and Sikkink (note 7), pp.6-8, Clifford Bob, 'Globalization and the Social Construction of Human Rights Campaigns', in Alison Brysk (ed.), *Globalization and Human Rights* (Berkeley: University of California Press, 2002), pp. 133-147, at p.134.

²⁸ Keck and Sikkink (note 7), pp.9,27; Risse et al (note 5), p.5.

²⁹ Frost (note 24), p.872.

³⁰ Keck and Sikkink (note 7), Risse et al (note 5), Anne-Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton, NJ: Princeton University Press, 2001), Audie Klotz, *Norms in International Relations: The Struggle against Apartheid* (Ithaca: Cornell University Press, 1995). Jacqui True and Michael Mintrom, 'Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming', *International Studies Quarterly* Vol.45, No.1 (March 2001), pp.27-58. Martha Finnemore, *National Interest in International Society*. (Ithaca, NY: Cornell University Press, 1996).

³¹ Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton: Princeton University Press, 2001), p.155. Also see William Korey, *NGOs and the Universal Declaration of Human Rights* (New York: St. Martin's, 1998), p.8. Gubin (note 19), p.297; Thomas Risse-Kappen, 'Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War', *International Organization* Vol.48, No.1 (Spring 1994), pp. 185-214, at p. 186.

³² Keck and Sikkink (note 7), p.28, 206-9; Risse (note 8), p.613; Bob (note 26), p.138.

³³ Taran (note 4), p.18, also see Taran (note 2), pp.95-6.

³⁴ Taran (note 2), pp.97-8.

³⁵ But TANs played an important role in the evolution of international refugee regime. Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm,' *Harvard Human Rights Journal* 15 (2002), pp. 133-154, at p.136.

³⁶ Jack Donnelly, 'The Social Construction of Human Rights,' in Tim Dunne and Nicholas J. Wheeler (eds.), *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999), p. 77. Schmitz and Sikkink (note 8), pp.517, 521, 525, 527. Compare to Keck and Sikkink (note 7), pp.10-1. For a general history of transnational promotion of human rights in the period, see Korey (note 30).

³⁷ Alex Cunliffe, 'The UNHCR: An Assessment of its Role in a Period of Developing Refugee Crises', *Political Studies*, Vol. 43, No.2, June 1995, pp.278-90, at p. 281.; Daniel Steinbock, "The Refugee Definition as Law: Issues of Interpretation," in Nicholson, Frances and Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 2001), pp. 13-36; and Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996).

³⁸ Taran (note 4), p.18.

³⁹ Risse and Ropp (note 5), p.264.

⁴⁰ Keck and Sikkink (note 7), p.29.

⁴¹ Taran (note 4), p.19.

⁴² Robert Putnam. 'Diplomacy and Domestic Politics: The Logic of Two Level Games,' *International Organization* Vol.42, No.3 (Summer 1998), pp.427-460.

⁴³ Koremenos et al (note 17), pp.770-1.

⁴⁴ Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999), p.37.

⁴⁵ Chayes and Chayes cited in Hathaway (note 19), p.1956.

⁴⁶ Ibid., p.1958.

⁴⁷ Franck cited in Ibid., p.1959.

⁴⁸ Ibid., p.1967.

⁴⁹ Abbot and Snidal (note 21), p.423.

⁵⁰ Kenneth Abbot, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization," *International Organization* Vol.54, No.3 (Summer 2001), 401-419, at p.412.

⁵¹ Ibid.406.

⁵² Abbot and Snidal (note 21), p.423.

