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Human Rights and International Trade: Mapping Workers' Rights under World Trade Organization Rules

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DERECHOS HUMANOS DEMOCRACIA Y JUSTICIA INTERNACIONAL

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ABBREVIATIONS

1996 Guidelines	Guidelines for Arrangements on Relations with Non-Governmental Organizations
1998 Declaration	Declaration of Fundamental Rights and Principles at Work
AB	Appellate Body
American Declaration	U.S. Declaration of Independence
Draft Norms	Draft Norms on the Responsibilities of Transnational Corporations and other business enterprises with regard to human rights
DSB	Dispute Settlement Body
DSRP	Understanding on Rules and Procedures Governing the Settling of Disputes
DSU	WTO Dispute Settlement Understanding
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
FLRs	Fundamental Labor Rights
French Declaration	Declaration of the Rights of Man and of the Citizen
GATS	General Agreement on Trade in Services
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
General Principles	Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy Framework
GSPs	Generalized Systems of Preferences
IALL	International Association for Labor Legislation
ICJ	International Court of Justice

ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ITO	International Trade Organization
IUPCT	International Union for the Publication of Customs Tariffs
League	Covenant of the League of Nations
MFN	Most Favored Nation Clause
MNE Declaration	Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
OECD	Organization for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
OIWG	Open-Ended Intergovernmental Working Group on Transnational Corporations
OSHS	Occupational Safety and Health Standards
PCIJ	Permanent Court of International Justice
PPMs	Production Process Methods
PRRF	Protect, Respect and Remedy Framework
SJFG Declaration	Declaration on Social Justice for a Fair Globalization
SRSG	Special Representative of the Secretary General
TRIPS	Trade Related Aspects of Intellectual Property Rights
TNCs	Trans National Corporations
WWI	The First World War
WWII	The Second World War

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESC	United Nations Economic and Social Council
UNHRC	United Nations Human Rights Commission
UNHRCo	United Nations Human Rights Council
USMCA	United States-Mexico-Canada-Agreement
U.S.	United States of America
Vienna Declaration	Vienna Declaration and Programme of Action
WTO	World Trade Organization

INTRODUCTION

Throughout recorded history there has been a division of labor in organized civilizations.[1] Before written records were kept, the most primitive conception of a social unit most probably was that of the family unit, which over time evolved to multiple family units, which then expanded to a clan like structure. Within this clan-like structure, differing family groups organized a primitive society in some sort of a hierarchical relationship to one another. The division of labor in prehistory was most probably organized along gender roles, with men responsible for the safety and security of the clan unit and women responsible for child rearing and other "domestic" duties. As children aged and acquired the ability to contribute, they too became a part of the division of labor within the clan, contributing through their abilities to maintaining the clan unit.[2]

Thus, it may be speculated that in prehistory, there was most probably, a division of labor delineated by gender, age and status. As time moved forward and human beings increased in number, complex civilizations emerged from small clan units, and within these early complex civilizations, a division of labor too emerged most probably closely aligned with gender, age and an individual's status (or a family's status) within the civilization. As the early world became more connected – globalized – through contacts with other civilizations, an exchange of goods and technologies with different civilizations began to take place, either through conquest or trade. Thus, with mankind's exit from the state of nature into primitive clan units and later into more complexly organized civilizations, a division of labor emerged, closely aligned with one's gender, age, and social rank in a civilized society.

In the 21st century the world is more connected than ever before. Goods and technologies are exchanged through a well-organized and regulated world trading system between nation states. It has been a long march of mankind from the loosely organized and connected clan units of prehistory to the complex civilizations in the

[1] Émile Durkheim and George Simpson, *Émile Durkheim on The Division of Labor in Society* (Macmillan 1933).
[2] Karl Marx and Friedrich Engels, *The German Ideology* (CJ Arthur (ed), 1st edn, Lawrence & Wishart 1970) 44.

21st century. Complex civilizations are now organized as nation states and cooperate together in addressing affairs impacting the global community, including international trade. Indeed, from this standpoint, in 2021, the world is connected like never before.

