CHAPTER 19. THE FUTURE OF INTERNATIONAL LABOUR STANDARDS BEYOND THE ILO FRAMEWORK: BETWEEN TRADE AND HUMAN RIGHTS

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Abstract

Despite the continued pivotal role of International Labour Organization (ILO) on a global scale and the momentum generated by the post-1998 ILO Declaration, the slowdown in its legislative activity and the criticism directed towards its supervisory bodies, especially in the aftermath of 2012 crisis, have prompted a reassessment of the purpose and approach to international labour standards. Two predominant pathways have emerged for these standards beyond Geneva: firstly, over the past three decades, Free Trade Agreements have incorporated social clauses, ensuring a balanced trade-labour nexus and thereby safeguarding labour standards. Secondly, these standards have become fundamental to the recent development and strengthening of workers' rights within the Inter-American System of Human Rights. This tailored application of international labour standards, eschewing a one-size-fits-all model, holds the potential to enhance international labour standards beyond the ILO framework.

Keywords: International Labour Standards; ILO; Inter-American System of Human Rights; Labour Rights; Trade and Labour

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<a> INTRODUCTION

Since its foundation in 1919, the International Labour Organisation (ILO) has long endeavoured to improve the working terms and conditions of people at work across the globe mainly by formulating and providing for international labour standards – as mandated in the 1919 ILO Constitution and the 1944 Philadelphia Declaration. The ILO has been one of the most successful international organisations throughout the 20th century. It has adopted 190 legally binding conventions, which have been largely ratified by Member States, and more than 200 recommendations, which despite being not formally binding have had normative effects (Klabbers 2023, 139). This rich legislative body has been examined by the ILO supervisory bodies, particularly the Committee of Experts on the Application of Conventions and Recommendations ('CEACR') and the Committee of Freedom of Association ('CFA'). Although they are not judicial bodies, their 'authoritative' interpretations were respected by the ILO's constituents – employers, workers and governments – and other international and national actors.

However, in 2012, the employers group challenged the role of the CEACR as an interpreter of ILO Conventions, specifically regarding the right to strike, which has not been expressly recognised by any of the ILO conventions and recommendations (Monaghan 2021). Although a 'truce' was reached and was expressed via a joint statement issued on 23 February 2015, questions have been raised regarding the adequacy of the ILO's institutional architecture. This all has been further aggravated by the already existing flaws such as the insufficient representation of relevant actors within the ILO's structures such as informal workers, social movements, Global South representatives, who are not traditionally part of the corporatist industrial relations model (Louis 2019). These shortcomings have spurred recent debates on the development of international labour standards within and beyond the confines of Geneva.

To achieve its mandates, the ILO's conventional strategy has been to 'persuade' its Member States that adopting and implementing international labour standards will bring them economic benefits as well as moral and social benefits. These claims are not completely ill-grounded or ineffective. Nonetheless, international labour standards have become less effective in a more competitive and globalised world. To address this challenge, since the 1990s, free trade agreements (FTAs) have been considered a possible platform from which fundamental labour rights and standards can be protected. Hence, it is timely and necessary to look into whether

and to what extent such trade and investment arrangements could play a role as an alternative to the development and enforcement of international labour standards. This is particularly true given that a significant portion of modern economic agreements contain labour-related commitments with an increasingly broad range of labour standards and more sophisticated institutional mechanisms for the implementation and enforcement of such obligations. It is also worth identifying lessons to learn from the actual disputes relating to the provisions in FTAs.

The ILO, as an agency of the United Nations, has been in a privileged position to bring together labour rights and human rights. Even though the notion of 'human rights' was not included in the landmark ILO 'Declaration on Fundamental Principles and Rights at Work', adopted in 1998 and amended in 2022, it developed the notion of *core labour standards*, which can be considered normatively and practically human rights (Mantouvalou 2012, Alston 2004), essential for decent work, which include: freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation, and a safe and healthy working environment marks. ILO constitutes the highest authority in the interpretation concerning human rights at work (Bellace 2014). It is not a surprise that regional bodies, such as the European Court of Human Rights (ECtHR), have relied upon ILO conventions and recommendations, and ILO supervisory bodies' decisions (Teklè 2020). Although the ECtHR has protected some individual and collective labour rights through Articles 8[i] and 11[ii] of the European Convention of Human Rights, it has also delivered some controversial judgments in which labour rights were not necessarily protected (Collins 2022; Dorssemont et al. 2014).[iii] Unlike this ambivalent relationship, the Inter-American Court of Human Rights ('IACtHR') has adopted a more progressive view vis-à-vis labour rights.

This chapter examines how international labour standards have been developed and interpreted beyond the ILO framework. To do so, firstly, it analyses the development of trade-labour linkages particularly in FTAs and offer some considerations to bear in mind for improvement of this alternative approach. Secondly, it delves into the IACtHR case law and how international labour standards have been a bedrock of the recent development and strengthening of labour rights within the Inter-American System of Human Rights.

<a> THE DEVELOPMENT OF INTERNATIONAL LABOUR STANDARDS THROUGH THE TRADE-LABOUR LINKAGE

<b> Background of the Birth of TLLs

Liberalisation of international trade and investment has been the key driving force of globalisation. It is often praised for boosting economic growth, reducing poverty and creating jobs in the developing and developed world alike (ILO 2017, 1). However, it is also accused of aggravating inequality in wealth distribution within and across the nations and particularly crippling individual States' conventional regulatory mechanisms to safeguard common goods such as taxation, public health and social welfare, environmental protection and labour standards (Stone 2006). In developed countries, the main challenge to national labour regulation is the weakened control that democratic institutions exert over market activity as well as the deteriorated terms and conditions of employment (in certain sectors) (Bercusson and Estlund 2007, 2). In developing economies, there are additional challenges such as structurally-maintained 'sweatshops' and hazardous work, which can often be tantamount to human rights violations (Dahan et al 2016, 6-7).

