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SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART II

USING GLOBAL MIGRATION LAW TO PREVENT HUMAN TRAFFICKING

*Janie A. Chuang**

Our understanding of human trafficking has changed significantly since 2000, when the international community adopted the first modern antitrafficking treaty—the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol).¹ Policy attention has expanded beyond a near-exclusive focus on sex trafficking to bring long-overdue attention to nonsexual labor trafficking. That attention has helped surface how the lack of international laws and institutions pertaining to labor migration can enable—if not encourage—the exploitation of migrant workers. Many migrant workers throughout the world labor under conditions that do not qualify as trafficking yet suffer significant rights violations for which access to protection and redress is limited. Failing to attend to these “lesser” abuses creates and sustains vulnerability to trafficking.

A new field and regime of global migration law (“GML”) could help fill these gaps. Rooted in a migrant-centered perspective, GML holds the promise of allowing us to better understand the complex legal and socioeconomic dynamics that feed cross-border migration and shape the migrant experience, while addressing the need for governance structures that better facilitate human mobility. As the first set of essays of this symposium suggests, the precise parameters and contents of GML are yet to be defined. Nonetheless, its identified goals and approach, broadly understood, could be useful in helping to prevent human trafficking in at least three respects. First, filling in one of the many normative gaps that render migrant workers vulnerable to exploitation, GML could shift the focus of transnational regulation of the foreign labor recruitment industry to an approach that prioritizes migrant welfare over private profit interests. Second, GML could address the need for better coordination and accountability of the diverse nonstate actors that have assumed governance roles in global labor migration. Third, by exposing and addressing the flaws in modern labor migration processes from a migrant-centered perspective, GML could destabilize longstanding views of trafficking as a problem best addressed through aggressive criminal justice interventions. GML could help recast trafficking as a multidimensional problem that requires us to confront and reform the many ways in which current socioeconomic structures feed—and reward—exploitation of the world’s poor by the world’s wealthy.

Addressing Migrant Worker Vulnerability to Exploitation

According to 2016 ILO estimates, there are 232 million international migrants, of which 150 million are migrant workers.² The remittances migrant workers send back to their families in developing countries now exceed

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¹ United Nations Convention against Transnational Organized Crime, 2225 UNTS 209, Dec. 12, 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, Nov. 15, 2000.

² INTERNATIONAL LABOUR OFFICE, ILO GLOBAL ESTIMATES ON MIGRANT WORKERS xi (2015).

US\$441 billion—three times the volume of official aid flows—and constitute more than 10 percent of the GDP in some twenty-five countries.³ For certain countries, encouraging out-migration for labor has become a de facto development policy, enabling them to derive revenues from the remittances and alleviate domestic unemployment problems. Meanwhile, countries of destination have come to rely heavily on migrant labor—particularly for the less desirable “3D” (dirty, dangerous, difficult) jobs—notwithstanding considerable public and political resistance to liberalizing migration policies. Despite their critical importance to these economies, migrant workers suffer from a dearth of protections against exploitation, violence, and other abuses.

Existing international treaties pertaining to migrant work are not only poorly ratified, but unevenly so, with few destination countries featured among the signatories.⁴ The increased outsourcing of labor migration management to nonstate actors—such as recruitment agencies and employment brokers—has, in any event, undercut governments’ ability to meaningfully fulfill the (scant) rights obligations they have accepted vis-à-vis migrant workers. While antitrafficking laws might seem a compelling alternative given their widespread support (and funding) by governments, they are a poor stand-in for laws that would affirmatively promote and facilitate safe labor migration. Antitrafficking laws address practices that fall along one extreme end of a “continuum of exploitation.” They focus on exploitation, such as forced labor or debt bondage, from which exit is or seems impossible—but that is not the experience of most migrant workers. Moreover, for those who are trafficked, most domestic laws render victim protection contingent on victims’ agreement to cooperate in the prosecution of their traffickers. At their core, antitrafficking regimes prioritize crime control and treat those deemed “trafficked” as victim-objects in need of rescue, rather than as subjects in need of rights recognition and entitlements.

One area, for example, where further norm development could prevent migrant worker abuses from escalating into trafficking situations pertains to foreign labor recruitment. Restrictive immigration policies in favored destination countries have created a market for third-party recruiters to facilitate migration and job placement. Recruiters identify and interview potential workers, place them in jobs abroad, process the necessary documentation, and arrange for their travel and on the job accommodations. While these services often enable clandestine migration, they are also used—even required in some contexts—for worker placement in official guest-worker programs. States increasingly have outsourced their labor migration management to private recruiters, granting them the power to control migrants’ entry and exit from countries, and the responsibility of ensuring migrant workers’ welfare throughout the labor migration process.

