

INTRODUCTION TO THE SYMPOSIUM ON TRANSNATIONAL FUTURES OF INTERNATIONAL LABOR LAW

*Adelle Blackett**, and *Laurence R. Helfer***

The centenary of the international organization whose constitution proclaims that social justice is indispensable for universal and lasting peace is too pivotal to go unnoticed. Established during the Paris Peace Conference of 1919, the International Labour Organization (ILO)¹ was once a paradigmatic subject of study by international legal scholars and international relations theorists.² A uniquely tripartite institution whose governance structure comprises workers, employers, and governments, the ILO survived the beleaguered League of Nations to become the first United Nations specialized agency in 1946. Its staff narrowly escaped the rise of fascism in Europe and settled into a wartime home at McGill University from 1940 to 1948, where they prepared for the challenges of a postwar future, including new economic relations and decolonization.

By the time the ILO received the Nobel Peace Prize in 1969, its influence was already waning. Yet those who follow the organization closely know that it facilitated democratization processes in Eastern Europe³ and provided steady support to the anti-apartheid movement in South Africa.⁴ The ILO also honed its normative core to prioritize Fundamental Principles and Rights at Work and sought to address the social dimensions of trade. It holds untapped potential to respond to the discontent that is manifest in the rise of nationalist populism in many countries.

The ILO Centenary: Taking Stock and Looking to the Future

The ILO has realized that this centennial year is too weighty to wrap itself in self-congratulation; it has instead focused on taking stock and articulating a blueprint for an inclusive future. During the annual International Labour Conference in Geneva in June 2019, the organization adopted the Centenary Declaration for the Future of Work⁵ and a pair of path-breaking legal instruments on the elimination of violence and harassment.⁶ In addition, the

* *Professor of Law & Canada Research Chair in Transnational Labour Law and Development, McGill University.*

** *Harry R. Chadwick, Sr. Professor of Law, Duke University School of Law.*

¹ [News and Events: The ILO Centenary](#), INT'L LABOUR ORG.

² *See, e.g.,* ANTONY ALCOCK, [HISTORY OF THE INTERNATIONAL LABOR ORGANIZATION](#) (1971); ERNST B. HAAS, [BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION](#) (1964); [THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION](#) (James T. Shotwell ed., 1934).

³ *See* Karen Curtis, [Democracy, Freedom of Association, and the ILO](#), in *LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR* 89 (Jean-Claude Javillier & Bernard Gernigon eds., 2006).

⁴ *See* [International Labour Conference, Declaration Concerning the Policy of "Apartheid" of the Republic of South Africa](#), INT'L LABOUR ORG. (1964).

⁵ Int'l Labour Conference, [ILO Centenary Declaration for the Future of Work](#), INT'L LABOUR ORG. (June 21, 2019).

⁶ Int'l Labour Org., [Violence and Harassment Convention](#), C190, June 10, 2019; Int'l Labour Org., [Violence and Harassment Recommendation](#), R206, June 10, 2019.

Office of the Legal Advisor convened leading scholars to reflect on “ILO100: Law for Social Justice,”⁷ and ILO officials have been present at scholarly conferences discussing the organization’s past and future.

One contribution to the ILO’s centenary, out of which this AJIL Unbound symposium emerges, was a course, the Transnational Futures of International Labor Law (#TFILL), convened at the McGill University Faculty of Law.⁸ The course featured twelve weeks of live webcast lectures by leading scholars from around the world on topics including corporate social responsibility, reliance on international labor standards by regional and domestic courts, labor market informality through the lens of climate justice, and the ILO’s approach to prison labor under the Forced Labour Convention, 1930 (No. 29). Most sessions included commentary by senior legal experts from the ILO’s permanent secretariat, the International Labour Office.

