

## SYMPOSIUM ON TRANSNATIONAL FUTURES OF INTERNATIONAL LABOR LAW

### THE ILO AT 100: INSTITUTIONAL INNOVATION IN AN ERA OF POPULISM

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International organizations rarely die, but they often become irrelevant. The mere fact of the International Labour Organization's (ILO's) survival thus says little about its accomplishments or impact. Yet the ILO has a rich history of reinventing itself in response to shifts in global labor conditions, and it has responded to those changes with legal and policy innovations that once attracted widespread attention and praise but have recently been met mostly with indifference.

The ILO centenary provides an opportunity to take stock of what the organization has achieved. But it also calls for a clear-eyed assessment of the profound challenges that the ILO currently faces from numerous and rapid transformations of work—such as the growing informal and gig economies, digitization and automation, and rising material inequality—as well as the populist ferment those trends have helped to engender. For the reasons explained below, the ILO's contributions to resolving the problems of the twenty-first century workplace are likely to be modest, thus disappointing advocates of a robust global labor regime. Yet the ILO is likely to remain surprisingly relevant, mainly by keeping these problems—and potential solutions to them—on the global agenda where they may eventually be taken up by actors outside the organization.

#### *The ILO's Founding and its Evolving Goals*

One reason for the ILO's longevity is that the overarching concerns that animated the organization in 1919 have remained highly salient over time. The ILO's founders feared a race to the bottom in which states would lower labor standards to attract foreign investment or aid domestic industries. International labor standards, if widely adopted and followed, would deter countries from entering the race and lowering workplace protections to sub-optimal levels. At the same time, the founders recognized the social justice function of labor rights. In this view, “the well-being ... of industrial wage-earners”<sup>1</sup> has an intrinsic value akin to human rights. Governments and employers also endorsed workplace protections on pragmatic grounds. They recognized that early twentieth century industrial capitalism “had generated mass poverty that might lead to political and social unrest,” and that the best way to stave off that unrest was to channel workers' reformist energies into an institution whose tripartite membership would tackle social reforms “within the existing political and economic order.”<sup>2</sup>

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<sup>1</sup> [Constitution of the International Labour Organization](#) art. 427, June 28, 1919.

<sup>2</sup> Sandrine Kott, [ILO: Social Justice in a Global World? A History in Tension](#), in *THE ILO @ 100: ADDRESSING THE PAST AND FUTURE OF WORK AND SOCIAL PROTECTION* 21, 23 (Christophe Gironde and Gilles Carbonnier eds., 2019).

To address these competing visions, the ILO sought to achieve three broad goals: widespread adherence to conventions and recommendations endorsed by employers, workers, and governments; international labor standards targeting the myriad hazards of the early twentieth century workplace while remaining sufficiently flexible to account for economic and social differences across countries and the changing nature of work; and a supervisory system to monitor adherence to those standards via complaints, state reports, and information gathering.

Over the next few decades, the ILO adopted numerous innovations to enhance this system.<sup>3</sup> Led by the creativity of several Directors General and the International Labour Office, the organization developed a suite of distinctive lawmaking and monitoring procedures:

- an obligation for all member states to submit every adopted treaty to their respective political branches to be considered for ratification;
- an informal practice of ILO officials interpreting conventions to clarify ambiguous treaty provisions and remove obstacles to ratification;
- the collection and publication of information on compliance with unratified conventions and non-binding recommendations;
- the creation of a permanent committee of independent experts that capaciously interpreted its mandate to review state compliance with ILO conventions, identify obstacles to the domestic protection of labor standards, and suggest ways to remove them;
- the establishment of a supervisory body to review labor union complaints alleging violations of conventions guaranteeing freedom of association and collective bargaining, regardless of whether a state had ratified those treaties; and
- a constitutional amendment requiring member states to explain whether they complied with unratified conventions and nonbinding recommendations.

The ILO received the Nobel Peace Prize in 1969 in recognition of its lasting influence on national legislation. Yet the organization had already entered a period of stagnation resulting from institutional overreach. Officials had sought to place the ILO at the forefront of global social and economic regulation after World War Two, but they lacked the support of a more diverse and politicized membership for these ambitious initiatives.<sup>4</sup> By the mid-1990s, many predicted that the ILO would be shut out of economic policy-making by the new and more powerful World Trade Organization.

