

Part 3:
The Emergence of
International Economic Law

Chapter 6 Managing the ‘Workers Threat’: Preventing Revolution Through the International Labour Organization

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1. Introduction

Writing in 1933, almost a decade and a half after the Versailles conference, the Columbia University professor James T Shotwell described the International Labour Organization (ILO) in vivid terms as ‘an alternative to violent revolution.’¹ The ILO, he argued, had been created ‘to meet the challenge of socialism and communism and prove to the workers of the world that the principles of social justice might be established under the capitalist system.’ Its programs ‘dealt with social justice the world over, rather than with the narrow issues of domestic economic warfare,’ envisaging ‘national and international reform rather than revolution.’² Nor was Shotwell alone in viewing the ILO as a means of diverting energy away from revolution and towards class reconciliation. A major study of the organization by an American political scientist, published the next year, likewise described the ILO as ‘patently a buttress against communism, as it stands for the collaboration of classes, though not always in fact their co-operation, within the present structure of society.’³

The same issue of the *Annals of the American Academy of Political and Social Science* in which Shotwell’s paper appeared also carried contributions

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1 James T Shotwell, ‘The International Labor Organization as an Alternative to Violent Revolution’ (1933) 166 *The ANNALS of the American Academy of Political and Social Science* 18–25.

2 *ibid* 18.

3 Francis Graham Wilson, *Labor in the League System* (Stanford University Press 1934) 50–52.

by staff and supporters of the young organization. These included an introduction by Harold Butler, the recently-appointed Director of the International Labour Office;⁴ a paper on 'How the International Labor Organization Operates' by Edward Phelan, an Assistant Director of the Office who had been instrumental in the design of the ILO;⁵ and an essay on 'The Principles of International Labor Legislation' by Ernest Mahaim, a former chairman of the ILO's Governing body.⁶ Other contributions addressed specific aspects of the ILO's functioning, from the standard-setting work of the Conference to the enforcement of those standards and the relatively routine research activities of the Office, while a whole section of papers addressed the relationship between the ILO and the United States. Comprising 25 separate papers in total, plus appendices including the ILO's constitution, the volume was squarely aimed at persuading members of the intelligentsia and policy-making elite in the United States of the benefits of ILO membership. The volume's editor, herself the ILO's Washington office manager, noted in the papers a 'tone of approval and the occasional exhor-

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- 4 Butler (1883–1951) had worked in the Home Office of the British government before being transferred to the Ministry of Labour in 1917. He subsequently served as a substitute member of the Commission on International Labour Legislation at the Paris Peace Conference and as the Secretary-General of the first International Labour Conference, and was appointed the first Deputy Director of the International Labour Office, responsible for Central Services. See generally 'Harold Butler: Director-General of the International Labour Organization, 1932-1938'; <www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/former-directors-general/WCMS_192709/lang-en/index.htm>.
- 5 After joining the British Ministry of Labour in 1916, Phelan (1888–1967) was appointed Secretary of the Labour Section of the British delegation to the Paris Peace Conference, and had been one of the principal drafters of Part XIII and the originator of some of its most innovative features; he then served as assistant secretary of the organizing committee for the first Labour Conference held in Washington, DC, in 1919, and was appointed Principal Secretary of that Conference; and was among the first appointments to the International Labour Office, as the first Head of its Diplomatic Division. On Phelan's life and career, see generally 'Edward Phelan: Director-General of the International Labour Organization, 1941–1948'; <http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/former-directors-general/WCMS_192711/lang-en/index.htm>; and International Labour Office, *Edward Phelan and the ILO* (2009).
- 6 Mahaim (1865–1938) had been a founding member in 1900 of the International Association for Labor Legislation (IALL) and author of *Droit International Ouvrier* (1913), and was a Belgian government representative to the International Labour Conference for almost twenty years (1919–1938).

tations ... that the United States join the Organization,’ but modestly charged this ‘to the personal responsibility of the contributors.’⁷

Appropriately for a professor of history, Shotwell’s paper focused on the origins of the ILO in the work of the Commission on International Labour Legislation at the Peace conference. Outlining the difficulties facing the Commission, he addressed the particular ways the British proposal, which formed the basis of the Commission’s discussions, had been adapted to meet the concerns of the American delegates—principally among them, the president of the American Federation of Labor, Samuel Gompers. This was history with a purpose, then, aimed at persuasion. Moreover, Shotwell wrote as an eye-witness to the events at Paris, indeed as an active participant in the negotiations over the ILO during which he had encouraged United States engagement in the nascent international institution. Shotwell’s activism on behalf of internationalist causes reached perhaps its apotheosis in his work leading to the signing of the Kellogg–Briand Pact to outlaw war in 1928.⁸ In 1934, Shotwell published a two-volume history of *The Origins of the International Labor Organization*;⁹ his work as scholar and activist would continue for another three decades.¹⁰

This chapter approaches the establishment of ILO in 1919 not from the perspective of a historian, nor an activist, but that of an international lawyer, interested in international organizations and the rationales and technologies of power they embody. I have previously argued that the expanding powers exercised by international organizations have been imagined and understood to be necessary to the process of making modern states on a broadly Western model. I have further argued that twin processes of expansion of international organizations’ powers and state formation are sustained by a logic of liberal reform that is at once external and internal to the law.¹¹

7 Alice S Cheney, ‘Foreword’ (1933) 166 *The ANNALS of the American Academy of Political and Social Science* ix, ix.

8 See generally Oona Hathaway and Scott Shapiro, *The Internationalists and Their Plan to Outlaw War* (Simon & Schuster 2017).

9 James T Shotwell (ed), *The Origins of the International Labor Organization* (Columbia University Press 1934) 2 vols.

10 See generally Harold Josephson, *James T. Shotwell and the Rise of Internationalism in America* (Associated University Presses 1975).

11 See generally Guy Fiti Sinclair, ‘State Formation, Liberal Reform and the Growth of International Organizations’ (2015) 26 *EJIL* 445; Sinclair, *To Reform the World* (note preceding n 1).