The title of the course and of this symposium—the Transnational Futures of International Labor Law—offers an approach that “loosens the grip both of a unitary, centralizing framing of the ‘sovereign nation state,’ however tripartite its conception, as the sole responsible actor; and of an accompanying exclusively statist understanding of law.”⁹ Both Philip Jessup and C. Wilfred Jenks are acknowledged as foundational thinkers in the field.¹⁰ But the roots of a transnational approach extend at least as far back as the ILO Constitution, which captured the cross-border effects of workplace and worker regulations in its assertion that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”¹¹

Other scholars have recently explored transnational framings. Gregory Shaffer and Terence C. Halliday theorize how transnational legal orders are established and in some cases settled, and they explore the relationship between preexisting national norms and new transnational ones.¹² For Peer Zumbansen, transnational law is also a challenge, a reminder of law’s fragility, and a basis to recall law’s contested character, constituencies, and communities.¹³ Focusing on the labor aspects of the transnational sharpens the analysis of how preexisting legal orders settle, and how they may need to be unsettled as transgressive legal orders emerge.¹⁴ As Adelle Blackett and Anne Trebilcock explain, transnational labor law (TLL)

has emerged to problematize and resist the direction of social regulation under globalization. Recognizing globalization’s asymmetries, and identifying spaces for action, TLL operates within, between and beyond states to construct counter-hegemonic alternatives. The field critically encompasses . . . the actions of transnational enterprises, labour federations, civil society and other actors. Moreover, TLL does not stop where national labour law begins: the two are deeply intertwined, and challenge each other. TLL is a form of multi-level governance, including the international, the regional, the national, and the shop floor: its ability to

⁷ [ILO100: Law for Social Justice](#), International Conference on the Occasion of the Centenary Celebration of the International Labour Organization, INT’L LABOUR ORG. (April 15–17, 2019).

⁸ A full archive of the course lectures is available online: <https://www.mcgill.ca/ldrl/what-we-teach/tfill>. A special Fall 2020 issue of the *International Labour Review* will include another selection of papers from the course.

⁹ Adelle Blackett & Anne Trebilcock, *Conceptualizing Transnational Labour Law*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 5 (Adelle Blackett & Anne Trebilcock eds., 2015).

¹⁰ PHILIP JESSUP, *TRANSNATIONAL LAW* (1956); WILFRED JENKS, *COMMON LAW OF MANKIND* (1958) (discussed in [Blackett & Trebilcock](#), *supra* note 9, at 22).

¹¹ [Constitution of the International Labour Organization](#), June 28, 1919, 49 Stat. 2712, 225 C.T.I.A. 373.

¹² [TRANSNATIONAL LEGAL ORDERING](#) (Gregory Shaffer & Terence C. Halliday, eds., 2015).

¹³ Peer Zumbansen, *Transnational Law, Evolving*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Jan M. Smits ed., 2012).

¹⁴ ADELLE BLACKETT, [EVERYDAY TRANSGRESSIONS: DOMESTIC WORKERS’ TRANSNATIONAL CHALLENGE TO INTERNATIONAL LABOR LAW](#) (2019).

address challenges of economic interdependency is similarly enmeshed with its ability to acknowledge and deal with complexity, diversity and asymmetries across time and space—amongst states, across uneven regional development, amongst vastly differently empowered institutions and actors. TLL holds no monopoly on either the rise of legal centrism through the prevalence of “rule of law” doctrines, or the expansion of pluralist, reflexive new governance methods. Its distinctiveness lies in its capacity to be counter-hegemonic, and promote social justice.¹⁵

Essays in this Symposium

The symposium opens with two essays from the coeditors. Adelle Blackett of McGill University builds on her contributions to the emerging field of transnational labor law to challenge a methodological nationalism that treats labor as naturally or necessarily governed at the domestic level.¹⁶ She provides three examples of misframings—the overlooked insights from the quadricentennial of the transatlantic slave trade; the asymmetrical governance of the contemporary movement of goods and persons; and the disconnect between protectionism and social protection—to call for a transnational perspective to be given prominence. Blackett underscores the ways in which the ILO has engaged with these misframings and even worked to embed transnational alternatives into emerging governance frameworks. Blackett’s contribution acknowledges the extent to which the ILO’s vision has been “othered” internationally, but shows how the ILO itself has inadvertently contributed to the process of othering. Her essay calls for an emancipatory approach to the transnational futures of international labor law, and offers pragmatic examples of its emergence in both the Better Work program and standard setting on decent work for domestic workers.