The ILO responded by developing a novel mechanism to focus the organization's attention on four core labor standards—freedom of association, the elimination of forced labor, the abolition of child labor, and non-discrimination in employment. The 1998 Declaration on Fundamental Principles and Rights at Work, which included these labor standards, marked a new era of innovation for the ILO. The Declaration enhanced the precision of the standards, created new monitoring procedures, and applied the procedures to all member states. The organization also launched an initiative to discard or revise outdated conventions and recommendations and improve the quality of future lawmaking efforts.

<sup>3</sup> See, e.g., Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006); Laurence R. Helfer, *Monitoring Compliance with Un-Ratified Treaties: The ILO Experience*, 71 L. & CONTEMP. PROBS. 195 (2008); FRANCIS MAUPAIN, *THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY* (2013).

<sup>4</sup> In the 1950s and 1960s, the ILO adopted conventions and recommendations on subjects including welfare, workers' education and training, rural development, and workers' health and medical benefits, but these instruments were not widely followed. Efrén Córdova, *Some Reflections on the Overproduction of International Labor Standards*, 14 COMP. LAB. L.J. 138 (1993).

### *Contemporary and Future Challenges*

Yet just as the ILO has begun to recover its institutional footing, profound changes to the world of work are once again casting doubt on its capacity to respond. Whatever other criticisms one might level at the ILO, the organization has not shied away from the starkness of these changes. The 2019 report of the Global Commission on the Future of Work succinctly explains why, in the ILO's "efforts to create decent work, the task just got harder."

Technological advances—artificial intelligence, automation and robotics—will create new jobs, but those who lose their jobs in this transition may be the least equipped to seize the new job opportunities. The skills of today will not match the jobs of tomorrow and newly acquired skills may quickly become obsolete. Left to its current course, the digital economy is likely to widen both regional and gender divides.... Transitioning to a future of work which respects the planet and seeks to arrest climate change will disrupt labour markets even further. The expanding population of young people in some regions is set to exacerbate youth unemployment and migratory pressures. Ageing populations in others will place additional strain on social security and care systems.

[B]illions of workers are in informal employment. A staggering 300 million workers live in extreme poverty.... Wage growth has not kept pace with productivity growth and the share of national income going to workers has declined. The gap between the wealthy and everyone else is widening.... Millions of workers remain disenfranchised, deprived of fundamental rights and unable to make their voices heard.<sup>5</sup>

What progress has the ILO made in addressing these profound challenges? In terms of its traditional role of setting international standards, three accomplishments are noteworthy:

- A Consolidated Maritime Labor Convention, adopted in 2006, that codifies comprehensive regulations for the global shipping industry and creates incentives for all actors—flag states, port states, labor-supplying states, ship owners, and seafarers—to enforce its provisions using an integrated certificate and inspection system.<sup>6</sup>
- A 2011 convention and recommendation on domestic workers that represents the ILO's first serious attempt to regulate the informal economy. The product of sustained advocacy by organizations of domestic workers, these instruments set minimum standards and social protections for all household workers, especially women, minorities, and migrants.<sup>7</sup>
- Most recently, in June 2019, a convention and recommendation on the elimination of violence and harassment, which commentators have hailed as "clos[ing] the global regulatory gap on workplace sexual harassment" by adopting sweeping protections "to all the foreseeable permutations and changing employment arrangements today."<sup>8</sup>

In the realm of non-binding norms, the ILO has adopted a series of policy statements to guide its response to contemporary workplace challenges. These include a 2008 Declaration on Social Justice for a Fair Globalization, a

<sup>5</sup> Int'l Labour Org., [Work for a Brighter Future: Global Commission on the Future of Work](#), Exec. Summary 18-21 (2019).

<sup>6</sup> NATHAN LILLIE, [A GLOBAL UNION FOR GLOBAL WORKERS: COLLECTIVE BARGAINING AND REGULATORY POLITICS IN MARITIME SHIPPING](#) (2006). As of 2019, the Convention has been ratified by ninety states and covers more than 90% of the world's shipping fleet.

<sup>7</sup> ADELLE BLACKETT, [EVERYDAY TRANSGRESSIONS: DOMESTIC WORKERS' TRANSNATIONAL CHALLENGE TO INTERNATIONAL LABOR LAW](#) (2019). As of 2019, there are twenty-nine states parties to the Domestic Workers Convention.