Both sides of this new, emerging 'global divide' have witnessed the decreasing bargaining and regulatory power of States vis-à-vis the agents of globalisation, namely transnational corporations and foreign investors, which are responsible for shaping global supply chains and financial integration (Bercusson and Estlund 2007, 3). Under this competitive pressure, very few individual nations, if any, could enhance the standard of working life, as it would arguably risk an ensuing adverse impact on their trade performance and attractiveness as an investment locale (Menashe 2020). It is therefore contended that this has all led to a shift of political power from labour to capital and from the public to the private sector, deepening socio-economic inequality and poverty both domestically and globally (Ronzoni 2016, 30).

This dilemma needs an international solution. The ILO has been constitutionally tasked with tackling some of the complexities arising from globalisation, typically by setting up minimum labour standards that apply in all ratifying member States.[iv] The ILO has also recognised the need for full cooperation between other international bodies, including trade organisations, to achieve its mandates. Because of the ILO's arguably inadequate enforcement mechanisms, however, campaigners for a fair globalisation have identified a possible multilateral trade regime as an alternative suitable forum to establish a formal trade-labour linkage ('TLL'). A

political attempt in this sense was notably made in 1996 at the World Trade Organization ('WTO') Ministerial Conference held in Singapore, but essentially failed. Developing countries then considered unacceptable a proposal to form a committee in the WTO to look into the relationship between trade and labour standards and voted it down. This event was also marked as a clash between 'the North' and 'the South' over the issue of labour standards in the context of trade. From developing countries' point of view, there was, and still is, a serious risk that any kind of TLLs may be misused or abused by developed countries as a 'Trojan Horse' (Burgoon 2009, 644) for 'disguised protectionism' or 'neo-imperialism' (Bahgwati 2009, 57). After all, the 1996 Conference concluded that the ILO *is* 'the competent body to set and deal with these standards'.[v]

<b> The Emergence and Evolution of Labour Provisions in FTAs and the ILO

Partly in response to these failed attempts, some economic powers upholding at least the idea of establishing a TLL[vi], such as the United States ('US') and the European Union ('EU'), have more actively sought to build a social dimension into their trade arrangements with their trading partners such as free (or preferential) trade agreements ('FTAs'). Since the North American FTA of 1994, inserting 'labour provisions' into trading arrangements has become a common feature.[vii] This accounts for the growth in their presence in such arrangements from 7.3 % of FTAs in 1995 to 28.8 % in 2016 (ILO 2017, 11), and even further growing at the time of writing.[viii] This trend appears to persist despite the recent turbulent changes in global trade and economy, such as the digitalisation of trade, the reorganisation of global value chains, and, above all, the geo-political and technological tensions. It is also often argued that labour provisions in US, EU and others' FTAs have constantly 'evolved', as illustrated in the recent negotiation over or development in labour-related commitments and mechanisms, for instance, in the Indo-Pacific Economic Framework ('IPEF'), the United States-Mexico-Canada Agreement ('USMCA'), the EU-United Kingdom Trade and Cooperation Agreement, and EU-New Zealand FTA (Marceau et al 2023).

Three main aspects characterised this 'evolution'. Firstly, there has been a broadening of the scope of labour standards to be protected with the proliferation of references to ILO instruments, particularly in EU arrangements. Secondly, there has been a reinforcement of the legally binding nature of the obligations enshrined in the FTAs. Labour provisions in FTAs signed in the 1990s and early 2000s normally contain an obligation only to enforce each State

party's own labour law. However, labour commitments in later FTAs, particularly those (re-) negotiated and concluded after the US Congress' bipartisan agreement 10 May 2007 (Rangel 2008) and EU's new vision of 'Global Europe' (European Commission 2006), began to include duties to enact and maintain adequate law to protect the labour rights and standards defined in the chapter (mostly referring to ILO instruments). Thirdly, there has been an increase of the enforceability of such obligations by clarifying their legal nature and forging more effective rules and institutions for enforcement (Namgoong 2019, 487; Agustí-Panareda et al 2014, 7-14). The Rapid Response Labor Mechanism ('RRLM') adopted in the 2019 USMCA illustrates this change. RRLM is an enforcement mechanism that, where the conditions are met, enables the US and Canada to impose upon goods manufactured at, or services provided by, an individual facility in Mexico responsible for the identified violation of the rights to freedom of association and collective bargaining remedies including the denial of entry of such goods.[ix]

There are significant differences between the US and EU approaches that have evolved over time. Most evident is that while the US arrangements rely ultimately on adjudication and sanctions to enforce their labour provisions (conditionality-based approach), the EU's model inserts more promotional and cooperative elements into it primarily through dialogue-based institutions for enforcement (Kolben 2017, 60-62).[x] Another difference relates to the extent to which ILO instruments are referred to in US and EU FTAs. US FTAs have broadened the scope of labour standards to be covered mainly by using their own term 'internationally recognized worker rights'' in the beginning and over time increasingly by employing the term 'labour rights' as in the *ILO Declaration on Fundamental Principles and Rights at Work (1998)*. These do not generally make references to the ILO fundamental Conventions with a notable exception of *Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)*. On the other side of the Atlantic, however, the EU has relied more upon external standards, such as ILO (fundamental) Conventions, rather than creating its own, to define the labour standards in the Trade and Sustainable Development ('TSD') chapters of its FTAs. Examples include the *United Nations Economic and Social Council Ministerial Declaration on Generating Full and Productive Employment and Decent Work for All (2006)* and the *ILO Declaration on Social Justice for a Fair Globalization (2008)*.

