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SYMPOSIUM ON TRANSNATIONAL FUTURES OF INTERNATIONAL LABOR LAW

THEORIZING EMANCIPATORY TRANSNATIONAL FUTURES OF INTERNATIONAL LABOR LAW

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The economic mandate of the "misnamed"[1] International Labour Organization (ILO) has long been "othered"[2] internationally. The ILO's 1944 constitutional annex, the Declaration of Philadelphia, confirms the ILO's "responsibility … to examine and consider all international economic and financial policies and measures in the light of th[e] fundamental objective" of lasting peace on the basis of social justice.[3] After 1945, through decolonization, and prior to the emergence of a Washington consensus-based neoliberal globalization, the ILO enabled some states to mediate the "social" in economic regulation—that is, to adopt free trade economic liberalism promoted transnationally with social redistribution addressed domestically, also referred to as embedded liberalism.[4] States established and harmonized international labor standards through multilateral processes steeped in an organizational tripartism that made workers' and employers' representatives ILO institutional actors alongside governments. At least in the global North, the ILO fostered a high degree of normative convergence nationally, regionally, and on shop floors. For the first Director-General, Albert Thomas, the ILO "taught the world to speak something like the same language on social questions."[5] Its approach has been nuanced, pragmatic, and transnational, taking leadership on issues like social protection that should also have been—but were not—the focus of other international economic institutions.

In the troubling contemporary moment of "emancipated hatred,"[6] precisely when the ILO stares down the predominance of informal labor markets, grapples with perilous mass labor migration, confronts topics that disproportionately affect gendered, racialized workers on the margins[7]—in short, as it more visibly engages with

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[1] James T. Shotwell, *Introduction*, *in* THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION xxii (James T. Shotwell ed., 1934) (deeming ILO a misnomer for "an international economic organization to deal with labor problems").

[2] INTERNATIONAL LAW AND ITS OTHERS (Anne Orford ed., 2006).

[3] Versailles Peace Treaty, June 28, 1919, 225 Parry 188; 2 Bevans 235; Declaration of Philadelphia, adopted by the International Labour Conference, May 10, 1944. *See also* FRANCIS MAUPAIN, THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION (2013); GUY FITI SINCLAIR, TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES 90–107 (2017).

[4] KARL POLANYI, THE GREAT TRANSFORMATION (1944/2001); QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM (2018) (recalling that neoliberalism also relies on state regulation, including at the transnational governance level, but to restrict social redistribution with an economic constitutionalism that privileges investor rights).

[5] ALBERT THOMAS, INTERNATIONAL SOCIAL POLICY 22 (1948).

[6] Rina Soloveitchik, *Judith Butler, "Trump is Emancipating Unbridled Hatred"*, Zeit Online (Oct. 28, 2016).

[7] Int'l Labour Org., Domestic Workers Convention, C189, June 1, 2011; Int'l Labour Org., Domestic Workers Recommendation, R201, June 1, 2011; Int'l Labour Org., Violence and Harassment Convention, C190, June 21, 2019; Int'l Labour Org. Violence and Harassment Recommendation, R 206, June 21, 2019. *See also* Adelle Blackett, *Introductory Note*, 53 ILM 250-66 (2014).

labor law *as* development[8]—the social justice-focused, embedded liberalism fostered by the ILO emerges as an aberration in a longer history of unfreedom.[9] This realization calls for founding narratives to be reconsidered, to pay closer attention to how the governance level for labor has been misframed. It also calls for institutional courage to name alternatives for the ILO's next century. Rather than cower in the face of rising nationalism and fascism, the ILO needs to cultivate transnational futures of international labor law[10] that are emancipatory.

International Labor Law and Transnational Social Policy

C. Wilfred Jenks, the international legal scholar who would become the ILO's sixth Director-General near the end of his lengthy career at the ILO, sought to build international social policy into the emerging postwar legal architecture. His writings and engagements complicated dichotomies between the domestic and the transnational, emphasizing "economic interdependence and the fuller recognition of its implications."[11]

Jenks's capacious vision may be glimpsed in the Havana Charter that would have led to an International Trade Organization (ITO), in which transnational governance was located at the interface between labor and trade. Unemployment and underemployment were not matters of domestic concern alone, and a premium was placed on "concerted action on the part of governments and international organizations."[12] In Article 7 of the Havana Charter, all countries were understood to have a "common interest" in achieving "fair" labor standards, promoting productivity, and improving wages and working conditions. Members were expected to engage in "appropriate and feasible" action to eliminate unfair labor conditions, both through cooperation with the ILO, and, as necessary, through the invocation of the ITO's own nullification and impairment provisions. As in Jenks's vision, cooperation would be indispensable, and would emerge from "regular exchange of information and views" among them. As ILO membership changed dramatically with decolonization, Jenks moved to reframe the "dogma of sovereignty" as Eurocentric. He called for engagement with the ideas of intellectual and political leaders from Jawaharlal Nehru to Kwame Nkrumah, Habib Bourguiba to W.E.B. du Bois.[13]