<sup>8</sup> Diane Desierto, [The ESCR Revolution Continues: ILO Convention No. 190 on the Elimination of Violence and Harassment in the World of Work](#), EJIL: TALK! (June 28, 2019).

Decent Work Agenda, a 2016 initiative on Decent Work in Global Supply Chains, and a 2019 Centenary Declaration for the Future of Work. The organization has also continued to publish evidence-rich national and comparative studies of different employment contexts and the diverse initiatives that governments, businesses, civil society groups, and international organizations have adopted to regulate and improve them.<sup>9</sup>

#### *Four Internal Impediments to Effective ILO Action*

These efforts are impressive on paper and they resonate in conference halls in Geneva and in national capitals. Their practical impact, however, remains partial and incomplete. This is hardly surprising given their ambition and the numerous obstacles facing any attempt to ameliorate the hardships that millions of workers around the world confront daily. Yet the ILO's efforts are also undercut by four internal impediments to effective action.

The first is a mismatch between lofty aspirations and practical achievements. The decade since the global financial crisis has acutely demonstrated the excesses of neoliberal capitalism, most notably employment insecurity, declining social protections, and widening material inequality. These are precisely the sort of concerns that the ILO was created to address. The organization's rhetoric acknowledges this historical link, audaciously seeking to "grasp the challenges of the fourth industrial revolution."<sup>10</sup> Yet when it comes to specific policies and programs—from evaluating corporate social responsibility schemes, to regulating the hazards of global supply chains, to adopting a legally binding instrument setting forth the minimum requisites of decent work—the ILO has often fallen short or even missed the boat entirely.<sup>11</sup>

These shortcomings can be partly explained by a second obstacle—an ongoing dispute between workers and employers over the right to strike. In 2012, employer representatives challenged the longstanding position of ILO monitoring bodies that the Convention on Freedom of Association implicitly protects the right to strike. The employers not only disavowed an interpretation of a core labor treaty that all tripartite members had accepted for more than half a century, but they also refused to cooperate in the review of proceedings relating to the right to strike. The result was a crisis of tripartism that threatened to undermine the ILO supervisory system, one of the organization's crown jewels.<sup>12</sup> An uneasy truce was brokered in 2015, but lingering tensions and disagreements have clouded the atmosphere of trust that is essential for an institution in which workers and employers, as well as governments, must approve new policies and initiatives.<sup>13</sup>

A third impediment is insufficient representativeness. This may seem a surprising critique to level at the only international organization that gives membership and voting rights to non-state actors. However, an unintended consequence of conferring full governance privileges on workers and employers has been the marginalization of other civil society actors. This mattered little when governments, trade unions, and employer associations were the most influential social and political forces in many countries. But as the corporatist model of industrial relations has atrophied with the rise of neoliberalism and the decline of organized labor, the absence of human rights advocates, consumer protection groups, and other social movements has hamstrung the ILO's foray into new domains,

<sup>9</sup> Velibor Jakovleski et al., *The ILO's Role in Global Governance: Limits and Potential*, in *THE ILO @ 100*, *supra* note 2, at 82-103.

<sup>10</sup> *L'OIT Veut Empoigner la 4e Revolution Industrielle*, *LE TEMPS* (Nov. 7, 2016).

<sup>11</sup> Paul van der Heijden, *The ILO Stumbling Towards its Centenary Anniversary*, 15 *INT'L ORG. L. REV.* 203 (2018).

<sup>12</sup> See, e.g., Francis Maupain, *The ILO Regular Supervisory System: A Model in Crisis?*, 10 *INT'L ORG. L. REV.* 117 (2013); Lee Swepston, *Crisis in the ILO Supervisory System: Dispute over the Right to Strike*, 29 *INT'L J. COMP. LAB. L. & INDUS. REL.* 199 (2013).

<sup>13</sup> For recent contestations between workers and employers over the right to strike, see Int'l Labour Org., [Report of the Committee on the Application of Standards - Part 1: General report](#) (June 21, 2019).

such as the informal economy. The nationally-based worker and employer delegates often clash over substantive issues, but they tacitly agree on the need to keep transnational civil society at a distance to avoid diluting their own influence.<sup>14</sup>

A fourth barrier to effective action is that ILO initiatives do not resonate in the wider world. The organization's legal and policy pronouncements are primarily aimed at "insiders well-versed in politically acceptable 'ILO speak,'" but they are much less intelligible to outsiders.<sup>15</sup> As a result, "the fact that the ILO plays a significant and active role in the enforcement of classic human rights on the work floor is something that generally remains underexposed."<sup>16</sup> This lack of exposure limits the organization's ability to frame ILO programs in politically salient language that captures the attention and mobilization efforts of a broader range of civil society actors. It also hampers the ability to connect with new constituencies—including labor movements and worker groups not led by unions<sup>17</sup>—to pressure governments and firms to improve domestic and transnational labor standards and social protections.