Here, I take liberalism to be a critical ethos and practice that is constantly concerned with the problem of ‘governing too much.’¹² Taking individual freedom as the principle and limit of governmental action, liberalism posits certain domains of liberty—including, importantly for our purposes, the market and economy—in which the state should interfere to the least extent possible. Yet, paradoxically, it also endorses and legitimizes numerous interventions in society and the individual: through mechanisms of ‘social government’ or the welfare state (social insurance schemes, old age pensions, programs of public health, and so on) which are seen as necessary to guarantee and support individual freedom in the face of the risks of modern society;¹³ and by disciplinary practices that shape individual subjectivities and instil the self-mastery necessary for the responsible exercise of freedom. These contradictory pulls—don’t intervene, but intervene in the right ways—are internal to liberal government and create a dynamic of liberal reform in both international organizations and states. In its various strategies of intervention and non-intervention, liberal government deploys a variety of techniques and associated sources of authority: legal, moral, and expert.¹⁴

What does all this have to do with the ILO and Versailles? The argument I wish to advance in this chapter is that the ILO was deeply shaped, in its origins and evolution, by the dynamic of liberal reform outlined above; and that, in turn, it contributed to the extension of that dynamic in its members. More broadly, I contend that the formation of the ILO articulated a new form of international governmentality that depoliticized, channelled, and managed the ‘workers threat.’ I begin by sketching the background to the formation of the ILO, before the Versailles moment and in the negotiations at the Peace Conference. Here, I am concerned with the ILO seen as an ‘alternative to violent revolution,’ protecting workers and safeguarding the economy. The chapter then outlines three modes of liberal government that the ILO embodied, both in the terms of its constituent instrument and in the early actions of its leading officials. Broadly, these modes involve appeals to legal, moral, and expert authority—and frequently to a complex admixture of all three. The chapter concludes by noting

12 Michel Foucault, *Security, Territory, Population* (Graham Burchell tr, Palgrave Macmillan 2007) 385.

13 Here I follow the analysis of the welfare state set out in David Garland, ‘The Welfare State: A Fundamental Dimension of Modern Government’ (2014) 55 *European Journal of Sociology* 327.

14 Guy Fiti Sinclair, ‘The International Civil Servant in Theory and Practice: Law, Morality, and Expertise’ (2015) 26 *EJIL* 747.

the significance of the ILO's early activities in each these technologies of government for more recent developments in global economic governance.

2. From Revolution to Reform

The ILO's formation must be seen as the culmination of a range of efforts, both public and private and on a national and international scale, over a period of at least a century, to address the 'social question.' The expansion of European commercial activity, spurred on by the industrial revolution, was accompanied by population growth, urbanization, the formation of an industrial proletariat, and growing concerns about social problems such as mass poverty, disease, crime, and immorality. These concerns were most sharply realized in the rise of revolutionary socialist movements, and ultimately in the Europe-wide revolutions of 1848, which had been heralded in the *Communist Manifesto*. As Charles Maier has argued, these revolutions—together with other traumatic upheavals around the mid-century, such as colonial wars and rebellions, civil wars, and wars of national independence—were followed by the reconstitution and consolidation of state power to an unprecedented degree.¹⁵ In the latter half of the nineteenth century, European governments attempted to ameliorate social conditions, and thereby guard against social disorder, through the introduction of a variety of public measures.¹⁶

Internationally, efforts to address labour conditions in Western Europe proceeded on two separate tracks. On the one hand, trade unionists organized internationally through the 'International Working Men's Association' (the 'First International'), formed in 1864; through the 'Second International', formed in 1889; and through a variety of international labour secretariats.¹⁷ On the other hand, liberal reformists, with the Swiss government leading, promoted the idea of international labour legislation as a means of standardising conditions of labour in different countries. These efforts eventually led to the formation of the International Association for Labour Legislation (IALL), a semi-official body, partly funded by govern-

15 Charles Maier, 'Leviathan 2.0: Inventing Modern Statehood', in E Rosenberg (ed), *A World Connecting* (HUP 2012) 29, at 69–170.

16 See generally Pat Thane, *Foundations of the Welfare State* (2nd ed, Longman 1996) 6–45.

17 See generally Lewis L Lorwin, *The International Labor Movement* (Greenwood Press 1953) 7–37.

ments, which in 1906 produced draft conventions on night work for women and the use of white phosphorous in matches.¹⁸ Given their later connections with the ILO, it is noteworthy that participants at the 1900 Congress which founded the IALL included Arthur Fontaine, Ernest Mahaim, and Émile Vandervelde.¹⁹

The more immediate context of the ILO's creation was, of course, formed by the devastations of the First World War and their consequences. The outbreak of the Great War initially forced a nationalist wedge between workers in opposing European states, resulting in the dissolution of the Second International. As the War progressed, however, the international trade unions movement—in particular led by the International Federation of Trade Unions (IFTU, or 'Amsterdam International')—rallied to reassert the interests of workers.²⁰ In July 1916, an inter-Allied trade union conference held in Leeds passed resolutions, put forward by the French *Confédération générale du Travail*, demanding that the peace treaties to terminate the war incorporate provisions recognising workers' rights and setting minimum labour standards, including the right to work, the right of 'coalition' in trade unions, provisions on emigration and immigration, social insurance, hours of labour, hygiene and protection, and inspection and statistics. The resolutions further demanded the establishment of an international commission to supervise the application of these standards, and in international labour office to 'coordinate and consolidate the various inquiries, studies, statistics, and national reports on the application of the la-

18 On the IALL, see generally Sandrine Kott, 'From Transnational Reformist Network to International Organization: The International Association for Labour Legislation and the International Labour Organization, 1900–1930s,' in Davide Rodogno, Bernhard Struck and Jakob Vogel (eds), *Shaping the Transnational Sphere: Experts, Networks and Issues from the 1840s to the 1930s* (Bergahn Books 2015) 239–257.