2.3. Standing at a Crossroad

When analysing and evaluating TLLs and labour provisions in FTAs in particular, the ultimate question to be asked is whether and to what extent they have contributed to improving the well-

being and working life of those in the workplace. This is in fact the ILO's primary mandate, namely, advancing social justice and promoting decent work.[xi] The ILO has long endeavoured to achieve this goal particularly by adopting and spreading international labour standards across the globe. In assessing labour provisions in such a light, it should be noted that there is a lack of qualitative and quantitative studies and of cross-country data, which makes it infeasible to assess the micro-impact (ILO 2016, 68). More fundamentally, there do not seem to exist a consensus of the root cause of the problem, normative goals and theoretical models that is shared among the labour provisions in FTAs. All combined, an evaluation of the macro-impact or institutional impact becomes unworkable. It would thus be realistic and inevitable to seek critical views made at a more general level or about a particular event relating to labour provisions of FTAs.

A first issue relates to what should be the aim(s)that labour provisions of FTAs and whether their current form and design is fit for purpose. In an economic and trade-focused view, the very purpose of labour provisions is to secure a condition for fair competition in trade and investment. In that regard, the labour matters that are closely and directly related to trade or investment can only fall within the scope of labour provisions. On the other hand, from a social perspective, protecting human rights at work and raising working conditions is the inherent goal rather than instrumental and consequential with trade measures being considered as an effective means to achieve that social goal. This was, to some extent, elucidated in the dispute between the US and Guatemala under the Dominican Republic-Central America FTA ('CAFTA-DR'), particularly with respect to the standard of trade-labour link requirement (e.g. the 'affecting trade' clause). This condition is broadly shared by nearly all FTAs, whether US or EU, and needs to be met to establish a breach of major substantive obligations.[xii] Under the CAFTA-DR, a party to it may establish, as a last resort, an arbitration panel to resolve a dispute. On 26 June 2017 the US and Guatemala jointly released an arbitral panel decision for the case brought by the US against Guatemala, alleging that Guatemala had breached Article 16.2.1(a) of the CAFTA-DR.[xiii] This was the first arbitral decision in history in a labour-related dispute in the context of FTAs. The Panel found that Guatemala failed in effectively enforcing its labour laws, particularly by neglecting to enforce labour court orders for anti-union dismissals and to take enforcement actions in response to worker complaints. However, the Panel decided against the US since an essential condition had not been met. The failure of effective enforcement of labour law did not affect 'trade between the parties', as required by the 'affecting trade' clause enshrined in Article 16.2.1(a). This decision has invited trenchant

criticism, most of which pointed out that in legal terms the hurdle of 'affecting trade' condition set by the Panel was excessively high, if not unnecessary, in principle and insurmountable in practice and, more generally, the social dimension of labour provisions was not adequately considered (Paiement 2018).[xiv]

A second concern is the possible fragmentation of international labour standards. As noted, many ILO instruments, the legal basis of those standards, are currently referred to in FTAs. Yet, it is not certain how to interpret such instruments in the context of the FTA concerned and what role the ILO is to play, if any, for that interpretation (Agustí-Panareda 2014). It is worth noting that FTAs tend to establish a panel of arbitration, or a similar body, that reviews and decides the interpretation and application of FTA labour clauses without being legally bound by ILO standards relating to the labour rights concerned; and its ruling does not have a precedent value. All this may deepen the concern about a fragmentation of international labour standards. This concern may be a little relieved by the decision of a Panel of Experts, which was established and composed of three members for the final resolution of a dispute between the EU and the Republic of Korea under their FTA (TSD chapter). In *EU-Korea*, one of the primary issues was whether some provisions of Korea's statutory law regarding trade union were in consistency with the ILO principle of freedom of association referred to in their FTA. As this issue was not raised and addressed in *US-Guatemala* under the CAFTA-DR that merely requires the parties to enforce their own domestic labour law without referring to international documents, the second dispute in the history of labour provisions in FTAs drew keen attention. Putting aside the differing views on the conclusion, the Panel carefully and constantly considered the ILO standards and jurisprudence when interpreting the text of FTAs at all fronts (Novitz 2021, 5-6).[xv]

Last, but not least, a final concern that commentators have raised is the effectiveness of labour provisions in FTAs (Marx et al 2017, 49; Maupain 2013, 202-205). The *US-Guatemala* case took almost ten years simply to find out that workers' rights were infringed upon, but labour provisions were not able to help with it as trade was not affected enough (Compa 2018, 7). This is perhaps the most profound concern that critics have expressed with regard to labour provisions of FTAs. However, there has been some changes in stance on this issue since a handful of disputes were expeditiously and adequately resolved through the RRLM in the USMCA.[xvi] Nevertheless, for every other FTA that lacks such effective monitoring and

enforcement mechanisms and FTAs to be signed in the future, there needs to be alternatives and solutions for labour provisions in FTAs to be more effective.