- ⁵³ John Duffield, (2003), 'The Limits of Rational Design', *International Organization* Vol. 57, no. 2 (2003), pp.411-430, at p.416.
- ⁵⁴ Jeffrey Legro, 'Which Norms Matter? Revisiting the 'Failure' of Internationalism', *International Organization* Vol. 51, No.1 (1997), 31-63, at p.34.
- ⁵⁵ Vaughn Shannon, 'Norms Are What States Make of Them: The Political Psychology of Norm Violation,' *International Studies Quarterly* Vol.44, No.2 (2002), pp.293-316, at p.293.
- ⁵⁵ (2000)
- ⁵⁶ David Forsythe, 'The United States and International Criminal Justice', *Human Rights Quarterly* Vol.24 (2002), pp.974-991, at p.976.
- ⁵⁷ Thomas (note 30), p.11.
- ⁵⁸ Cholewinski (note 4); Hune and Niessen (note 3); Aleinikoff and Chetail (note 2); Joan Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum Seekers and Internationally Displaced Persons: A Guide to International Procedures and Mechanisms* (New York: Transnational, 2002); Anne Bayefsky, *The UN Human Rights Treaty System in the 21st Century*, (The Hague: Kluwer Law International, 2000).
- ⁵⁹ Abbot et al (note 49), p.415.
- ⁶⁰ Jacqueline Bhabha, 'Internationalist Gatekeepers? The Tension Between Asylum Advocacy and Human Rights', *Harvard Human Rights Journal* 15 (2002), 155-181, at p.166.
- ⁶¹ *Ibid.*, pp.168-9; Anker (note 34), pp.133-5.
- ⁶² Arthur Helton, 'Displacement and Human Rights: Current Dilemmas in Refugee Protection,' *Journal of International Affairs* Vol.47, No.2 (1994), pp. 379-398, at p.383. The definition can be seen as narrow for two reasons. First, gender abuses (mass rape, sexual slavery) are not included among the grounds for persecution. Second, individuals must be victims, not groups. On the refugee definition in regional refugee regimes and the extant interpretations of the 1951 definition, see Frances Nicholson and Patrick Twomey eds., *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 2001); and Susanne Schmeidl and J. Craig Jenkins, 'Measuring International Forced Migration, 1969-1999', *International Journal of Sociology* 33: 3 (Fall 2003), pp.70-87, at p.74.
- ⁶³ Linda Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Worker Convention,' *International Migration Review*, Vol.25, No.4 (1991), pp.737-771, at p.757.
- ⁶⁴ ILO 1999. Review of Instruments on Protection of Migrant Workers Rights, *Migrant Rights Bulletin* (Supplement), October-November. Retrieved from http://www.migrantsrights.org/ILO_report1010199.htm, on April 21, 2004.
- ⁶⁵ Cholewinski (note 4), pp.149-50.
- ⁶⁶ James Nafziger and Barry Bartel, 'The Migrant Workers Convention: its Place in Human Rights Law', *International Migration Review*, Vol.25, No.4 (1991), pp.771-799, at pp.786-7.
- ⁶⁷ Abbot and Snidal (note 21), p.434.
- ⁶⁸ Taran (note 4), p.19.
- ⁶⁹ Cholewinski (note 4), p.201. Nafziger and Bartel note that two sets of standards might be in conflict: some provisions of the ICMW are weaker, but others are more progressive than in the ILO conventions (note 65), pp.784-5
- ⁷⁰ (note 3), p.402.
- ⁷¹ In fact, the Preamble to the ICMW recognizes that 'illegals' face greater human wrongs than 'legals.' The idea and provision of migrant worker rights in international treaties is not contingent on citizenship in any state or on the category of entry. Unlike constitutionally created civil rights which are guaranteed to individual members in a nation, internationally codified human rights are 'universal.' International treaties on migrant rights play a tremendously important because they uniquely reject nationality as a basis for distinction in terms of human rights provision (e.g., ICMW, Article 7) and codify legal status of those individuals who do not have states to protect them. Thanks the presence of such agreements, a government can thus challenge a migrant's *legal* right to stay in the country, but it cannot question her *human* right to stay in the country.
- ⁷² Ghai (note 2), pp.174, 177; Nafziger and Bartel (note 65), p.772; Tiburcio Carmen. *The Human Rights of Aliens Under International and Comparative Law* (Boston: Martinus Nijhoff Publishers, 2001), p.268. Compare to Cholewinski (note 4), p.200.
- ⁷³ Hune and Niessen (note 3), p.402, Bosniak (note 62), pp.737-8.
- ⁷⁴ Cholewinski (note 4), p.202.

⁷⁵ Joan Fitzpatrick, 'The Human Rights of Migrants', in Aleinikoff and Chetail (note 2), pp.169-184, at p.177.

⁷⁶ David Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2000), p.110.

⁷⁷ On immigration, national security and national identity, see Ole Wæver et al. *Identity, Migration and the New Security Agenda in Europe* (London: Routledge, 1993).

⁷⁸ Schloemann and Ohlhoff, cited in David Fisher, Susan Martin and Andrew Scheonholtz, 'Migration and Security in International Law,' in Aleinikoff T. Alexander, and Vincent Chetail (note 2), pp.87-122, p.87.

⁷⁹ Ibid.

⁸⁰ Peter Rosendorff and Helen Milner, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape', *International Organization* Vol.55, No.4 (2001), pp.829-858, at p.830. Note that I will not count reservations among 'escape clauses'. On reservations, see Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent,' *American Journal of International Law*, Vol.96, No.3 (July 2002), pp.531-60. Also note that some treaties or some of their parts, like Article 33 of the Refugee Convention, do not allow reservations. In the ICMW, by Article 88, the state can make reservations, but *not* to specific rights or specific categories of migrant workers.

⁸¹ Taran (note 4), pp.19-20.

⁸² Cholewinski (note 4), pp.151, 164, 172-3, 176-7, 183.

⁸³ A separate international treaty directly deals with the issues human smuggling and trafficking: the Convention Against Transnational Crime (December 2000, Palermo).