19 Fontaine (1860–1931) had served as Director of the French Ministry of Labor at the time, and was Chairman of the ILO's Governing Body from 1919 until his death. Vandervelde (1866–1938) was a member of the Belgian Workers' Party from 1886 and a Member of Parliament from 1894, serving at different times as Minister of Justice and Minister of Foreign Affairs and chair of the executive body of the Second International (1900–1918). See generally Jasmien Van Daele, 'Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization' (2005) 50 *International Review of Social History* 435.

20 Reiner Tosstorff, 'The International Trade-Union Movement and the Founding of the International Labour Organization' (2005) 50 *International Review of Social History* 399. On the IFTU, see generally Geert Van Goethem, *The Amsterdam International: The World of the International Federation of Trade Unions (IFTU), 1913–1945* (Ashgate 2006).

bor laws;²¹ A counter-conference held in Berne in October 1917, organized by the German leader of the IFTU and attended by Central Power representatives, proposed an even more far-reaching set of terms for inclusion in the peace treaties.²² The next month saw the Bolsheviks' triumph in Russia.

The work of the International Labour Commission in Paris therefore took place against the backdrop of very real revolutionary possibilities. Waves of labour strikes, political strikes, and revolutions had swept across central Europe since 1917, and threatened to extend even to Western liberal democracies such as Britain and France. As Harold Butler put it, the months following the War ushered in a 'general metamorphosis of the social outlook' in England, including the rise of socialism among industrial workers, greater demand for public ownership and democratic control of industry, and widespread acceptance, across the political spectrum, of the need to extend social insurance, improve housing and education, and address extreme cases of poverty.²³ Describing the preoccupations of the British and French Prime Ministers at the time, David Lloyd George and Georges Clemenceau, Edward Phelan later wrote:²⁴

Both were fearful of an extension of Bolshevism ... both realized how the trade-union movement had grown in power in their respective countries, how the unions had made sacrifices to secure war production and expected some return; and above all both were concerned with the problem of demobilization and its results, a proletariat trained to the use of arms and hardened to warfare.

A further trade union conference, held in Berne in February 1919, brought together representatives from Allied, Central Power, and neutral countries, and sought to build upon the demands made at the earlier Leeds and Berne conferences.²⁵ The members of the Commission who gathered in Paris in February–March 1919 were, by and large, moderate socialist and liberal reformers. Chaired by Samuel Gompers, the head of American Federation of Labour, which had a strict policy of avoiding politics, the Com-

21 'Standards of Labor Legislation Suggested in Resolutions of International Labor Conference at Leeds, July, 1916' (June 1917) 4/6 Monthly Review of the US Bureau of Labor Statistics 912–915.

22 Tosstorff (n 20) 409–413.

23 Harold Butler, *Confident Morning* (Faber & Faber 1950) 130–131.

24 Edward J Phelan, 'The Labor Proposals before the Peace Conference, in Shotwell, *The Origins...* (n 9), vol 1, 207.

25 Tosstorff (n 20) 418–421.

mission included Arthur Fontaine, Ernest Mahaim, Émile Vandervelde, and the French trade union leader Léon Jouhaux, who had played a leading role in the Leeds conference.²⁶ Behind the scenes, lawyers, economists, and other public servants and technical advisors – including Shotwell – played an essential role in attempting to balance the demands of workers with the competing interests of European governments, not to mention those of important extra-European countries such as the United States and Japan.²⁷

Judged against these challenges, Part XIII of the Versailles Peace Treaty, which formed the constituent instrument of the ILO, was a remarkable achievement. Politically and diplomatically, the text managed to address and resolve the strongly-held concerns raised by the different parties; legally, in the drafting of its provisions, and in the structure of the institution it brought into being, it was highly innovative. In all respects, it renewed commitment to the liberal ideals of progressive social reform. As Emile Vandervelde put it:²⁸

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- 26 Other members of the Commission included, for the United States, in addition to Gompers, the President of the American Shipping Board (AN Hurley); for the British Empire, a Labour Member of the War Cabinet (George Barnes) and Assistant Under-Secretary of State (Sir Malcolm Delevingne); from France, in addition to Fontaine, the Ministers of Labour (Pierre Colliard) and Industrial Reconstruction (Louis Loucheur); from Italy, the Commissioner-General for Emigration (Baron Mayor des Planches) and Vice-President of the Supreme Labour Council (Angiolo Cabrini); from Japan, an Envoy Minister of the Japanese Emperor (K Otchiai) and a former Director of Commercial and Industrial Affairs in the Ministry of Agriculture and Commerce (Minoru Oka); from Belgium, in addition to Mahaim and Vandervelde, a Labour Party Senator (Henri Lafontaine); a professor from Havana University, Cuba (Antonio de Bustamente); a member of the Polish National Committee (Count Zoltowski) and Director-General of the Ministry of Labour (François Sokal); and the Minister of Foreign Affairs of the Czechoslovak Republic (Eduard Benes). See generally Edward J Phelan, 'The Commission on International Labor Legislation, in Shotwell, *The Origins...* (n 9), vol 1, 128–129; Van Daele, 'Engineering Social Peace' (n 19).
- 27 In his eyewitness account of the work of the Commission, Shotwell mentions significant interactions with (among others) James Brown Scott, Felix Frankfurter, Harold Butler, and Edward Phelan; as well as encounters with John Maynard Keynes, William Beveridge, Edward ('Colonel') House, and Jean Monnet. See generally James T Shotwell, *At the Paris Peace Conference* (Macmillan 1937). For other eyewitness accounts of the Commission, see generally Butler, *Confident Morning* (n 23), 155–176; Phelan, 'The Commission' (n 26).
- 28 Cited in Phelan, 'The Labor Proposals' (n 24) 209.

If I dared to express my thoughts in a tangible way, I should say that there are two methods of making the revolution which we feel is happening throughout the world, the Russian and the British method. It is the British method which has triumphed in the Labor Commission ...

The following parts of this chapter explore how this ‘British method’—that is to say, liberal reform, as opposed to revolution—was codified in Part XIII and manifested in the early actions of ILO officials.