<b> Some Ways Forward

As noted above, there seems to be no common understanding of the root causes of States' incompliance with international labour norms and standards. The literature pinpoints three major kinds of reasons for States' disinterest in or reluctance to promote labour rights: deficiency of information or rationality (about the positive contribution of high labour standards); inadequate capacity for labour protection; and insufficient political will (ILO 2016, 72-75).

Firstly, if deficiency of information or rationality is the case, persuasion would be the most appropriate means, and an implementation mechanism of trade-labour linkages should focus on institutionalising the exchange of knowledge and best practice between the States (Langille 2015, 97). This approach stands on the premise that full information and consensus shared by states will be a sufficient condition to bring about their respect and commitment to international labour standards without economic incentives through sanctions or conditional benefits. What is needed is accordingly their seeking for research, assistance and persuasion as means of governance (Banks 2011, 57).

Secondly, if inadequate capacity for labour protection is the cause, an institutional arrangement for linkages ought to target the building capacity of relevant actors, namely States (and other public authorities), stakeholders and firms. In particular, more systemic technical assistance and cooperative support is recommended. An institutionalised interaction between the civil societies of partner States is also an exemplar arrangement under this view. All these promotional efforts should be regularly monitored to assess the progress and hence adjust the processes, and the relevant information should be made public for transparency (ILO 2016, 72-75). A particular concern should also be ensuring that the victim workers and relevant trade unions participate in all the mechanisms, ranging from dialogue to monitoring and (indirect) arbitral conflict resolution, and have their voices heard therein.

Thirdly, if insufficient political will is the reason, a conditionality-based enforcement mechanism will be necessary. This recourse can be broken down into two types: positive and

negative conditionality. A positive conditionality, namely granting trade preferences for complying with certain labour norms, will be more effective and legitimate when the insufficient political will is entrenched with the State's particular structural and economic conditions. These circumstances bring up the short-term cost aspect of labour standards more than their long-term net positive economic benefits. A positive-conditional linkage will be even more necessary if such circumstances are combined with inadequate capacity for labour protection.[xvii] By contrast, if weak political will stems from the interest of the country's political and business elites and not of the people/country in its entirety (let alone workers), a negative-conditionality arrangement may be necessary. This takes several forms such as prohibition from importing products that involve a breach of international labour standards or a withdrawal/suspension of tariff preferences regarding such products. Given the weak, or lack of, political will only serves them, a fine-tuned economic sanction targeted at such a group of elites would perhaps be more effective and legitimate.

<a> INTERNATIONAL LABOUR STANDARDS IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

<b> Labour Rights in the Inter-American System of Human Rights

The Organization of the American States ('OAS) is the most important human rights organisation in the Americas. In its different instruments, particularly the 1948 OAS Charter – revised by the 1967 Protocol of Buenos Aires, the 1948 American Declaration, and the 1988 Protocol of San Salvador, the Inter-American System has adopted a wide range of labour rights. Nonetheless, there seems to be an important gap in arguably the most important Inter-American instrument, the 1969 American Convention – entered into force on 18 July 1978 – which is mainly a political and civil rights instrument. This instrument created the IACtHR – established in 1979 – which is in charge of interpreting the American Convention in contentious and advisory cases. It is worth mentioning that State Parties must have accepted its jurisdiction. Article 26, one of the few exceptions to the political and civil nature of the instrument, sets out that States should adopt measures to achieve 'the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States'. Unsurprisingly, given this institutional and legal architecture, doubts were casted upon the justiciability of labour rights within the Inter-American system.

From its creation until 2001, the IACtHR timidly protected labour rights through the lens of civil and political rights (Moscoso-Becerra 2019, 390), particularly Articles 4 (right to life) and 7 (right to personal liberty) of the American Convention as developed in the case of *Caballero Delgado and Santana v. Colombia* where a trade unionist who went missing was not protected under Article 16 (freedom of association).[xviii] The IACtHR took an important step forward in the 2001 *Baena Ricardo et al v. Panama* judgment where, having established a direct violation of the aforementioned Article 16 of the American Convention, it decided, for the first time, to protect directly labour rights.[xix] The IACtHR adopted the same direct approach when recognising violations of Article 6 (freedom from slavery) in the emblematic cases of *Ituango Masacres v. Colombia*[xx] and *Hacienda Brasil Verde Workers v. Brazil*.[xxi] Further, the IACtHR protected labour rights indirectly through the principle of equality and non-discrimination, and through the lens of procedural rights such as the right to a fair trial and the right to judicial protection, particularly in cases where workers had been unfairly dismissed (Bolaños Salazar 2017, 256).[xxii] Despite this approach being relatively protective, the effectiveness and protection of social rights and particularly labour rights is at risk when a distinction is made between civil and political rights, on the one hand, and social and cultural rights, on the other (Mantouvalou 2013, 547).

To ensure their indivisibility and equal protection, the IACtHR took a bold step in the 2017 *Lagos del Campo v. Peru* judgment in which it recognised, for the first time, the direct justiciability labour rights under Article 26 of the American Convention (Ferrer Mac-Gregor 2020, 173; Canessa Montejo 2017, 144).[xxiii] Under this new approach, the IACtHR has decided to protect the right to work with a special focus on job stability[xxiv], the right to fair and satisfactory working conditions[xxv], and freedom of association.[xxvi] In this relatively short but prolific period, given the rather laconic wording of Article 26 of the American Convention, the IACtHR has relied upon the national and international legal instruments to determine the content of these labour rights protected within the Inter-American System.[xxvii] In this regard, ILO standards have been consistently referred to by the IACtHR.