The next contribution, by Laurence R. Helfer of Duke University, reviews the ILO’s history of innovation as an international lawmaking and monitoring body and the significant challenges that the organization now faces.¹⁷ Over the last century, the ILO has successfully reinvented itself in response to shifts in global labor conditions, most notably by developing a comprehensive supervisory system to gather information, evaluate reports, and review complaints relating to compliance with international labor standards. Helfer is uncertain, however, whether the ILO can effectively respond to the hardships and dislocations of the twenty-first century workplace—which include the informal and gig economies, digitization and automation, and widening material inequality—and the rise of nationalist populism that those trends have helped to engender. He identifies four impediments to the ILO’s efforts in this regard—a mismatch between aspirations and practical achievements; a dispute between workers and employers over the right to strike; insufficient representativeness of the tripartite membership; and the difficulty of framing initiatives that capture the attention of civil society. Helfer concludes that the ILO is likely to remain relevant as a clearinghouse for studies about the travails of the twenty-first century workplace, and proposals to remedy them, that may later be taken up by actors outside the organization.

Four other essays offer assessments of particular aspects of transnational labor law’s future. Liam McHugh-Russell of McGill University offers a trenchant critique of the ILO’s engagement with the World Bank’s “Doing Business” indicators project as it relates to the hiring and firing of workers.¹⁸ The World Bank project serves as a case study for McHugh-Russell’s broader challenge to pay attention to the distinction between “governance by knowledge” and “governance by norms.” For McHugh-Russell, it is important to recognize when a

¹⁵ Blackett & Trebilcock, *supra* note 9, at 4.

¹⁶ Adelle Blackett, *Theorizing Emancipatory Transnational Futures of International Labor Law*, 113 AJIL UNBOUND 390 (2019).

¹⁷ Laurence R. Helfer, *The ILO at 100: Institutional Innovation in an Era of Populism*, 113 AJIL UNBOUND 396 (2019).

¹⁸ Liam McHugh-Russell, *International Labor Law and Its Others: Governance by Norm Versus Governance by Knowledge*, 113 AJIL UNBOUND 402 (2019).

project purports to express a norm that might notionally be integrated into the field of international law, but in reality is a technical, ends-oriented claim that is only loosely linked to an international institution's normative mandate. Although the Doing Business project was vigorously challenged by labor scholars within and beyond the ILO, their critique inadvertently lent credibility to an indicators-based approach to international labor regulation that has dubious scientific validity. McHugh-Russell concludes by calling for close attention to how claims of authority are constructed to address the power that they may continue to hold.

Álvaro Santos of Georgetown University offers a timely analysis of why the “gold standard” of labor provisions in trade agreements remains woefully inadequate to the task of protecting workers.¹⁹ He argues that the United States–Mexico–Canada Agreement (USMCA) may represent a pivot in a different direction. For Santos, the USMCA's most important innovations are the labor law reform in Mexico, locked into the agreement's labor chapter, as well as the reduction of investors' rights and the new rules of origin. He argues that the traditional focus on linking trade to labor standards should be replaced by rebalancing the asymmetries between capital and labor. Santos also argues that to improve workers' welfare in rich countries like the United States, there is no substitute for domestic reform. Trade agreements should therefore be redesigned, in keeping with the ILO's founding principles, to make trade work for workers.

The essay by Guy Fiti Sinclair of the Victoria University of Wellington explores the origins of the “transnational” in transnational labor law, beginning with Philip Jessup's famous treatise and then turning to the writings of “the most prominent international lawyer associated with the ILO, Clarence Wilfred Jenks.”²⁰ As Jenks rose through the ranks of the organization, eventually becoming Director-General in 1970, he participated in the full range of its lawmaking, monitoring, information gathering, and technical assistance activities. These firsthand experiences informed Jenks's prodigious scholarly output, much of which analyzed the ILO's tripartite structure and its wider implications for expanding the role of non-state actors in the international legal order. The apotheosis of Jenks's capacious vision of international society was the publication in 1958 of *The Common Law of Mankind*. Although Jessup's *Transnational Law* is more well known, Sinclair makes a case for revisiting Jenks's book, both as a historical document—a reflection of the postwar era's rapidly changing economic, political, and power dynamics within and across borders—and as a forward-looking, constitutionalist vision of an international community bound by “a set of moral values and legal obligations” with universalist aspirations.²¹