3. *Legal Proceduralism versus Revolution*

Law is a technology of liberal government *par excellence*. The routinization of charismatic and traditional authority through a variety of legal-rational procedures and techniques has been the leading characteristic of modern, Western government since at least the nineteenth century, not to mention much earlier examples in other cultures and on other continents.²⁹ Law places limits upon state power, defining the boundaries between state power and the various domains of liberty carved out by liberalism, delineating institutional architectures, and assigning specific powers to different state organs. The institutions of liberal government—including ‘disciplinary’ institutions such as schools, prisons, and hospitals and mechanisms of ‘social government’ or ‘security’—are interpenetrated and supported by a latticework of legal rules. Any perceived imbalance between freedom, discipline, and security thus requires a corresponding adjustment in law.

Looking at Part XIII today, with the benefit of a century’s hindsight, it is perhaps surprising to observe that the founding instrument contained no ‘hard’ norms of labour law. Contrary to the hopes of the trade unionists who had recently gathered in Berne (twice) and Leeds, only Section II articulated a set of labour standards at all—and there only as an aspirational set of ‘General principles’, subject to important caveats and conditions. This ‘charter of rights’, as it came to be known, was a late addition to the text, intended to reflect the high ideals and goals towards which both the international labour movement and liberal social reformers had struggled

29 See generally Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich eds, University of California Press 1978) 2 vols.

over decades. But they were carefully couched in non-binding language, as the following extracts illustrate:³⁰

... [T]here are methods and principles for regulating labour conditions which all industrial communities *should endeavour to apply, so far as their special circumstances will permit.*

Among these methods and principles, the following *seem* to the HIGH CONTRACTING PARTIES to be of special and urgent importance:

... [L]abour *should not* be regarded merely as a commodity or article of commerce ...

The adoption of an eight hours day or a forty-eight hours week as *the standard to be aimed at* ... The principle that men and women *should* receive equal remuneration for work of equal value ...

Each State *should* make provision for a system of inspection in which women *should* take part, in order to ensure the enforcement of the laws and regulations for the protection of the employed.

In contrast, the binding provisions of Part XIII—where we find ‘shall’ instead of ‘should’—were all concerned with creating an institutional structure and procedures. The ‘permanent organisation’ established by Articles 387–399 was to consist of a ‘General Conference,’ which would meet on a regularly recurring basis, at least once per year; a permanent ‘International Labour Office, with a Director and staff; and a ‘Governing Body,’ comprising 24 members, including eight nominated by the members of ‘chief industrial importance,’ which would appoint the Director and exercise control over the Office. Articles 400–420 in turn related mostly to the operations of the Conference, though they also provided procedures for reporting, complaints, and enquiries. Though relatively brief, these various provisions introduced several remarkable innovations into international governance.

First and perhaps most inventive was the so-called principle of ‘tripartism.’ This principle entailed the separate representation of three distinct groups in both the Conference and the Governing Body, with half the delegates in each organ representing government members, a quarter representing workers, and another quarter representing employers. Already during the War, the British government’s Ministry of Labour had introduced—with limited success—a scheme for ‘self-government in industry’ which

30 Treaty of Peace at Versailles (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188, Part XIII (‘Part XIII’), art 427 (emphasis added).

brought together employers and workers in joint councils, known (after its leading sponsor) as 'Whitley Councils'.³¹ The structure suggested in the British proposal that formed the basis of Part XIII transformed this 'bilateral' principle into a 'trilateral' one, involving government. A quintessentially liberal mechanism, tripartism aimed to bring conflicting social classes together to resolve their differences through dialogue, debate, and voting.

The law-making functions assigned to the ILO comprised a second remarkable innovation introduced by Part XIII. Article 405 empowered the International Labour Conference to adopt, by a two-thirds majority of votes cast, one of two kinds of international instrument: a recommendation for consideration by governments, to be given effect by national legislation or otherwise; or a draft international convention for ratification by member governments. By virtue of the principle of tripartism discussed above, these procedures involved non-state actors in an international 'legislative'—that is, standard-setting—process with implications for state law, albeit without automatic or direct effect.³² Article 405 allowed for the production of both draft conventions and recommendations, making it possible to work towards wider agreement; by not requiring the take-it-or-leave-it presentation of a draft convention, as Shotwell noted, these alternatives allowed the door to social progress to be left open.³³ Both options made international 'legislation' subject to national legislative action—conventions were only binding on member states that ratified them, and the implementation of recommendations likewise relied on state action—thus preserving the prerequisites of state sovereignty. Moreover, the option of adopting recommendations rather than draft conventions allowed for the participation of federal states—in particular, the United States—where labour legislation lay within competence of state legislatures.

Third, Part XIII introduced novel institutional procedures with respect to implementation, notification, and accountability. Members were required to place the draft conventions and recommendations passed by the Conference before their relevant state authorities within 18 months, and inform the Secretary-General of the League of Nations of actions taken with respect to recommendations and the formal ratification of conventions.³⁴ Members further agreed to produce annual reports on the measures they had taken to give effect to the provisions of conventions to

31 Butler, *Confident Morning* (n 23) 136–139.

32 In this sense, the Conference was rightly described as a world 'Parliament of labour.' Albert Thomas, *International Social Policy* (ILO 1948) 39.

33 Shotwell, *At the Paris Peace Conference* (n 27) 62.

34 Part XIII, art 405.

which they were party, in a form to be determined by the Governing Body.³⁵ Complaints could be brought, through the Office, against any member which appeared to have ‘failed to secure in any respect the effective observance within its jurisdiction of any convention to which it is a party.’³⁶ The Governing Body would communicate any such complaints (or ‘representations’) made by workers and employers associations to the relevant member government and, where no (or an unsatisfactory) response was forthcoming, could publish a complaint and any response received.³⁷ In the case of complaints made by one members against another in respect of a convention which both had ratified, the same procedure could apply; alternatively, the Governing Body could initiate a procedure for the appointment of a Commission of Enquiry, which ultimately allowed referral to, and final decision by, the Permanent Court of International Justice.³⁸

In brief, then, the drafters of Part XIII created the ILO as a permanent mechanism, governed by law, capable of framing international standards, and able to resolve transnational disputes involving states and particular non-state actors. As such, the ILO offered an institutionalized mechanism of class reconciliation and cooperation that could, in theory, progressively implement higher labour standards and address new issues as they arose. The use of legal procedures to contain and channel political disagreement thus lay at the heart of the ILO’s efficacy as ‘an alternative to violent revolution.’ Indeed, it is difficult to imagine even the suggestion of such an innovative mechanism without the backdrop and threat of actual revolution.