However, the ILO's transnational social justice vision came with internal critiques. While the ILO's fifth Director-General, former U.S. acting secretary of labor David Morse, acknowledged the emergence of tripartite transnational cooperation in his acceptance of the ILO's Nobel Peace Prize in 1969, he also acknowledged the ILO's responsibility for an "economic progress which has … benefited only a small sector of the population."[14] He specifically named the problem of transplanting a vision of social development to the global South that was rooted in the institutions and assumptions of the global North.

Jenks's transnationalism also encountered trenchant external criticism. While Jenks encouraged "countries wishing to attract private capital from abroad" to support an international charter assuring investor protections,[15] the leading international law and Third World Approaches to International Law scholar, Georges Abi-Saab, named

[8] Adelle Blackett, *Emancipation in the Idea of Labour Law*, *in* The Idea of Labour Law 420 (Guy Davidov & Brian Langille eds., 2010).

[9] Sven Beckert, Empire of Cotton: A Global History (2014).

[10] *See* Adelle Blackett & Laurence R. Helfer, *Introduction to the Symposium on Transnational Futures of International Labor Law*, 113 AJIL Unbound ___ (2019).

[11] C. Wilfred Jenks, The Common Law of Mankind 297-98 (1958).

[12] Final Act of the United Nations Conference on Trade and Employment, Mar. 24, 1958, UN Doc E/CONF.2/78, Sales No. 1948.II.D.4.

[13] Jenks, *supra* note 10, at 245.

[14] David A. Morse, *ILO and the Social Infrastructure of Peace*, Nobel Lecture, Dec. 11, 1969.

[15] Jenks, *supra* note 10, at 253.

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the "hypothetical reciprocity" of investor protection.[16] While Jenks sought to build into international labor law a "legal framework of post-colonial policy" anchored on the Indigenous and Tribal Populations Convention, 1957 (No. 107) as a response to the "attainment of national independence by multi-racial and other mixed communities,"[17] Abi-Saab challenged the irony of rejecting the "legal shield" of newly independent states' "long struggle for emancipation."[18] Philip Jessup affirmed that the "line between the internal and the transnational is rather thin,"[19] referenced both industrial strike action and colonial attitudes in his book, and acknowledged both the significance of territory and the need to root transnational claims less in sovereignty than in jurisdiction. But it is Abi Saab's critique of the malleability of jurisdiction that focused attention on how colonial histories remain deeply intertwined with any emancipatory reconstructions.[20]

Misframing Labor to Exclude the Transnational

It is by focusing on the margins of labor law that the tendency to misframe labor concerns as naturally, necessarily domestic governance matters becomes particularly. Three examples help to elucidate this point: the erasure of slavery in the history of international labor law; the governance mismatch between the movement of persons and the movement of goods; and the conflation of trade protectionism and social protection.

First, historian Eric Williams's pathbreaking work is rarely referenced in international labor law or its interface with trade. Yet its core insight situates the centuries long legal institution of transnational slavery and the slave trade at the heart of the development of capitalism and the Industrial Revolution.[21] The plantation economy is increasingly recognized as the pioneer of the division of labor.[22]

At some level, the early ILO understood this link. Director General Albert Thomas even petitioned delegates of the League of Nations in an unsuccessful bid to claim the ILO's constitutional competence to address slavery, within its jurisdiction over conditions of work.[23] Also echoing the pan-Africanist intellectual titan who should have been recognized as the father of modern sociology in the United States, W.E.B. Du Bois, Thomas wrote that "there will be no true protection of labour if we do not concern ourselves with the conditions of Black labour."[24] Rather than follow DuBois's vision, however, the ILO entangled itself in a vision of "native" labor that was shaped by colonial administrators. Its normative oeuvre took it away from the thick understanding of legacies of racialized unfreedom that were understood within emancipatory social movements.[25]

To envision the second issue, conjure two images. One is an iconic symbol of an orderly, liberalized transnational trade: a ship filled with steel containers securely transporting goods across deep waters. Alongside it, conjure the image of perilously overcrowded boats, transporting desperate migrants, all too often to their deaths. These contrasting images capture much of the anxiety and discontent of the present era. The ILO's Constitution declares that

[16] Georges Abi Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 How. L.J. 95, 106 (1962).

[17] Jenks, *supra* note 10, at 249.

[18] Abi Saab, *supra* note 15, at 103.