⁸⁴ Helton (note 61), pp.383, 392.

⁸⁵ Joan Fitzpatrick, 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection', *Georgetown Immigration Law Journal* 13 (1999), pp.351-356.

⁸⁶ Other legal instruments are more favourable to the claimants. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment explicitly forbids *refoulement*, without any national security caveats. Fisher (note 77), p.119.

⁸⁷ Witness the debate in the UK over proposed new powers to deport refugees who are convicted of 'serious crimes.' *The Guardian*, 'New Powers to Deport Fall Foul of UN', 8 November 2004.

⁸⁸ Today, due to high number of applicants, most states often defer legalized assessment of claims to the UNHCR – in a form of 'offshore processing.' Anker (note 34), p.137; Bhabha (note 59), p.1; Goodwin-Gill (note 36), pp.33-4; van Selm Joanne van Selm, "Refugee Protection Policies and Security Issues," in Edward Neuman and Joanne van Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability and the State* (Tokyo: UN Press, 2003), pp.66-92, at pp.72, 77.

⁸⁹ David Martin, 'Refugees and Migration,' in Christopher C. Joyner (ed.), *The UN and International Law* (Cambridge University Press. 1997), pp.155-80, at p.179.

⁹⁰ Ibid., pp.173-6; Schindlmeyr (note 22), p.119; Helton (note 61), pp.389-90; William Maley, 'A Tower of Babel? Reappraising the Architecture of Refugee Protection', in Neuman and van Selm (note 87), pp.305-329, at pp.306-7.

⁹¹ Anker (note 34), p.151; Schmeidl and Jenkins (note 61), p.72; van Selm (note 87), pp.70, 79-80, 83-5.

⁹² Helton (note 61), p.384, fn 23.

⁹³ Maley (note 89), pp.311-6.

⁹⁴ Goodwin-Gill (note 36), p.181.

⁹⁵ Declaration Reaffirming the Commitment of Signatory States to the 1951 Refugee Convention (Geneva, December 2001). Available at <http://www.unhcr.org/cgi-bin/teaxis.vtx> [Retrieved on September 19, 2004]; The Declaration Reaffirming the Commitment of the Members of the EU to the Refugee Convention and Protocol (Tampere, October 1999). Available at <http://www.eunet.org/tampere99/refugee.html> [Retrieved on October 2, 2004].

⁹⁶ But one should not jump to the conclusion that states will sign international treaties only if security exceptions are provided. The widely ratified Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment explicitly forbids *refoulement*, but provides no exception to national security whatsoever. See Fisher et al (note 77), p.108. This seems to be the exception among human rights treaties, however.

⁹⁷ In the social science lore, endogeneity refers to a situation in which the values of the independent variables are a consequence, rather than a cause, of the dependent variable. In my case, the signature to a

treaty may be endogenous to the prior decision by state actors to include complexity, precision, and escape clauses in a treaty.

⁹⁸ George Downs, David Rocke, and Peter Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' *International Organization* Vol.50, No.3 (Summer 1996), pp.379-406.

⁹⁹ Cholewinski (note 4), p.202.

¹⁰⁰ As variables, the design-based can still be analytically profitable. Once we account for conditions that determine the success and failure of human rights treaties, we can move to accord a measure of autonomy to intervening variables and consider the ways in which they contribute to outcomes. In this respect, my findings – that less complexity, less precision and more escape clauses foster greater treaty-participation – can even be generalized across groups of states (i.e. democracies) and across international treaties.

¹⁰¹ Böhning (note 1), pp.699-700.

¹⁰² Juhani Lönnroth, 'The International Convention on the Rights of All Migrant Workers and Members of their Families in the Context of Nationality and International Migration Policies: An Analysis of Ten Years of Negotiations,' *International Migration Review*, Vol.25, No.4 (1991), pp.710-734, at pp.726-8.

The ILO was aware that the creation of the ICMW would push the ILO conventions off the radar screen. Ibid.726; Nafziger and Bartel (note 65), pp.779-80.

¹⁰³ Lönnroth (note 101), p.715.

¹⁰⁴ Ibid., p.733

¹⁰⁵ Ibid., pp.733-5).

¹⁰⁶ Cholewinski (note 4), p.146, fn. 41

¹⁰⁷ Lönnroth (note 101), p.731, 733-4.

¹⁰⁸ Böhning (note 1), p.704.

¹⁰⁹ Cholewinski (note 4), p.146, n.41.

¹¹⁰ Ibid., pp. 203, fn. 285, also see 187, fn. 216).

¹¹¹ Ibid.: 188. Also see Nafziger and Bartel (note 65), p.784 and Bosniak (note 62), p.784.

¹¹² (note 97), p.383.

¹¹³ Ibid., p.388.

¹¹⁴ Ghai (note 2), p.169.