4. *Law and Morality: Towards Responsive Law*

In the ‘social science strategy’ proposed by Philippe Nonet and Philp Selznick, three modalities of law-in-society can be distinguished. In the first, law is an instrument of repressive power; in the second, it is ‘a differentiated institution capable of taking repression and protecting its own integrity’; in the third, law is responsive to social need and exigencies.³⁹ Each of these types of law—repressive, autonomous, and responsive—identifies

35 Part XIII, art 408.

36 Part XIII, art 409.

37 Part XIII, art 410.

38 Part XIII, arts 411-417. It should be noted that this provision was not in fact used until 1961.

39 Philippe Nonet and Philp Selznick, *Law & Society in Transition: Toward Responsive Law* (Transaction Publishers 2001) 14.

a characteristic posture, and may be distinguished from the others along various dimensions. Thus, whereas repressive law is characterized by a communal morality or moralism, and autonomous law is identified with an 'institutional morality ... preoccupied with the integrity of legal process,' responsive law expresses a 'civil morality,' or 'morality of cooperation.' Likewise, repressive law employs an ad hoc, expedient mode of reasoning; autonomous law seeks to adhere strictly to legal authority, to the point of becoming formalistic; whereas responsive law is purposively oriented.⁴⁰ Moreover, each of these modalities is associated with one or more schools of jurisprudence.

In its creation and early operations, I will argue, the ILO was closely associated with the move from autonomous to responsive law, both nationally and internationally. Whereas 'classical legal thought' in nineteenth-century European and North American law was typically formalistic and in general expressive of an 'autonomous law' modality, by the early twentieth century attention to 'the social' had started to shift the over-all legal posture towards concern with social welfare, social justice, and social rights.⁴¹ In the United States, this shift was most closely associated with the sociological jurisprudence of thinkers such as Roscoe Pound.⁴² In Europe, figures such Léon Duguit similarly developed a jurisprudence that grounded the legitimacy of the state in its contribution towards social solidarity, through laws and other measures that guaranteed social security, public health, employment, and individual development.⁴³ In its advocacy for social interests, welfare, and rights, the ILO positioned itself at the forefront of an international movement to reconceptualize law in anti-formalistic, purposive, and responsive terms.

40 *ibid* 16.

41 Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development* (CUP 2006), 37–42.

42 Pound (1870–1964) was the Dean of Harvard Law School from 1916 to 1936. His key articles on the topic include Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1910–1911) 24 *Harvard Law Review* 591, 25 *Harvard Law Review* 140; and 'The Theory of Sociological Judicial Decision' (1922–1923) 36 *Harvard Law Review* 641.

43 Duguit (1859–1928) taught in the Law Faculty at the University of Bordeaux from 1886 to 1928, where he was a friend and colleague of Émile Durkheim. His most important works include *L'État, le droit objectif et la loi positive* (Albert Fontemoring 1901), and *Le droit social, le droit individuel et les transformations de l'État* (Félix Alcan 1908). See generally JES Hayward, 'Solidarist Syndicalism: Durkheim and Duguit Part II' (1960) 8 *The Sociological Review* 185.

In this effort, ILO officials drew on the moral authority embedded in the new organization's purposes and principles. Part XIII thus began with a preamble asserting the ILO's high moral purpose:⁴⁴

Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled ...

The HIGH CONTRACTING PARTIES, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world agree to the following ...

Likewise, the 'General principles' constituting the 'charter of rights' in Section II of Part XIII set out the social principles guiding the ILO's members, elevated to a moral code: 'The HIGH CONTRACTING PARTIES, recognising that the wellbeing, physical, moral and intellectual, of industrial wage-earners is of supreme international importance ...' Indeed, the same 'General Principles' suggested that the ILO's mission embodied a *universal* morality, extendable in principle to all countries and regions of the world, although 'differences of climate, habits and customs, of economic opportunity and industrial tradition, [made] strict uniformity in the conditions of labour difficult of *immediate* attainment.'⁴⁵ Accordingly, from a relatively early stage the ILO consciously extended its reforming mission to colonial territories and states in Asia and Africa; from 1922, India was recognized as a member 'of chief industrial importance' on the Governing Body; and the ILO occupied a seat on the League's Permanent Mandate Commission.⁴⁶

ILO officials and supporters invoked these high moral purposes and principles in tandem with claims to formal legal or delegated authority. Described by the first Director of the Office, Albert Thomas, in a quasi-religious vocabulary—as 'a faith if not a doctrine,' constituting the sole means of 'salvation for the world'⁴⁷—the 'charter of rights' comprised 'Nine Articles of faith,' upon which Thomas 'built up a great body of doctrine with

44 Part XIII, Section I.

45 Part XIII, art 427 (emphasis added).

46 Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (OUP 2005) 27–28.