[19] Philip Jessup, Transnational Law 26 (1956).

[20] Georges Abi Saab, *The Newly Independent States and the Scope of Domestic Jurisdiction*, 54 ASIL Proc. 84 (1960).

[21] Eric Williams, Capitalism and Slavery (1944).

[22] Kari Polanyi Levitt, Reclaiming Development: Independent Thought and Caribbean Community (2005); Caitlyn Rosenthal, Accounting for Slavery: Masters and Managers (2018).

[23] Archives of the ILO, 1923.

[24] Archives of the ILO, 1921 (author's translation).

[25] Cedric Robinson, Black Marxism (1983/2000)

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labor is not a commodity, but the images suggest something far grimmer—that migrants receive less favorable treatment than commodities.

Jurisdictionally, migration is framed as a matter of domestic law, even though transnational mobility was the norm until late into the last century.[26] As human beings risk their lives to move across borders and sell their labor under particularly inhumane conditions, they disrupt legal orders through the exercise of human agency in the face of deep-seated inequality, both within and between states.[27] Emancipatory transnational futures require deepened international solidarity, including by the ILO, on reasonable labor market access.[28]

Third, in March 2017 at a G-20 meeting of finance ministers, the current U.S. administration forced an ill-fated shift toward "protectionism." Then German Finance Minister Wolfgang Schäuble tried unsuccessfully to downplay it, stating: "It's completely clear we are not for protectionism. But it wasn't clear what one or another meant by that."[29] Schäuble's statement encapsulates a quandary. Trade protectionism tends to be conflated with social protection, raising different legitimacy concerns: states' exercise of comparative advantage, non-protectionist respect for the fundamental principles and rights at work, the extension of social protection to all workers, full employment policies, and adjustment costs for the "losers" of trade.[30] The U.S. Central American and Dominican Republic Free Trade Agreement (CAFTA-DR) panel report involving Guatemala—the first final report issued by an arbitral panel interpreting a labor clause in a free trade agreement in the twenty-five-year history of such clauses—embodies this mismatch.[31]

The case focused on labor violations involving workers at a major port that handles exports destined for the United States, and companies that export primary commodities—coffee and textile manufacturing—emblematic of North-South trade. The U.S. trade representative decided not to adjudicate the allegations of murder of trade unionists invoked in the original submission.[32] The panel gave the language in Article 16.2(1)(a) of the CAFTA-DR, "in a manner affecting trade," a particularly exacting interpretation, requiring the conferral of a competitive advantage on an employer or employers engaged in trade between the parties.[33] It did not rely on international labor law. The mismatch is particularly evident in the panel's failure to recognize how a labor chapter, replete with references to fundamental principles and rights at work, would be relevant to the interpretation of CAFTA-DR's overall objectives, in particular Article 1.2's reference to "promot[ing] conditions of fair competition in the free trade area." The inclusion of a labor chapter in the agreement should confirm that labor is not a mere trade "add on." It should have resulted in enhanced interpretative space for alternative normative prioritizations—such as a commitment to fundamental international labor standards—to be respected and even enhanced through trade.

[26] Frédéric Mégret, *Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law*, 111 AJIL Unbound 13 (2017).

[27] Thomas Piketty, Capital in the Twenty-First Century (2012); Branko Milanovic, Global Inequality (2016).

[28] Adelle Blackett, *Development, the Movement of Persons and Labour law: Reasonable Labour Market Access and Its Decent Work Complement*, *in* The Role of Labour Standards in Development: Sustainable Theory in Practice 143 (Tonia Novitz & David Mangan eds., 2012); E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AJIL Unbound 142 (2017).

[29] Jon Sharman, *US "Forces G20 to Drop Any Mention of Climate Change" in Joint Statement*, Independent (Mar. 18, 2017).

[30] Adelle Blackett, *Trade Liberalization, Labour Law & Development: A Contextualization*, *in* Labour Law and Worker Protection in Developing Countries 93 (Tzehainesh Teklè ed., 2010); Michael Trebilcock, Dealing with Losers: The Political Economy of Transitions (2014).

[31] Arbitral Panel, In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report, para. 190 (June 14, 2017).

[32] Paula Church Albertson & Lance Compa, *Labour Rights and Trade Agreements in the Americas*, *in* Research Handbook on Transnational Labour Law 474, 481 (Adelle Blackett & Anne Trebilcock eds., 2015).

[33] The United States-Mexico-Canada Agreement (USMCA) essentially rejects this definition in note 4 to Article 23.3.

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Instead, the case illustrates that a "social dimensions" approach to labor in trade needs to be rethought, in favor of a "social regionalism"[34] that takes the transnational seriously, understands labor law as development, and builds distributive justice into the terms of trade.