¹¹⁵ In the language of social science, such research strategy would yield an account of the counterfactual difference (the answer to the question what would have occurred with the dependent variable had the proposed cause been absent), the time order, as well as critically, the causal mechanism (the answer to why the cause led to the effect). A study of negotiations would also contribute to theoretical refinement by producing new hypotheses and helping to fine-tune existing ones. Finally, it would yield more observations and generate new sources of data which can be used for testing new and old, but refined hypotheses.

¹¹⁶ On asymmetric negotiations, including a discussion of North-South issues, see Christer Jönsson, 'Diplomacy, Bargaining and Negotiation,' in Carlsnaes et al (note 6), pp.212-231, at p.220.

¹¹⁷ (note 13), p.180.

¹¹⁸ Helen Milner, *Interests, Institutions, and Information* (Princeton: Princeton University Press, 1997), pp.14-9; Money (note 11).

¹¹⁹ Risse (note 5), pp.616-9; Thomas (note 30), p.13.

¹²⁰ Amy Gurowitz (note 19); Tony Kushner and Katherine Knox, *Refugees in the Age of Genocide* (London: Frank Cass, 1999); Kristen Hill Maher, 'Who Has a Right to Rights: Citizenship's Exclusions in an Age of Migration', in Alison Brysk (ed.), *Globalization and Human Rights* (Berkeley: University of California Press, 2002), pp.19-43; and Leo Chavez, *Covering Immigration: Popular Images and the Politics of the Nation* (LA: University of California Press, 2001), esp. chapter 5.

¹²¹ Meyers (note 10) focuses on the politics of selection and admission, not on the ways in which human rights are extended to different migrant groups, p. 26.

¹²² Risse et al (note 5), p.2,

¹²³ (note 7), p.205.

¹²⁴ Ibid., p.28.

¹²⁵ Jönsson (note 115), p.220.

¹²⁶ Keck and Sikkink (note 7), p.17, 204).

¹²⁷ Audie Klotz, 'Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences', *European Journal of International Relations*, Vol.8, No.1 (March 2002), pp.49-76, at p.69-70.

¹²⁸ Bob (note 26), p.136.

¹²⁹ Keck and Sikkink (note 7), p.38.

¹³⁰ Hathaway (note 19), pp.1953-4.

¹³¹ Ibid., p.1954.

¹³² Hune and Niessen (note 3), pp.41, 42.

TABLES (to accompany the paper)

Table 1 Signature and ratification (or accession and succession) of principal human rights treaties and ILO conventions (year opened for signature in parentheses), as of 15 February 2005		
	I	II
Covenant on Civil and Political Rights (1966)	160 (30)	153 (30)
Covenant on Economic, Social and Cultural Rights (1966)	156 (30)	150 (30)
Convention on the Elimination of Racial Discrimination (1965)	169 (30)	176 (30)
Convention on the Elimination of Discrimination Against Women (1979)	179 (30)	178 (30)
Convention Against Torture (1984)	150 (30)	138 (30)
Convention on the Rights of the Child (1989)	194 (30)	192 (29)
Convention Relating to the Status of Refugees (1951)	155 (30)	142 (29)
ICMW (1990)	40 (2)	26 (1)
ILO Convention 97 (1949)	49 (10)	42 (10)
ILO Convention 143 (1975)	20 (4)	18 (4)
ILO Convention on Forced Labour, C182 (1930)	171 (29)	164 (29)
ILO Convention on the Elimination of Forced Labour, C105 (1957)	168 (30)	162 (30)
ILO Convention on the Abolition of Child Labour, C182 (1999)	154 (30)	151 (30)
I Number of signatures (number of OECD states); II Number of ratifications by state parties (OECD) Note: The U.S. has not ratified the Convention on the Rights of the Child and the ILO C182 and it participates in the 1967 Protocol, but not in the 1951 Refugee Convention, Sources: www.ohchr.org, www.ilo.org, www.unhcr.ch		

Table 2 Complexity and precision in selected international treaties						
<i>Complexity</i>						
I Number of actual number of articles in the treaty						
II Number of parts, chapters, or sections in the treaty (including annexes)						
III 'Novelty' of its provisions (new rights, new language) (great – creates several new rights, uses some new language; low – no new rights, familiar language)						
<i>Precision</i>						
IV Definition of the vulnerable group or subgroups. (yes – clear and precise definition; maybe – definition exists, but unclear; no – no clear definition)						
V Are rights well-specified and well-differentiated among groups? (yes – mostly well-specified; maybe – somewhat specified; no – mostly unspecified)						
<i>Treaty</i>	I	II	III		IV	V
ICMW	96	9	Low		Yes	Yes
Refugee Convention	46	7	Great		No	No
ILO 97/143	23/24	4/3	Great		Maybe	No