47 Thomas (n 32) 40, 123.

all the dialectic of a medieval theologian.⁴⁸ As such, they were available for deployment in a variety of ways, whether as a free-standing source of authority where no—or only weak—legal authority existed, or as a means to enhance and augment the latter. A 'hermeneutic of growth,' quickly adopted in the ILO, thus framed Part XIII as a 'living constitution,' at once a manifestation of 'autonomous' and 'responsive' law, in the terminology of Nonet and Selznick:

[I]n these ten years that we have just been through, we have shown that the Constitution [Part XIII] as it was originally drawn up was a sound Constitution ... We are also in the process of demonstrating that it is a living institution, in the sense that it is capable of adaptation; that it is not just a static charter, ... but that it is a living organism which works and which is capable of expansion and modification in order to meet the needs of practical life.⁴⁹

This view of the ILO's founding instrument encouraged and legitimized an expansive, 'responsive' approach to its activities. Convening workers' representatives together with those of governments and employers, the Conference already claimed to serve as a 'Parliament of labour,' 'the social conscience of mankind,' and 'the forum of the ordinary man in world affairs.'⁵⁰ A far-flung network of branch offices and correspondents, supplemented by ever-expanding 'missions' to member states, as well as personal contacts in the IFTU and through it to trade unions, extended the Office's influence even further and enabled it to respond to the energy of the international labour movement even better. As Thomas put it in an address to the IFTU Congress in 1922: 'The Office is nothing else but a great international thermometer. If there is ardour and activity in the labour movement, its action expands. If, on the contrary, the activity of the labour movement slows down and stagnates, our work too contracts.'⁵¹

The responsive approach taken by ILO officials, inspired by the broad moral purposes of Part XIII, rapidly took the organization into new areas of activity and activism. Some of these were 'natural,' if contested, extensions of the organization's existing mandate, such as labour protections for migrants, refugees, maritime and agricultural workers, and worker hous-

48 Butler, *Confident Morning* (n 23) 173.

49 Harold Butler, 'Past, Present, and Future of the International Labour Organization,' in Humphrey Milford (ed), *Problems of Peace* (OUP 1930) 43.

50 C Wilfred Jenks, 'Introduction,' in International Labour Office, *Edward Phelan and the ILO* (n 5) 1, 6.

51 Thomas (n 32) 29.

ing. Others were more overtly 'political', including investigations into atrocities against workers by counter-revolutionary 'White Terror' in Hungary, the conditions of Russian prisoners in German internment camps, the compulsory labour service in Bulgaria, the effects of political disturbances on production and working conditions in Upper Silesia, and allegations of Fascist paramilitary violence against workers' organizations in Italy. These extensions of the ILO's ostensible legal authority attracted criticism and resistance, including challenges before the Permanent Court of International Justice, which in turn resulted in important advisory opinions rejecting a 'restrictive' interpretation of Part XIII and embracing of a theory of 'extended competence' instead.⁵²

The first few years of its operations thus saw a rapid expansion of the Office to be much larger than the minimal secretariat support anticipated by all sides in the negotiations over Part XIII. A report on the organization of the Office dated 7 May 1921, prepared by a Commission of Experts appointed in accordance with a resolution of the League of Nations Assembly, gives a good sense of the functions that the Office was expected to perform at that time. Noting that the 'general policy' of the Office had already been criticized for being too innovative and promoting socialist ideas, the Commission expressed confidence that Office staff were 'controlled with a firm hand', were 'well aware of the grave dangers to the future of the Office which would attend any ventures outside the province which has been marked out for it', and were 'inspired with too great a confidence in its future possibilities, too lofty an idea of its mission, and too impassioned and rational a zeal for the accomplishment of its destiny, so to compromise the work which [had] been entrusted to them'. The Commission further considered that, 'generally speaking', the Office's work had remained 'clearly within the limits laid down by the Treaties,' but warned that its authority

might be compromised, especially when its enquiries lead it inevitably over the border line into adjoining, and often closely connected, fields of activity, such as, for instance, that of economics, unless the International Labour Office were to act with the greatest possible prudence and laid no claim to do more than supply the necessary element of co-

52 International Labour Office, *The International Labour Organisation: The First Decade* (1931) 99–101.

ordination together with such data and statistics as it alone is in a position to provide.⁵³

As the next part of this chapter shows, the danger to which the Commission averted—the possibility that the Office might trespass into the realm of economics—would soon be realized.

5. *Law and/as Expertise*

In championing a turn to responsive law, undergirded by a ‘social’ morality, early twentieth-century liberals regarded law as an instrument of ‘social engineering’ through which society could be reshaped. As a part of what Samuel Haber called ‘an efficiency craze—a secular Great Awakening, an outpouring of ideas and emotions in which a gospel of efficiency was preached without embarrassment’, the idea of social engineering was common to the Progressive movement in the United States, New Liberalism in Britain, and other, related movements, in Europe and elsewhere.⁵⁴ This ‘gospel of efficiency’ informed the emergence of scientific management and rationalization in the field of public administration,⁵⁵ while in the human sciences it influenced a range of social reform efforts, including, at the extreme, eugenics.⁵⁶ More broadly, the period saw a growing faith in the ability of experts to identify and implement solutions to social problems. Thus, for example, Roscoe Pound’s sociological jurisprudence advocated the use of scientific expertise for social planning, and viewed the rise of the administrative state as a positive and natural outcome of recent social evolution.⁵⁷

This intellectual milieu influenced the way the ILO was conceived and operated in its early years. Some seeds of the ILO’s expert authority can be

53 Cited in ‘Organisation of the Secretariat of the League of Nations and of the International Labour Office’ (25 May 1921) 3:20 International Labour Office Official Bulletin 1, 6–7 and 9.

54 Samuel Haber, *Efficiency and Uplift* (University of Chicago Press 1964) ix.

55 See generally Dwight Waldo, *The Administrative State* (2nd ed, Holmes & Meier 1984) ch 3.

56 See generally Michael Freedon, ‘Eugenics and Progressive Thought: A Study in Ideological Affinity’ (1979) 22 *The Historical Journal* 645.

57 See generally G Edward White, ‘From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America’ (1972) 58 *Virginia Law Review* 999; Morton J Horwitz, *The Transformation of American Law* (HUP 1992).

discerned in the few provisions of Part XIII that indicated the Office's functions, such as:⁵⁸

... the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour ... the conduct of such special investigations as may be ordered by the Conference ... duties ... in connection with international disputes ... edit[ing] and publish[ing] ... a periodical paper dealing with problems of industry and employment of international interest ... such other powers and duties as may be assigned to it by the Conference.