Unsurprisingly, countries of origin and destination lack the political will to closely scrutinize the labor migration processes that have brought them, respectively, remittances and a flexible and cheap labor supply. Even politics aside, the structure of the recruitment industry is difficult to regulate—it is an industry marked by low barriers to entry and multiple levels of subcontracting activities.⁵ Moreover, states’ limited extraterritorial reach means that destination and origin countries must pass legislation as if recruitment was a local rather than a transnational process. The recruitment industry has thus enjoyed negligible oversight over its activities, affording these “ungoverned and ungovernable” actors⁶ impunity for any abusive practices they might perpetrate. That foreign labor recruitment practices span multiple jurisdictions enables easy deflection of legal responsibility, with blame redirected at the parties operating outside the jurisdiction. Yet, for many migrant workers, recruitment services are necessary. To gain coveted access to jobs abroad, migrant workers may agree to high recruitment fees, taken on as debts to be worked off in the job placements over a period of months,

³ WORLD BANK, *MIGRATION AND REMITTANCES FACTBOOK 2016* iv (3d ed., 2016).

⁴ Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L. J. 609, 627–28 (2017).

⁵ Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 446–457 (2017).

⁶ Jennifer Gordon, *Global Labour Recruitment in a Supply Chain Context*, INT’L LAB. ORG., FUNDAMENTALS WORKING PAPERS (2015).

even years. The recruitment market thus “turns migrants into debtors,”⁷ leaving them vulnerable to a wide range of exploitative practices by unscrupulous recruiters, including exorbitant recruitment fees, contract switching, and prolonged abusive treatment by their employers. States’ outsourcing of labor migration management to recruiters has, in effect, helped fuel market-oriented governance that prioritizes private profit interests over migrant welfare.⁸

GML could play a crucial role in flipping the script, placing migrants’ well-being at the center of concern, and addressing the gaps in labor migration regulation that render migrant workers vulnerable to abuse by unaccountable actors. GML could, for example, build upon recent efforts to address abusive private recruitment practices, including through limitations on recruitment fees found in the 2014 International Labour Organization (ILO) Forced Labor Protocol and the 2011 ILO Domestic Workers Convention. GML could also help coordinate a transnational response to recruitment abuse, and close the jurisdictional loopholes that enable unscrupulous recruiters to skirt accountability for their actions. In attending to recruitment abuse and other areas of migrant worker concern, GML could offer a crucial antidote to “trafficking exceptionalism”—which has focused public opprobrium on only the most extreme forms of exploitation while arguably implicitly normalizing the “lesser” exploitation that too many migrant workers experience.⁹ GML could counter this harmful dynamic by emphasizing what advocates have long known to be true: namely, that protecting workers from “lesser exploitation” is an overlooked yet critical strategy for preventing abuse from escalating into situations of trafficking.

Promoting Good Governance and Accountability

That recruiters have been able to operate with seemingly complete license is symptomatic of a larger problem with global labor migration—a governance void. Unlike other areas of international law, labor migration is not the focus of any particular international institution. Despite being the guardian of two (poorly ratified) migrant worker-focused treaties, the ILO has emphasized its broader mandates, such as forced labor, that while relevant to migrant worker populations, are not focused on them. The absence of a labor migration-focused institution, combined with states’ retreat from active labor migration management, has left a governance gap that a growing number of international actors have eagerly sought to fill. The relative absence of accepted labor migration norms, particularly regarding recruitment, has inspired active attempts at standard setting in the area. But with competing claims of expertise (and varying degrees of commitment to migrant workers’ rights) and even with the best of intentions, these actors risk working at cross-purposes.

Efforts to govern the “ungovernable” recruitment industry serve as a prime example of this entrepreneurial impulse to fill the governance void. Recognizing the need for governance in matters pertaining to international labor recruitment, the International Organization on Migration (IOM)—a UN affiliate organization with expertise in repatriation and resettlement of migrants—has sought a governance role. IOM has launched an International Recruitment Integrity System (IRIS), “a voluntary, multi-stakeholder certification system” that promotes ethical recruitment standards in an effort to “bring transformative change to part of the recruitment industry pertaining to international recruitment where the business model is largely based on the exploitation of migrant workers.”¹⁰ Curiously, not only has IOM aspired to set ethical standards for the industry, it has even gone so far as

⁷ Julia O’Connell Davidson, *Troubling Freedom: Migration, Debt, and Modern Slavery*, 1 MIGRATION STUD. 176 (2013).