A monumental achievement of this long march of interconnectedness is the emergence of human rights. Human rights are rights that all members of the human species possess by virtue of their shared humanity. These rights are linked to the concept of the inherent dignity of an individual. Human rights are classified in many ways, most typically in terms of "generations of human rights" to denote what the rights entail and as "positive and negative human rights" to denote action verses inaction with regards to obligations of the state and private actors to provide for a means have the right protected and realized. The generational classification of rights alludes to rights that are civil and political in nature, to rights that are economic and social in nature, and to rights that are collective, cultural and environmental in nature. The positive and negative classification distinguishes between what must, or must not be done for an individual to actualize the right, that is, if action is required for an individual to actualize the right, the right is deemed to be positive, and if constraints on action are needed for an individual to actualize the right, the right is deemed to be negative.

Just as in prehistory, in the complex nation states of today, a division of labor is present. This division of labor is in many nation-states still organized closely along the same structure as that of the primitive social unit; thus, frequently distinctions between gender, age and social rank remain. In the globalized 21st century, goods and services are traded between nation-states through a well-organized and regulated world trading system. However, differing conditions exist in the division of labor on a national dimension. Also, differing regulations exist between the world's nation states in terms of the regulation of labor, specifically the rules and regulations of employment and conditions in which workers labor, which is characterized as labor law.

The labor rules and regulations on employment and conditions in which workers labor I define in this thesis as "worker rights". In looking more closely at worker rights, I ask in light of the globalized world, can or are these worker rights human rights, and

if so accepted, what then are the implications for the world's well-organized and regulated trading system? This is the core focus of my project and I approach it from the aforementioned statements about the historical development of the world and the division of labor from prehistory to the 21st century.

The conception of worker rights as human rights has been relevant for over 60 years already beginning with the United Nations (hereinafter UN) Universal Declaration of Human Rights of 1948[3] (hereinafter UDHR). The UDHR addresses rights related to personal liberties in articles 1-19, rights concerning social and economic relations are addressed in articles 20-26 and rights concerning communal solidarity in articles 27-28. Upon a closer examination of rights related to social and economic relations, articles 23 and 24 specifically outline the rights of individuals in deference to worker rights:

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and the protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.[4]

Article 24

1. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.[5]

The UDHR has been described as visionary document laying the foundations for human rights in the global order and as Mathias Risse comments, 'Endorsing it means endorsing the idea that we ought to make the world such that these rights apply'.[6] Just over 22 years ago, worker rights were more recently proclaimed by the International Labour Organization (hereinafter ILO) in its 1998 adoption of the Declaration of

[3] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) 1948.
[4] ibid art 23.
[5] ibid art 24.
[6] Mathias Risse, 'A Right to Work? A Right to Leisure? Labor Rights as Human Rights' (2009) 3 Journal of Law and Ethics of Human Rights 1, 31-32.

Fundamental Principles and Rights at Work[7] (hereinafter 1998 Declaration). The 1998 Declaration identified four fundamental worker rights:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.[8]

Problematic is the lack of strict adherence to the principles outlined in the 1998 Declaration, which are most certainly lacking among many nation states, as with other soft law instruments promulgated by the ILO. This is especially problematic in an increasingly connected and economically globalized world, expanding to include lesser-developed states, which often have inadequate protections and enforcement mechanisms for worker rights. Indeed, this is particularly evident through nation states with authoritarian conceptions of government and lack of respect for human rights notwithstanding being admitted into the world's well-regulated world trading system, the World Trade Organization (hereinafter WTO). At the WTO's Ministerial Conference on 10 November 2001 a decision was made by consensus for China to become a member of the WTO.[9] The non-application of ILO standards by manufacturing enterprises in China is particularly illustrative of the aforementioned problem. With China being the economic powerhouse that it is in the 21st century, the conception of worker rights as human rights is paramount in China, especially when analyzing states with an authoritarian conception of government.