Each of these provisions became the basis for wide-ranging activities undertaken by the Office, mentioned above. Chief among other steps taken to enhance the Office's scientific or expert authority was the creation of a Scientific Division that initially was to serve as a 'clearing house of information,' gathering and distributing reports from around the world and then producing its own reports, as well as syntheses of collected information, in a large range of publications including an *Encyclopaedia of Industrial Hygiene*; an annual *International Labor Directory, Legislative Series, International Survey of Legal Decisions on Labour Law*, and *Yearbook*; and a monthly *Summary and International Labour Review*.⁵⁹ The Office's—and more broadly, the ILO's—expert authority was further augmented through the establishment of other specialized sections within the Office, and the use of external experts in an array of conferences, advisory committees and correspondence committees addressing particular topics, such as anthrax, industrial hygiene, social insurance, and labour statistics.⁶⁰ Notable among many such endeavours was the ILO's landmark study of forced labour for the League's Temporary Slavery Commission, and subsequent appointment of an Expert Committee on Native Labor.⁶¹

Other actions taken by the ILO combined expert with legal authority. When it became overly cumbersome for the Governing Body to review the information provided by governments regarding their ratification of international labour conventions, the Conference resolved to establish a special committee of experts, who would be chosen 'on the ground of their tech-

58 Part XIII, Art 396.

59 'The Scientific Work of the International Labour Office' (December 1927) 12 Monthly Summary of the International Labour Organisation 7, 7.

60 See generally E Beddington Behrens, *The International Labour Office* (Leonard Parsons 1924) ch 8.

61 Rodríguez-Piñero (n 46) 31–36.

nical competence alone,' to review the information provided by governments.⁶² The same session of the Conference also created a separate conference committee to allow government representatives to submit additional information or explanations in relation to the expert committee's reports, and for those representatives to be questioned by both governmental and non-governmental delegates.⁶³ Though criticized as 'unconstitutional'—Ernest Mahaim warned that these 'innocuous experts' were likely to become a 'tribunal' of 'inspectors'⁶⁴—this further layer of procedure nevertheless provided yet another, generally welcomed opportunity to divert and defuse political conflict through hybrid legal-expert means.

A kind of expert legal authority likewise provided the basis for a growing range of technical advice provided by the Office to governments. ILO officials on 'mission' to member states were asked for advice on drafting labour legislation, and increasingly on the implementation of such legislation through administrative means. Over time, this developed into a practice of technical assistance *avant la lettre*, whereby ILO officials provided solutions for a wide range of problems in various issue-areas, including refugees, factory inspections, and, above all, social insurance schemes, in particular to states on the southern and eastern European peripheries. From the late 1920s onwards, and especially in the aftermath of the Great Depression, the organization's 'centre of gravity' began to shift away from Europe and ILO missions extended as far as Southern Africa (1928), Soviet Union and East Asia (1928–29), India and Middle East (1933), and South and southeast Asia (1937–38). Accordingly, ILO officials provided more and more technical advice to members in Asia, such as Japan and China, and the Americas, including the United States, which became a member in 1934.⁶⁵

The development of international labour jurisprudence within the Office represents a further innovation in the legal-expert authority exercised by the ILO. Part XIII supplied no authority for the Office to provide authoritative interpretations of labour conventions produced under ILO auspices. Nevertheless, the concentration of legal expertise and collation of international legislation and state practice within the Office provided useful

62 E A Landy, *The Effectiveness of International Supervision* (Oceana 1966) 16-17 and 21 fn 6 (citing Albert Thomas).

63 *ibid* 36–37.

64 *ibid* 20.

65 On the development of technical assistance practices in the ILO, see generally Guy Fiti Sinclair, 'A "Civilizing Task": The International Labour Organization, Social Reform, and the Genealogy of Development' (2017) 20 *JHIL* 1–53.

guides to interpretation, and the Office regularly published the advice it had rendered as a result of member-state inquiries in the Bulletin for the benefit of others. While such publication was invariably accompanied by an explicit disavowal of interpretive authority, a presumption gradually emerged that the Conference must be presumed to have intended a particular provision to be understood in the manner in which the Office had previously interpreted an identical or equivalent provision in another Convention, if that opinion had been submitted to the Governing Body and published in the Bulletin and had met with no adverse comment.⁶⁶

Finally, if ILO practice indicated a merging or blurring of legal and expert authority, it also soon became apparent that the boundaries between law, social reform, and economy had been breached. In addition to the high moral sentiments it articulated, the Preamble to Part XIII alluded to a powerful economic motivation: 'Whereas also 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 ...'⁶⁷ At least part of the purpose of international action on labour standards, therefore, was to remove the competitive advantage enjoyed by countries that imposed lower standards of protection. In addition, the report issued by a Commission of Enquiry appointed under Article 411 of Part XIII could indicate 'measures, if any, of an economic character against a defaulting government which it considers to be appropriate, and which it considers other Governments would be justified in adopting';⁶⁸ another indication that the ILO was concerned with economic relations. The ILO's early inquiry into production in the Ruhr, its involvement in the Economic and Financial Conference held in Genoa in 1922,⁶⁹ and, especially, its massive inquiry into post-war industrial production, which lasted for four years and resulted in a five-volume report,⁷⁰ further indicated a view of the ILO as an integral part of the wider international economic framework established after the War.

66 'Interpretation of the Decisions of the International Labour Conference' (10 April 1938) 23:1 International Labour Office Official Bulletin 30, 32.

67 Part XIII, Section I (Preamble).

68 Part XIII, Art 414.

69 Patricia Clavin, *Securing the World Economy* (OUP 2013) 23–25; 'The International Labour Organisation and the Genoa Conference' (21 June 1921) 5:25 International Labour Office Official Bulletin 3.