⁸ Gisele Valarezo, *Offloading Migration Management: The Institutionalized Authority of Non-State Agencies over the Guatemalan Temporary Agricultural Worker to Canada Project*, 16 INT. MIGRATION & INTEGRATION 661 (2014).

⁹ Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012).

¹⁰ See INTERNATIONAL RECRUITMENT INTEGRITY SYSTEM.

to directly participate in it, acting as recruiter in two pilot programs—working closely with governments to recruit Thai agricultural workers for work in Israel, and (previously) to recruit Guatemalan agricultural workers for work in Quebec. Neither program could be touted as advancing the rights of migrant workers, however, with the working conditions of both populations generating much criticism and concern.¹¹

Those aspiring to a governance role also include a far more powerful—and far less accountable—set of actors: philanthrocapitalists. Philanthrocapitalists represent a new generation of philanthropists who—unlike earlier generations of philanthropists, who focused on funding third party initiatives—are creating and actively managing their own ventures, using their access to the global elite to assume a direct role in global governance. Philanthrocapitalists aspire to use their business skills to fix the world's social problems, and in the context of antitrafficking and exploitation measures, position corporations as crucial agents of change by engaging in more ethical recruitment practices and better supply chain management.¹² Anti-trafficking-focused philanthropies have even combined forces to create an impact investment fund (with aspirations of reaching US\$ one hundred million by 2020)—that aims “to bring much-needed strategic focus and financial resources to the fight against modern slavery.”¹³ The promise of big money and access to power centers has afforded philanthrocapitalists tremendous influence over the nature and scope of *other* actors’ actions in the field—chilling critique of their methods by potential grantees, and even potentially marginalizing or displacing (particularly financially-strapped) governments and international institutions responsible for developing and implementing antitrafficking responses. Unlike for other actors in the policy realm, there is no built-in mechanism to hold philanthrocapitalists accountable for their activities. Not beholden to the demands of an electorate, or a membership, or a set of shareholders, or other funders, their decisionmaking can all too readily take place in an echo chamber, impervious to scrutiny and criticism.¹⁴

GML could play a crucial role in clarifying the parameters of the roles that different actors involved in global labor migration governance might assume. Through the lawmaking process, GML could pull focus away from the multitude of efforts by various actors to establish voluntary “ethical codes of conduct” and towards the project of establishing a set of norms that not only are backed by international consensus, but usefully “translate moral responsibility into legal liability.”¹⁵ In obliging states to prioritize migrant workers’ rights protections, GML could resurrect a far more robust role of states in labor migration management. Moreover, inasmuch as GML might offer a governance structure that could hold dominant actors to account for their actions, it could also carve out a protected role for other, less powerful, actors whose perspectives are too often excluded from the policymaking fora: the workers themselves. Promoting a migrant-centered perspective, GML recognizes that migrant workers are uniquely positioned to identify the gaps in migration governance that create vulnerability to exploitation throughout the migration process, across countries of origin, transit, and destination.

¹¹ See generally, HUMAN RIGHTS WATCH, A RAW DEAL: ABUSES OF THAI WORKERS IN ISRAEL'S AGRICULTURAL SECTOR (2015); Valarezo, *supra* note 8.

¹² The most prominent of these include the Walk Free Foundation (founded by Australian mining magnate Andrew Forrest) and Humanity United (founded by Ebay co-founder Pierre Omiyar). See, e.g., Walk Free Foundation, Tackling Modern Slavery in Supply Chains: A Guide 1.0; Sarah Murray, Casting a Tighter Net, STAN. SOC. INNOVATION REV., Fall 2015 (describing the work of Humanity United).

¹³ See FREEDOMFUND.ORG.

¹⁴ Janie A. Chuang, *Giving as Governance: Philanthrocapitalism and Modern-Day Slavery Abolitionism*, 62 UCLA LAW REV. 1516 (2015).

¹⁵ Genevieve LeBaron & Joel Quirk, Introducing the terms of debate: regulation and responsibility in global supply chains, OPENDEMOCRACY (Sept. 13, 2016) (introducing a policy debate over the following statement: “Ending forced labor and modern slavery in global supply chains requires binding legislation, rather than corporate self-regulation and self-disclosure.”)