Nevertheless, the problem with lack of respect for and adherence to the principles of the Declaration is not limited to states with an authoritarian conception of government. As Anne Marie Lofaso observes, lackadaisical occupational, safety and health standards (hereinafter OSHS) are prevalent in many states that are not governed by an authoritarian regime, such as the United States of America, (hereinafter U.S.). For example, numerous studies on the working conditions of U.S. coal miners have illustrated that regardless of increasing amounts of evidence

[7] ILO Declaration, *ILO Declaration on Fundamental Principles and Rights at Work,* International Labour Conference (86th Session Geneva, 18 June 1988).
[8] These four fundamental worker rights are to be promoted and realized by all ILO members, irrespective of their having ratified the ILO Conventions associated with said fundamental worker rights. For more see: ibid Section 2 (a) (b) (c) (d).
[9] WTO | NEWS - WTO Ministerial Conference approves China's accession - Press 252.

showing that black lung ailment for workers have been worsening, the coal industry was successful through lobbying efforts at blocking the adoption of powerful safety regulations and policies, and as Lofaso observed, it was largely due to the unregulated labor market, which contributed to the suppression of the freedom of coal miners who suffered from the heinous sickness of black lung from succeeding at collective action to compel mine operators to install adequate air safety measures, and due to their lack of success, it succeeded in snuffing out their lives.[10] Protections for and guarantees of worker rights with regards to health and safety vary from state to state irrespective of conceptions of governance. As the example illustrated, even in fully economically developed states, with democratic conceptions of governance, often worker rights are second to employer rights, which is based on the historical development of the division of labor and political power, indeed premised upon a class structure throughout the world.

In the 21st century, aspects and impacts of globalization affect the peoples and nations of the world in many ways. In this work, I define globalization as the emergence of a global society wherein economic, political, environmental, and cultural activities in one a part of the world come to have significance for people in other parts of the world. Globalization is the end result of advances in communication, transportation, and other technology that connects the peoples of the world and can be traced to the age of exploration.[11] As the world becomes more connected through advances in technology, erosions of capital controls, and migration, one can argue that globalization has created conditions for the rapid dissemination of capital, information and people all over the world. International trade and foreign direct investment has increased with the emergence of transnational corporations, (hereinafter TNCs) striving to expand and subcontract through the global supply chain to lower cost host states (most often developing or least developed states) in order to lower production cost, which in turn maximizes shareholder value, often to the demerit of workers. As John Barkbull and Lisa A Dicke noted, in their assessment of the relationship between individuals and corporations in the globalized world of the 21st century, 'to keep their

[10] Anne Marie Lofaso, 'Workers' Rights as Natural Human Rights' (2017) 71 University of Miami Law Review 565, 571.
[11] Mathias Risse, *On Global Justice* (Princeton University Press 2012), 15-16; John Barkdull and Lisa A Dicke, 'Globalization , Civil Society , and Democracy ?: An Organizational Assessment' (2004) 5 Seton Hall Journal of Diplomacy and International Relations 33, 34-35.

jobs, workers must accept low wages and benefits, as well as onerous work conditions, or footloose companies will move their operations elsewhere'.[12] Thus, it can be argued that with the erosion of capital controls and the expansion of membership in the WTO, there is truly a "race to the bottom" insofar as lower production costs (labor) and competitive advantages gained through regulatory arbitrage being the primal objectives for TNCs in their zeal to maximize shareholder value through increasing net revenue of the enterprise whilst minimizing operating costs.

A gap between cultures and traditions and likewise, between developed and developing states, does not increase only between states and peoples, but also inside them. This has been offered up by many WTO members as an objection for enforcement of worker rights and recognizing worker rights as human rights, the argument being that the culture, conditions, and development of labor is not as extensive as in developed states. As Janice Bellace noted over 20 years ago, some nations decried the stance of western advanced nations as hypocritical, arguing that the working conditions and situations in their countries that much of the developed world criticizes are similar to that which existed inside the western countries at an earlier stage in their development. Indeed, cultural clashes can be best illustrated by the positing taken by some developing states in Asia for example in accusing western states of enforcing standards that are not vital in their instances due to their conception of "Asian values" which function to handle social conditions rather than direct governmental regulation.[13] Further, labor conditions in different states effect and give rise to claims of competitive advantages when it comes to trade, and as noted by Mathias Riise, in the globalized 21st century, it is not in the interest of states to be at a competitive disadvantage:

> Labor conditions in one country affect its competitiveness and thus also the competitiveness of others on the world market…It was in no country's interest

[12] To keep their jobs, workers must accept low wages and benefits, as well as onerous work conditions, or footloose companies will move their operations elsewhere. For more see: Barkdull and Dicke (n 11) 36.