### *Conclusion: The ILO's Influence in an Era of Populism*

Even if these internal impediments can be overcome, the ILO's ability to ameliorate the hardships and dislocations of the twenty-first century workplace will remain uncertain due to a shift in its external landscape—the rapid rise of nationalist populism in many countries.

The causes of this trend are complex, but the concentration of the material benefits of free trade, deregulation, and other neoliberal policies in the upper echelons of societies, together with the atrophying of full-time employment, job security, and social protections for ordinary workers, are surely major contributing factors.<sup>18</sup> Nationalist political leaders have channeled the anger of those left behind economically toward a range of targets—vaguely defined cosmopolitan elites, venues for cross-border collaboration, and technocratic expertise more generally. The result has been a weakening of many multilateral institutions due to political gridlock, disparagement by some governments, and unilateral disengagement by others.<sup>19</sup>

These are turbulent times for any international organization. Yet, might the ILO be different? The fears of labor unrest that spurred the ILO's creation in 1919 are strikingly similar to the anxieties that rouse today's populists. But unlike the founding era, when "reform activity developed along three main lines: protection, redistribution and collective bargaining,"<sup>20</sup> consensus on how, where—and even whether—to address these concerns remains

<sup>14</sup> See, e.g., Jakovleski et al., *supra* note 9, at 96; Marieke Louis, *Who Decides? Representation and Decisionmaking at the International Labour Organization*, in *THE ILO @ 100*, *supra* note 2, at 40-56.

<sup>15</sup> Huw Thomas and Peter Turnbull, *From Horizontal to Vertical Labour Governance: The International Labour Organization (ILO) and Decent Work in Global Supply Chains*, 71 *HUM. REL.* 536, 546 (2018).

<sup>16</sup> van der Heijden, *supra* note 11, at 204.

<sup>17</sup> Gilles Carbonnier & Christophe Gironde, *The ILO @ 100: In Search of Renewed Relevance*, in *THE ILO @ 100*, *supra* note 2, at 13, 15 (noting the "the rise in China of labour movements not supervised by unions"); Noam Scheiber, *Debate Over Uber and Lyft Drivers' Rights in California Has Split Labor*, *N.Y. TIMES* (June 29, 2019) (describing a proposal by ride-sharing companies Uber and Lyft "to recognize a labor organization that would represent drivers' interests on certain issues" but classify them as independent contractors rather than employees).

<sup>18</sup> See generally *THE OXFORD HANDBOOK OF POPULISM* (Cristóbal Rovira Kaltwasser et al., eds. 2017).

<sup>19</sup> See, e.g., Dani Rodrik, *Globalization's Wrong Turn: And How it Hurt America*, *FOREIGN AFF.* (July-Aug. 2019); Richard Haass, *How a World Order Ends: And What Comes in its Wake*, *FOREIGN AFF.* (Jan.-Feb. 2019).

<sup>20</sup> Kott, *supra* note 2, at 23.

elusive. The idea of locally-rooted social movements collaborating across borders may strike some as oxymoronic, but it in fact has a long historical pedigree—for better or worse.<sup>21</sup>

Still, the prospect of the ILO becoming a venue for social programs backed by loose alliances of populist majorities seems remote. It is far more likely that the ILO will continue to serve as a clearinghouse for studies about the *travails* of the twenty-first century workplace and proposals to remedy them. If one or more of these initiatives catches fire among social movements—populist or otherwise—the ILO may have helped to set an agenda that can overcome vested interests and generate meaningful social, economic, and political change.

<sup>21</sup> David Motadel, *The Far Right Says There's Nothing Dirtier Than Internationalism – But They Depend on It*, N.Y. TIMES (July 3, 2019) (“[N]ationalist groups around the world are building alliances and operating more and more in transnational institutions.... In fact, international alliances of nationalist movements are as old as these movements themselves.”).