<b> International Labour Standards in the Pre-2017 Inter-American Court Case Law

The IACtHR has shaped its relatively recent judgments in light of ILO labour standards, enshrined in conventions and recommendations as well as decisions and resolutions of the ILO's supervisory bodies, particularly the CEACR and the CFA (Kalil and Pucheta 2021;

Duhaime and Decoste 2020). From 2001, but particularly from 2017, this has allowed the Inter-American Commission on Human Rights, which is in charge of the promotion of human rights in the Americas, and, more importantly the IACtHR, to protect labour standards as human rights. In the period 2001-2017, the IACtHR developed a rich case law in two key areas, namely: migrant workers and the prohibition of forced labour.

The *Advisory Opinion OC-18/03* constitutes one of the first emblematic examples of the recognition of labour rights as human rights within the Inter-American System.[xxviii] Mexico submitted a request to the IACtHR, asking whether depriving undocumented migrant workers of certain labour rights violated the principles of equal protection of the law and non-discrimination. The IACtHR began by recognising that domestic legislation could impose certain restrictions to the enjoyment of labour rights. However, relying upon several ILO instruments[xxix], the IACtHR stated that 'the migratory status of a person can never be a justification for depriving him of *the enjoyment and exercise of his human rights*, including those related to employment' (emphasis added).[xxx] In the same vein, the International Labour Office – the ILO's permanent secretariat – had issued a formal opinion in which it stated that both documented and undocumented workers are entitled to a minimum level of fundamental labour rights.[xxxi] This approach has been confirmed subsequently by several reports related to migrant workers adopted by the Inter-American Commission (Kalil and Pucheta 2021, 182-186).

Further, forced labour, the prohibition of which is enshrined in Article 6(2) of the American Convention, is one of the most serious challenges in the region. However, the Inter-American System does not provide a specific definition. To clarify its meaning, in the case *Masacres de Ituango vs. Colombia*[xxxii], the IACtHR relied upon Article 2(1) of ILO Convention 29 on Forced Labour to consider that the definition of forced or compulsory labour consists of two basic elements: first, the work or service is exacted 'under the menace of a penalty'; and, second, it should be performed involuntarily.[xxxiii] Furthermore, the IACtHR added a third element: that the alleged violation can be attributed to State agents, either due to their direct participation or to their acquiescence to the facts.[xxxiv]

There is a strengthening of the protection of workers' rights against forced labour in the case *Hacienda Brasil Verde vs. Brasil* that concerned 85 workers, some of them children, that had been working under slavery-like working conditions for a privately-owned estate '*Hacienda*

Brasil Verde', a cattle ranch located in the north of Brazil.[xxxv] Not only did the IACtHR rely upon ILO findings that the development of forced labour in the region was due to the existence of closed links between landowners and the federal, state and municipal authorities in Brazil, but also the IACtHR referred to ILO standards to adopt a 'modern' and 'broad' definition of slavery and forced labour. Drawing upon ILO Conventions 105 on Abolition of Forced Labour Convention, 138 on Minimum Age, 182 on the Prohibition of the Worst Forms of Child Labour, the IACtHR considered that forced labour should not be confined to the 'right of ownership' over an individual.[xxxvi] Although Brazil had argued that it was necessary to distinguish between servitude and debt bondage[xxxvii], the IACtHR pointed out that Article 27(2) of the American Convention enshrined an 'absolute' right not to be subject to slavery, servitude, forced labour or the slave trade and traffic in women.[xxxviii] Inspired by the Inter-American Commission, which, in turn, had followed the broad definition of slavery and forced labour adopted by the ILO, the IACtHR recognised the closed link between forced labour and other related abusive practices such as slavery and slavery-like practices, debt bondage, trafficking and labour exploitation. This led the IACtHR to conclude that workers at *Hacienda Brasil Verde* were not only in a situation of servitude, but also in a situation of slavery, particularly given the degree of control exercised by the employers and their loss of liberty.[xxxix]

<b> International Labour Standards in the Post-2017 Inter-American Court Case Law

From the 2017 judgement of *Lagos del Campo v. Peru*, the IACtHR has developed an extremely rich and progressive case law on labour rights relying on Article 26 of the American Convention and Article 45 of the OAS Charter. It has adopted a purposive and systemic approach, which has recognised the autonomous protection and direct justiciability of social, economic, cultural and environmental rights in the Inter-American system.

To unpack the meaning of the right to work, the IACtHR has examined Article XIV of the American Declaration and the Protocol of San Salvador. It has also considered the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights.[xl] More importantly, particular attention has been paid to the 'right to job stability' as defined in the ILO Convention 158 on Termination of Employment Convention and ILO Recommendation 143 on Workers' Representatives. Based on this approach, the IACtHR has decided that State Parties must protect the right to job stability, which does not translate into an absolute stability, but as recognised in most Western countries, it entails a protection against

unfair dismissal. This can be done either by reinstatement or, if appropriate, by compensation and other social benefits established in domestic law. It is also necessary to establish effective grievance mechanisms in cases of unjustified dismissal, to ensure access to justice and the effective judicial protection of such rights.[xli]