Reframing the Problem, Redefining the Solutions

As Tendayi Achiume notes, we are experiencing a “deepening globalization that reinforces co-dependence between the postcolonial world on the one hand, and the expanded class of beneficiaries of colonial advantage on the other.”¹⁶ Indeed, the problem of human trafficking has helped expose the troubling extent to which wealthy economies are built on the backs of migrants from resource-poorer countries of the world. The marginalizing of “economic migrants”—particularly those who are undocumented—as somehow less deserving of protections from harm has only reinforced that dynamic. As sociologist Julia O’Connell Davidson demonstrates, the dyads used to categorize economic migration and determine the scope of migrants’ entitlements—smuggling vs. trafficking, irregular vs. legal migration, forced vs. voluntary labor—ultimately operate to maintain the “exclusion clauses” in the social contract that undercut the promise of universal equality and freedom, and impose deleterious effects on many groups of migrants.¹⁷

These binaries—which undergird contemporary migration law—fail to capture the realities of modern-day labor migration. Take, for example, the smuggling vs. trafficking legal distinction, which treats victims of the former as complicit in crime, and the latter as deserving of protection. The fact that trafficked persons may also have been smuggled has enabled states to engage in strategic misidentification to evade the costly and administratively burdensome obligations owed to trafficked persons. Nor is the irregularity of one’s migration a meaningful signifier of either the nature of migrants’ experiences, or their rights entitlements/deprivations. The focus on irregularity, for example, has diverted attention away from abuses that occur in state-sanctioned guest-worker programs (or even “cultural exchange” programs that function as de facto guest-worker programs), that may, ironically, incentivize irregular migration.

Perhaps most significantly, the notion that what is “voluntary” and what is “forced” are so readily distinguishable fundamentally misunderstands the conditions under which migrant workers migrate and labor in our modern global economy. Many debt-financed migrants may willingly and knowingly endure periods of “unfreedom”—involving exploitation, violence, and other abuse during the indenture—as a means of achieving a better future. Addressing that reality requires confronting uncomfortable truths about how much exploitation we are willing to accept as a society, particularly “liberal” societies founded upon notions of universal freedom and liberty.¹⁸

The close scrutiny that GML could bring to contemporary labor migration processes—particularly as grounded in a migrant-centered perspective—could force policymakers to confront the falsity of these dyads. That, in turn, could engender a crucial paradigm shift in how states understand the problem of modern-day exploitation. That is, trafficking and “lesser” exploitation are not simply the product of individual deviant behavior, best addressed by criminalizing the perpetrators of abuse; rather, the roots of exploitation lie in deeply entrenched societal structures (for example, weaknesses in migration and labor frameworks) that constrain migrants’ choices. Reframed in this manner, potential solutions would entail laws and policies that facilitate safe labor migration across borders and that afford migrant workers more expansive labor protections. Indeed, in addressing human *mobility* more broadly—questioning the assumption that migration presents the optimal solution to the situations faced by potential migrants—GML could even underscore the need to

¹⁶ See E. Tendayi Achiume, *Migration as Decolonization*, 111 AJIL UNBOUND 142 (2017).

¹⁷ O’Connell Davidson, *supra* note 7.

¹⁸ Compare Yun Gao & Véronique Poisson, *Exploitation of Chinese Migrants’ Vulnerabilities in France*, in CONCEALED CHAINS: LABOUR EXPLOITATION AND CHINESE MIGRANTS IN EUROPE (Gao Yun ed., 2010) with Antonella Ceccagno et al., *Exploitation of Chinese Immigrants in Italy*, in *id.* (offering competing perspectives on whether the experiences of Chinese migrant workers working in the haute couture garment industries in France and Italy, respectively, ought to be prohibited as forced labor or accepted as voluntary “self-exploitation”).

address the underlying socioeconomic push factors, such as poverty and discrimination, that compel individuals to undertake risky migration projects.

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Existing antitrafficking frameworks, with their focus on crime control, have failed, even on their own terms. Too few traffickers are prosecuted and too few victims are “rescued.” There is an urgent need to rethink our approach and to understand better the connection between migrant worker abuse and trafficking. GML may offer our best hope of preventing trafficking, by facilitating human mobility so that migrant workers need not surrender their freedom in exchange for opportunities to pursue better lives, or even to survive.