70 See generally *ibid* 51–52.

6. Conclusion

What were the lasting legacies of these modes and technologies of liberal government, embedded in the text of the Treaty of Versailles and elaborated through the early actions of ILO officials? Certainly, it is not possible to draw a straight line from the varied and often conflicting intentions of the negotiators at Paris, through the text of the Treaty, to the present day. The interplay of exogenous events (such as wars, economic and other crises), endogenous feedback effects, institutional interactions, and leadership choices are too diverse and unpredictable over the span of a century to suggest so simple a narrative.⁷¹ Nevertheless, it is possible to pick out a few features that might, with some deference to path dependency, be seen as significant precursors or antecedents of practices, whether in the present-day ILO itself or more broadly in international economic law and governance.

First, it is clear that certain concepts embedded in Part XIII were subsequently taken up in a variety of international instruments and organizations, including some of the most significant in operation today. As noted above, Part XIII articulated a set of 'social' goals and policies, which by 1937 James Shotwell was already characterising as part of a 'vast field of social and economic rights.'⁷² Among these goals was 'the prevention of unemployment';⁷³ in 1944, the Conference recognized the ILO's 'solemn obligation ... to further among the nations of the world' programmes that would achieve, among other things, 'full employment and the raising of standards of living.'⁷⁴ The same ideal appeared in the Charter of the United Nations, now linked to the twin enterprises of development and human

71 See generally Laurence R Helfer, 'Understanding Change in International Organizations: Globalization and Innovation in the ILO' (2006) 59 *Vanderbilt Law Review* 649; Deborah D Avant, Martha Finnemore and Susan K Sell, 'Who Governs the Globe?' in Deborah D Avant, Martha Finnemore and Susan K Sell (eds), *Who Governs the Globe?* (CUP 2010) ch 1; Orfeo Fioretos (ed), *International Politics and Institutions in Time* (OUP 2017).

72 Shotwell, *At the Paris Peace Conference* (n 27) 55.

73 Part XIII, Section I (Preamble).

74 'Declaration Concerning the Aims and Purposes of the International Labour Organisation' (Declaration of Philadelphia), 10 May 1944, Annex to the Constitution of the ILO, Art III(a).

rights;⁷⁵ in the General Agreement on Tariffs and Trade (GATT);⁷⁶ and in the Agreement Establishing the World Trade Organization (WTO).⁷⁷ These and other social goals have retained a powerful hold on international imagination, even if they are perhaps more often than not honoured in the breach.⁷⁸

The ILO also pioneered techniques of governance that have been integrated into the practices of other international organizations. Methods of international supervision—such as in the ILO’s reporting and complaints, or ‘naming and shaming,’ procedures described above—have since been adopted by other institutions of global governance, notably in human rights area.⁷⁹ So-called ‘soft law’-making techniques of the kind undertaken by the ILO—in the recommendations adopted by the Conference and the ‘jurisprudence’ generated by the Office—have become much more widely reflected in the practice of international institutions, including in

75 Charter of the United Nations (26 June 1945), Article 55: ‘With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’

76 General Agreement on Tariffs and Trade (10 October 1947), Preamble: ‘Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment ...’

77 Marrakesh Agreement establishing the World Trade Organization (15 April 1994), Preamble: ‘*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment ...’

78 See generally Steve Charnovitz, ‘What the World Trade Organization Learned from the International Labour Organization’ in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Trade Law* (Elgar 2015) 411 (ch 29) 413–16.

79 See generally Hellen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012); James H Lebovic and Erik Voeten, ‘The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR’ (2006) 50 *International Studies Quarterly* 861. On the ILO’s supervisory mechanisms, see Landy (n 62); Laurence R Helfer, ‘Monitoring Compliance with Unratified Treaties: The ILO Experience’ (2008) 71 *Law and Contemporary Problems* 193.

the general comments of human rights supervisory mechanisms, as well as a source of significant controversy among international law scholars.⁸⁰ Indeed, in recent decades the ILO itself has increasingly turned to the use of 'soft law,' in the form of codes, standards, and declarations.⁸¹

What then of the view, for which I have suggested some evidence above, that the ILO should be understood as part of the wider international economic framework born from the Versailles settlement? In the aftermath of the Great Depression, the ILO became increasingly concerned with economic issues and became a leading advocate of national and even international economic planning.⁸² As I have argued elsewhere, ILO technical assistance to non-Western societies profoundly shaped notions and practices of development as they emerged as the dominant ideology of international law after World War II.⁸³ Moreover, the notion of 'special and differential treatment' for developing countries that emerged within the GATT/WTO jurisprudence may be traced back to the provisions of Part XIII.⁸⁴ Alexandrowicz's treatise on *World Economic Agencies* thus included a substantial chapter on the ILO,⁸⁵ and it is still occasionally included in surveys of international economic law.⁸⁶ It can hardly be doubted that other institutions such as the WTO, the World Bank, and the International Monetary Fund are now considered much more central to the field. However, if the current moment may be acknowledged as presenting an unusually acute crisis in the international economic order—albeit a lesser one than a centu-

80 See generally Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (OUP 2000).

81 See generally Philip Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 EJIL 457; Claire La Hovary, 'The ILO's Supervisory Bodies' "Soft Law Jurisprudence" in Blackett and Trebilcock (n 78) ch 22.

82 See generally Anthony M Endres and Grant A Fleming, *International Organizations and the Analysis of Economic Policy 1919-1950* (CUP 2002); Sinclair, 'A "Civilizing Task"' (n 65).

83 Sinclair, 'A "Civilizing Task"' (n 65).

84 Part XIII, Art 427 (recognising that 'differences of climate, habits and customs, of economic opportunity and industrial tradition, [made] strict uniformity in the conditions of labour difficult of immediate attainment,' while holding that 'there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit'). See generally Charnovitz, 'What the World Trade Organization Learned' (n 78).

85 Charles Henry Alexandrowicz, *World Economic Agencies* (Stevens 1962) ch 3.

86 See, eg, Steve Charnovitz, 'The Field of International Economic Law' (2014) 17 *Journal of International Economic Law* 607.

ry ago—we might yet expect to see a rearrangement of international institutional relations and, just possibly, a renewed role for the values which the ILO represents.