Freedom of association, enshrined in several Inter-American instruments[xlii], is another crucial area where the IACtHR, relying considerably upon ILO standards, has developed a rich case law. From relatively early on, the IACtHR considered freedom of association as a cornerstone of the Inter-American system. In *Baena Ricardo and others v. Panama*, considering the preamble of the ILO Constitution and ILO Conventions 87 and 98, the IACtHR decided that the right to freedom of association, enshrined in Article 16 of the American Convention, constituted a requirement for universal and lasting peace.[xliii] Furthermore, in the case *Huilca Tesce v. Peru,* drawing upon the ILO Convention 87[xliv] and resolutions of the ILO Committee on Freedom of Association in cases related to El Salvador (No. 1233), Guatemala (No. 1176, 1195, 1215 and 1262) and Colombia (No. 1429, 1434, 1436, 1457, 1465 and 1761)[xlv], the IACtHR stressed that State Parties should ensure that workers exercise their freedom of association freely, without being afraid of suffering any kind of violence.[xlvi] In the same vein, inspired by resolutions on the Case 1569 of the ILO Committee on Freedom of Association and its fundamental nature of freedom of association, the IACtHR affirmed the State could not interfere with trade union funds[xlvii] nor could it enter into trade union premises, which were inviolable.[xlviii] This has been supplemented by the *Advisory Opinion 22/16*, in which the IACtHR developed in length, based – once again – on the ILO Convention 87, the extent of State Parties' obligations to respect both the negative and positive dimensions of trade union rights, particularly those enshrined in Article 8.1, *a* of the Protocol of San Salvador.[xlix]

More recently, the IACtHR delivered one of the most remarkable judgments, *Advisory Opinion 27/21*[l], where, relying largely upon ILO instruments, ILO Committee of Freedom Association and ILO Committee of Experts decisions, it recognised that freedom of association, the right to collective bargaining, and the right to strike are fundamental human rights within the Inter-American System.[li] Furthermore, drawing upon the ILO Conventions 87 and 111 on Discrimination (Employment and Occupation) as well as the ILO Committee on Freedom of Association decisions, the IACtHR adopted a gendered approach whereby State Parties should play an important role in ensuring that women can freely exercise their fundamental labour rights, particularly their trade union rights.[lii]

<b> The Inter-American of Court of Human Rights and the Future of Work

The activism of the IACtHR and the particular reliance upon ILO instruments tails that further case law could further develop international labour standards in areas closely related to the future of work. Firstly, enshrined in Article 45 of the OAS Charter, and drawing upon several international instruments, including ILO Convention 155 on Occupational Safety and Health Convention, the IACtHR has recently recognised the right to fair and satisfactory working conditions as a human right that protects the health of workers.[liii] In the context of the recent Covid crisis, it is worth pointing out the preventive and intersectional nature of this right, particularly in a region – Latin America, where the workforce is highly vulnerable.[liv] This may also become relevant in the context of climate change, which is causing extreme weather.

Secondly, in its *Advisory Opinion 27/21* on freedom of association, the IACtHR has recognised the need to protect platform workers' fundamental trade union rights, particularly in Latin America where informality is extremely high. Although there are no specific ILO instruments in this regard, the IACtHR referred to ILO Conventions 175 on Part-time Work and 177 on Home-Work, and ILO Recommendations 184 on Home-Work and 198 on Employment Relationship to decide that State Parties must ensure the effective participation of workers' representatives when designing and implementing labour regulations related to technology in the workplace.[lv] This is and will be crucial given the prominent role that technology and certainly A.I. is playing and will play in the future of industrial relations.

<a> CONCLUSION

This chapter has depicted, firstly, how two different rivers, trade and labour, have met at the sea of a globalised world, and how they have evolved so far. This linkage has changed over the past thirty years to reform labour provisions in FTAs, namely, how to strike a balance between trade and labour considerations in linkages, how to prevent a risk of international labour standards from being fragmented and how to forge better-equipped enforcement mechanisms. This fast-developing trend of trade-labour linkages leaves a number of research agendas and tasks to be discussed and conducted before us. It is, firstly, necessary a clearer and more coherent account that addresses the empirical, normative and legal issues in relation to TLLs in a more comprehensive manner. Furthermore, one needs to delve into a way that successfully combines a conventional model of FTA labour provisions (state-to-state arrangements) and a novel model based on corporate accountability. As an example of the latter model, the RRLM in the USMCA (and a possible mechanism in the IPEF that is currently under negotiation) is

set to address a violation of the agreed-upon labour rights based on a facility or entity rather than a State, which enables the workers concerned to enjoy their rights more responsively. In so doing, it must be borne in mind that any forms of TLLs, conventional or novel, should serve the goal of the ILO in adopting and spreading international labour standards because such TLLs have fundamentally come to existence to advance social justice and decent work throughout the world along with the ILO.

Secondly, this chapter has shown the impressive influence of ILO Conventions and Recommendations, ILO Committee on Freedom of Association and Committee of Experts decisions and recommendations in the development and strengthening of the Inter-American labour standards. This relationship could further develop international labour standards in the in the field of climate change. In January 2023, the Chilean and Colombian governments submitted an advisory opinion request to the IACtHR to examine the scope of State Parties' duties, and minorities' rights in the context of the climate emergency with a particular focus on the right to life. This may be an exceptional opportunity for the IACtHR to explore, having in mind the '2015 ILO Guidelines for a Just Transition towards environmentally sustainable economies and societies for all', the impact of climate change on workers' rights, and the extent to which green policies should respect their human rights, particularly in a period of climate crisis. Finally, the IACtHR new approach – from 2001, and particularly from 2017 onwards, has bolstered ILO standards, which are interpreted and applied by legally-binding decisions beyond the ILO system. If ILO supervisory bodies were to consider the IACtHR judgments, this possible 'dialogue' – rather than the current one-sided relationship, could be helpful to further strengthen and developed ILO standards. This remains to be seen.