Reimagining Transnational Futures

The three examples described above illustrate the flaws in the assumption that labor law is somehow naturally and exclusively a domestic regulatory matter. Envisioning the transnational futures of international labor law invites us to consider "present futures,"[35] that is, historically-rooted engagements with the future of work and workers that acknowledge the weight of the past on our present and that reconsider the political misframing of labor as to be addressed solely within the Westphalian state, rather than at the level that best befits the analysis. Sometimes, readjustment is necessary.

Readjustment might be glimpsed through the document meant to guide future ILO action, the 2019 Centenary Declaration for the Future of Work. It was a laborious document to negotiate, and bears traces of tripartite discord in this moment of discontent. Unlike the avant garde references to non-discrimination in the Declaration of Philadelphia, the ILO Centenary Declaration—which is not annexed to the ILO constitution—does not even mention racial discrimination. That said, it calls on all ILO constituents "to reaffirm their unwavering commitment and to reinvigorate their efforts to achieve social justice and universal and lasting peace to which they agreed in 1919 and 1944," recommits to full employment, engages with labor migration, and underlines the significance of promoting multilateralism in the future of work.[36] In this moment of discontent, the ILO will need more than these lofty phrases to pry open space to refocus international social policy.

The ILO will need to leverage its constitutional mandate to claim an overdue space alongside other international institutions to unsettle inequalities and build emancipatory, transnational futures for international labor law. The ILO has shown that it is able to act in targeted, timely ways to facilitate the emergence of alternative mediations of the social in the economic. Two emerging, counterhegemonic transnational legal orders[37] in international labor law are noteworthy. The first fosters preferential trade access to country-wide textile industries in a number of small, open economies of the global South, to engender continuous improvement in labor standards via Better Factories – Better Work programs.[38] It relies on the ILO's dialogic or convenor function[39] to influence labor law reform and strengthen labor compliance. The initiative may well force the ILO to tackle the thorny but unavoidable issue of living wages in this highly competitive and volatile sector, following the precedent of the pathbreaking ILO work on wages in the maritime industry. By providing space for tripartite exchange among the mostly small open economies in country-wide labor monitoring programs to negotiate the framework for sectoral living wages, the ILO would offer a pivotal and pragmatic transnational governance alternative.

The second possibility operationalizes international labor law in distinctly transnational ways. Domestic workers offer a counterintuitive example. These workers face historical marginalization and workplace isolation despite

[34] Adelle Blackett, *Toward Social Regionalism in the Americas*, 23 Comp. Labor L. & Pol. J. 901 (2002).

[35] Nancy Fraser, Scales of Justice: Reimagining Political Space in a Globalising World (2009).

[36] ILO Centenary Declaration for the Future of Work, Adopted by the Conference at its 108th Session, Geneva, June 21, 2019.

[37] Transnational Legal Orders (Terrence Halliday & Gregory Schafer eds., 2016).

[38] *See* Drusilla Brown et al., The Impact of Better Work: A Joint Program of the International Labour Organization and the International Financial Corporation (2016); Adelle Blackett, *Social Regionalism in Better Work Haiti*, 31 Intl J Comp Lab. L. & Ind. Rel. 163 (2015).

[39] Laurence Boisson de Chazournes, *A "Dialogic" Approach in Perspective*, *in* Research Handbook on Transnational Labour Law, *supra* note 32, at 65; Maupain, *supra* note 3.

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their prevalence in global migration. However, they organized and have sought law reform locally, regionally, and then transnationally, alongside a range of global union federations, transnational NGOs, and other civil society organizations in a distinctly fluid approach to tripartism. Together, they successfully lobbied the ILO to adopt new international labor standards, which they immediately drew upon to seek further constitutional and labor law reform and to unsettle societal practices of inequality that directly affect them. Remarkably, with ILO technical support, there has not only been some backlash, but also some significant change. The ILO is positioned to sustain this change through its transnational learning community on decent work for domestic workers.[40]

Conclusion

If the ILO's vision has been othered internationally, this essay attests to ways in which the ILO has unwittingly sustained other exclusions and margins. By looking back, as ILO officials did for the fiftieth anniversary Nobel Peace Prize, it is possible to rethink the past misframings to mitigate the risk that a neoliberal globalization will advance on the divided terrain of inequality between and across states. The ILO has contributed an increasingly fluid tripartite model of engagement for the social mediation of the economic. Into its next century, it must have the courage to address persisting forms of unfreedom that were sidelined from its inception, and reimagine labor law as development, to foster transnational futures of international labor law that are emancipatory.

[40] Adelle Blackett, Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law (2019) (discussing the transnational learning community that has formed around regulating domestic work).

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