The last contribution, by Mimi Zou of the University of Oxford, considers the status of transnational labor law in China's Belt and Road Initiative (BRI). Zou invokes the term “State Capitalism 4.0” to describe how the Chinese “party-state” strictly controls state-owned and private enterprises that invest in BRI countries.²² She focuses in particular on the Chinese construction industry on the African continent and the “dispatch” workers hired through foreign labor cooperation agencies licensed by the Ministry of Commerce. To avoid unrest between these Chinese contract workers and construction firms' management, the government has issued numerous quasi-legal pronouncements regulating the labor practices of Chinese firms operating in BRI countries. The results of this active intervention are mixed, Zou argues. On the positive side, the party-state has leveraged its considerable influence and enforcement powers to improve labor standards. Yet China's commitment to transnational labor law excludes the right to freedom of association and collective bargaining that are pillars of the ILO's Fundamental Principles and Rights at Work. Zou concludes by calling for empirical studies to identify precisely how the party-state is influencing the labor standards, norms, and practices of Chinese firms operating abroad.

¹⁹ Álvaro Santos, [Reimagining Trade Agreements for Workers: Lessons from the USMCA](#), 113 AJIL Unbound 407 (2019).

²⁰ Guy Fiti Sinclair, [Past as Prologue? Theorizing Transnational Labor Law Between Jessup and Jenks](#), 113 AJIL UNBOUND 413 (2019).

²¹ *Id.* at 413.

²² Mimi Zou, [China and the Belt and Road Initiative: Transnational Labor Law Under State Capitalism 4.0](#), 113 AJIL UNBOUND 418 (2019).

Conclusion

The resurrected interest in the ILO at the dawn of its second century is welcome and overdue.²³ Yet it also raises a conundrum for an institution that embraces a bold and capacious social justice mandate in its 1944 constitutional annex, the Declaration of Philadelphia.²⁴ The drafters of the Declaration recognized that the ILO could not achieve this mandate on its own. The ILO must not only assess but also influence the direction of broader global governance challenges, including the cultivation of human rights and international solidarity-based approaches to labor migration. It must not only collaborate, but also persuade other international institutions of the need to center a social justice vision, including through the United Nations Sustainable Development Goals and the interpretation of trade agreements. The ILO must not only champion the emergence of alternative, transnational futures of international labor law; it must also create space for an unlikely but necessary assemblage of international, regional, and state-based institutions; economic actors and social movements; and thought leaders to build and accompany it on that path.

The essays in this symposium offer a range of perspectives on the feasibility of achieving these noble ideals. But all of the contributors agree that the ILO must foreground its constitutional social justice mandate as it enters its second century. Doing so, however, raises profound and challenging issues. To center social justice is to “[bring] redistribution out of the closet.”²⁵ It is also to contest deep-seated, historical forms of subordination and inequality. To think transnationally is to pry open space for alternatives; contestation is to be expected.

The current Director-General, Guy Ryder, reminded audiences at the outset of the McGill course that the ILO continues to need friends, including in academia. The contributions to this symposium are a deliberate act of intellectual friendship. By closely and critically exploring the transnational futures of international labor law, the contributors seek to catalyze further scholarly engagement with and beyond an institution that, in a moment of deep discontent, wisely and urgently persists in seeking peace through social justice.

²³ In the United States, the late Virginia Leary was a trailblazer in the field of international labor law. The American Society of International Law recognized her with [the Goler T. Butcher Medal](#) in 2008.

²⁴ [Declaration Concerning the Aims and Purposes of the International Labour Organization](#) (adopted May 10, 1944 in Philadelphia). The Declaration’s more noteworthy statements include the following: “Labour is not a commodity;” “Freedom of expression and of association are essential to sustained progress;” “Poverty anywhere constitutes a danger to prosperity everywhere;” and “All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”

²⁵ Karl Klare, [Horizons of Transformative Labour Law](#), in *LABOUR LAW IN THE ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 1, 3 (Joanne Conaghan et al. eds., 2002). See also QUINN SLOBODIAN, [GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM](#) (2018) (recalling that neoliberalism included an alternative transnational embedding).