Endnotes

[i] Denisov v Ukraine [2018] ECHR 1061.

[ii] One of the most emblematic cases is: *Demir & Baykara v Turkey* (App No. 34503/97) [2009] IRLR 766 (Grand Chamber, ECtHR).

[iii] See: RMT v UK [2014] ECHR 366.

[iv] See e.g. *The ILO Constitution*, Arts. 19-22.

[v] WTO, Singapore Ministerial Declaration of 13 December 1996, *WT/MIN(96)/DEC/W, 36 I.L.M. 218* (1997).

[vi] This chapter defines the term 'trade-labour linkages' as encompassing any institutionalised attempts to link labour issues with trade matters.

[vii] The term 'labour provisions' is used in this chapter to denote their legal character as legally binding and enforceable, encompassing both conditional and promotional elements.

[viii] ILO, *Labour Provisions in Trade Agreements Hub*, https://www.ilo.org/LPhub/ (accessed 14 July 2023).

[ix] USMCA, ANNEX 31-A Facility-specific Rapid Response Labor Mechanism to Chapter 31 Dispute Settlement; ANNEX 31-B Canada-Mexico Facility-specific Rapid Response Labor Mechanism to Chapter 31 Dispute Settlement. See: ANNEX 31-A, Article 31-A.10: Remedies; ANNEX 31-B, Article 31-B.10: Remedies.

[x] However, this EU's general approach could change in future FTAs as it is considering "more assertive enforcement [of Trade and Sustainable Development chapters], including through trade sanctions". European Commission's Communication (The power of trade partnership: together for green and just economic growth), COM(2022) 409 final/2, Brussels, 16 August 2022.

[xi] *ILO Centenary Declaration for the Future of Work* (adopted by the Conference at its one hundred and eighth session, Geneva, 21 June 2019).

[xii] See e.g. the EU-Mercosur FTA, Chpt.13, Art.2.5: "A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental or labour laws in order to encourage trade or investment".

[xiii] Final Report of the Panel, *In the Matter of Guatemala–Issues Relating to the Obligations under Article 16.2.1(a) of CAFTA-DR*, 14 June 2017 (hereafter 'Final Panel Report').

[xiv] See e.g, Compa, L., Vogt, J. and Gottwald, E. (2018) *Wrong Turn for Workers' Rights: The U.S.—Guatemala CAFTA Labor Arbitration Ruling—and What to Do about It*, International Labor Rights Forum; AFL-CIO (2017), *U.S. Trade Policy Fails Workers*, 26 June 2017, https://aflcio.org/2017/6/26/us-trade-policy-fails-workers.

[xv] Report of the Panel of Experts, *Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea FTA*, 20 January 2021 (released on 25 January 2021) paras 148, 165. For a brief of background and context of EU-Korea, see e.g. Nissen, A. (2022) 'Not That Assertive: The EU's Take

on Enforcement of Labour Obligations in Its Free Trade Agreement with South Korea', *European Journal of International Law*, 33(2): 607-630.

[xvi] For the list of complaints for the RRLM that have been made and addressed or are currently in progress, see https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/fta-dispute-settlement/usmca/chapter-31-annex-facility-specific-rapid-response-labor-mechanism.

[xvii] For a similar approach, namely the 'leveraged deliberate cooperation', see e.g. Banks, K. (2011) 'Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law'. *Berkeley Journal of Employment & Labor Law*, 32: 51.

[xviii] I/A Court H.R., *Case of Caballero Delgado and Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C No. 22.

[xix] I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72.

[xx] I/A Court H.R., *Case of The Ituango Massacres v. Colombia.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148.

[xxi] I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318.

[xxii] I/A Court H.R., *Case of Acevedo Jaramillo and others v Peru.* Preliminary Objections, Merits, Reparations and Costs. Judgment of February 7, 2006, Series C, No. 144; *Case of Dismissed Congressional Employees (Aguado Alfaro et al) v Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006, Series C, No. 296; *Case of Canala Huapaya and others v Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 24, 2015. Series C, No 296.

[xxiii] I/A Court H.R., *Caso Lagos del Campo v. Perú*. Preliminary Objections, Merits, Reparations and Costs. Judgement of August 31, 2017. Serie C No. 340.

[xxiv] Ibid.; I/A Court H.R., *Case of Dismissed Employees of Petroperú et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2017. Series C No. 344; I/A Court H.R., *Case of San Miguel Sosa et al. v. Venezuela*, *supra* note 8.

[xxv] I/A Court H.R., *Case of Spoltore v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 9, 2020. Series C No. 404, and *Caso de los Empleados de la Fábrica de Fuegos en Santo Antônio de Jesus y sus familiares v. Brasil*, Preliminary Objections, Merits, Reparations and Costs Judgment of July 15, 2020. Series C No. 407.

[xxvi] I/A Court H.R. *Caso Lagos del Campo v. Perú*. Preliminary Objections, Merits, Reparations and Costs. Judgement of August 31, 2017. Serie C No. 340; *Advisory Opinion OC-27/21 on the Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and Their Relation to Other Rights, with a Gender Perspective*, May 5, 2021, Serie A; *Case of the Former Employees of the Judiciary v. Guatemala*. Interpretation of the Judgment on Preliminary Objections, Merits and Reparations. Judgment of November 17, 2021, Serie C No. 459.

[xxvii] I/A Court H.R. *Caso Lagos del Campo v. Perú*. Preliminary Objections, Merits, Reparations and Costs. Judgement of August 31, 2017. Serie C No. 340, pars. 145-146; *Case of Poblete Vilches et al. v. Chile*. Merits, Reparations and Costs, supra, para. 103.

[xxviii] I/A Court H.R. *Advisory Opinion OC-18/03: Judicial Condition and Rights of the Undocumented Migrants*. Judgment September 17, 2003. Serie A No. 18, para. 134.

[xxix] As detailed in I/A Court H.R. *Advisory Opinion OC-18/03: Judicial Condition and Rights of the Undocumented Migrants*. Judgment September 17, 2003. Serie A No. 18, para. 86: The ILO Declaration of the concerning the Fundamental Principles and Rights in Work and their Monitoring (2(d)); ILO Convention 97 on Migrant Workers (revised) (Article 6); ILO Convention 111 on Discrimination (Employment and Occupation) (Articles 1 to 3); ILO Convention 143 on Migrant Workers (supplementary provisions) (Articles 8 and 10); ILO Convention 168 on the Promotion of Employment and Protection against Unemployment (Article 6).

[xxx] I/A Court H.R. *Advisory Opinion OC-18/03: Judicial Condition and Rights of the Undocumented Migrants*. Judgment September 17, 2003. Serie A No. 18, para. 134.

[xxxi] I/A Court H.R. *Advisory Opinion OC-18/03: Judicial Condition and Rights of the Undocumented Migrants*. Judgment September 17, 2003. Serie A No. 18, para. 134.

[xxxii] I/A Court H.R., *Case of The Ituango Massacres v. Colombia.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148.

[xxxiii] I/A Court H.R., *Case of The Ituango Massacres v. Colombia.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, para. *160.*

[xxxiv] I/A Court H.R., *Case of The Ituango Massacres v. Colombia.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, para. *160.*

[xxxv] I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318.

[xxxvi] I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, paras. 253 and 331.

[xxxvii] I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para 231.

[xxxviii] I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para. 243.

[xxxix] I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para. 342-343.

[xl] I/A Court H.R. Caso Lagos del Campo v. Perú. Preliminary Objections, Merits, Reparations and Costs. Judgement of August 31, 2017. Serie C No. 340, par. 145.

[xli] I/A Court H.R. Caso Lagos del Campo v. Perú. Preliminary Objections, Merits, Reparations and Costs. Judgement of August 31, 2017. Serie C No. 340, par. 149.

[xlii] Article 45, *c* of the OAS Charter, Article XXII of the American Declaration, Article 16.1 of the American Convention and Article 8.1, *a* of the Protocol of San Salvador.

[xliii] I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, par. 157.

[xliv] I/A Court H.R., *Case of Huilca Tecse v. Peru*. Merits, Reparations and Costs. Judgment of March 3, 2005. Series C No. 121, par. 74.

[xlv] I/A Court H.R., *Case of Huilca Tecse v. Peru*. Merits, Reparations and Costs. Judgment of March 3, 2005. Series C No. 121, párr. 75.

[xlvi] I/A Court H.R., *Case of Huilca Tecse v. Peru*. Merits, Reparations and Costs. Judgment of March 3, 2005. Series C No. 121, par. 77.

[xlvii] I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, par. 164.

[xlviii] I/A Court H.R., *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, par. 165.

[xlix] I/A Court H.R., *Advisory Opinion OC-22/16: Entitlement of legal entities to hold rights under the Inter-American Human Rights System*. February 26, 2016. Series A, No. 22., para. 101-102.

[l] I/A Court H.R., *Advisory Opinion OC-27/21 on the Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and Their Relation to Other Rights, with a Gender Perspective,* May 5, 2021, Serie A, pars. 52, 63, 82-105, 136-141.

[li] For further analysis, see: Mariela Morales Antoniazzi and Julieta Lobato (2022) 'Un paso al frente: la huelga como derecho humano en el Sistema Interamericano de Derechos Humanos', *Research Paper Series No. 2022-03*, Max Planck Institute for Comparative Public Law & International Law; Mordecai, K. (2022) 'The Fundamental Human Rights to Trade Union Freedom, Collective Bargaining and to Strike in the Americas', *International Labor Rights Case Law*, 8: 163-167; Ricardo José Macedo de Britto Pereira (2023) 'The Interpretation of the Inter-American Court of Human Rights on Labor Collective Rights from a Gender Perspective', *International Labor Rights Case Law*, 9: 15-19.

[lii] I/A Court H.R., *Advisory Opinion OC-27/21 on the Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and Their Relation to Other Rights, with a Gender Perspective,* May 5, 2021, Serie A, pars. 167, 181, 184, 191.

[liii] I/A Court H.R., *Case of Spoltore v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 9, 2020. Series C No. 404, para. 95; and *Caso de los Empleados de la Fábrica de Fuegos en Santo Antônio de Jesus y sus familiares v. Brasil*, Preliminary Objections, Merits, Reparations and Costs Judgment of July 15, 2020. Series C No. 407, para. 155.

[liv] I/A Court H.R., *Case of Spoltore v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 9, 2020. Series C No. 404, para. 94; and *Caso de los Empleados de la Fábrica de Fuegos en Santo Antônio de Jesus y sus familiares v. Brasil*, Preliminary Objections, Merits, Reparations and Costs Judgment of July 15, 2020. Series C No. 407, para. 168, 191, 197, 198, 203.

[lv] I/A Court H.R., *Advisory Opinion OC-27/21 on the Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and Their Relation to Other Rights, with a Gender Perspective*, May 5, 2021, Serie A, pars. 206, 208, 211, 212

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