[13] Janice R Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' (2001) 17 International Journal of Comparative Labour Law and Industrial Relations 269, 271-272.

> to be at a competitive disadvantage if others could benefit by exposing their work force to unfavorable working conditions.[14]

Indeed, notwithstanding preexisting preferences and exceptions for developing states, the WTO is designed give all members equally competitive advantages - not unequal competitive advantages - which amounts to a distortion of the level playing field in world trade among WTO members. While admittedly, legislation in a sovereign state reflects the culture, history, social ideals and values unique to the particular state,[15] in an economically globalized world, particularly with the WTO regulating world trade, the question arises as to how, against such a such legal fragmentation amongst sovereign states be harmonized from the point of view of protecting human rights, with worker rights being conceptualized as human rights? Further, was consideration of worker rights ever envisioned in the design of the contemporary world's trading system? The aforementioned questions are the driving force and are at the core of this work.

After the end of the Second World War, the idea of global governance became closer to reality with the establishment of the UN on 24 October 1945.[16] Furthermore, several new institutional mechanisms designed to achieve global governance in economic matters emerged from the United Nations' Monetary and Financial Conference in Bretton Woods, New Hampshire, U.S., from July 1-22 1944, those being the International Monetary Fund and the International Bank for Reconstruction and Development.[17] Global regulation of world trade was also an objective of the allied planners in the aftermath of the Second World War and to achieve this objective, envisioned was the establishment of an international organization to manage world trade, the International Trade Organization (hereinafter ITO). Yet the ITO, while instituted, was never ratified by states and ceded to become an institution due to many states, including reluctance by the U.S., to cede even more sovereignty to another global institution. With the failure to establish the ITO, the General

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[14] Risse (n 6) 37.

[15] Roger Cotterrell, *The Sociology Of Law: An Introduction* (2nd edn, Oxford University Press 2012) 9-10.

[16] 'History of the United Nations | United Nations' <https://www.un.org/en/sections/history/history-united-nations/index.html> accessed 4 August 2020.

[17] 'FRASER | Discover Economic History | St. Louis Fed' <https://fraser.stlouisfed.org/search.php?q=International+Monetary+Fund&partialfields=partOf%3A430> accessed 4 August 2020.

Agreements on Tariffs and Trade (hereinafter GATT 1947) became the operational instrument that emerged to regulate world trade. Worker rights as human rights were thus not a part of GATT 1947. However, worker rights were envisioned at the time as necessary and indeed were a part of the agenda to establish the ITO at the Havana Conference. Thus, world trade operated using GATT 1947, a provisional document, with no permanent secretariat or staff, and no provisions for the protection of worker rights for almost 50 years.[18]

With the dissolution of the Soviet Union on 26 December 1991,[19] the opportunity to reform GATT 1947 and reorder the world, economically speaking, with regard to trade law as one component, was of paramount importance in the Marrakesh negotiations that led to the establishment of the WTO in 1994.[20] The WTO agreement addressed not only world trade in goods, but also the protection of intellectual property, provision of services and trade related aspects of foreign direct investment; yet no protection of worker rights, as human rights, were included in the Marrakesh agreement. Why was this the case? Perhaps because at the time most members of the WTO were developed or developing states, not least developing states; perhaps because at the time most members of the WTO had adequate worker rights enshrined in their municipal legislation; or recognizing worker rights as human rights, and perhaps including among the WTO agreement minimal standards for worker rights was seen as a potential obstacle TNCs to maximizing shareholder value through offshoring production to less developed states; and thus perhaps through lobbying efforts of TNCs, worker rights as human rights and an agreement outlining minimal worker rights was left out of the final agreement that established the WTO done at Marrakesh, 15 April 1994.[21] This thesis aims to map the path to worker rights and the path to human rights, while mapping the development of the structure in which free trade, the bargained exchange, the market operate in the 21st century.

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[18] Andreas F Lowenfeld, *International Economic Law* (2nd edn, Oxford University Press 2008) 26-28; Craig VanGrasstek, *The History And Future Of The World Trade Organization* (1st edn, World Trade Organization 2013) 10-11.

[19] Declaration no. 142-N of the Soviet of the Republics of the Supreme Soviet of the USSR 1991.

[20] VanGrasstek (n 18) 19, 69-73.

[21] World Trade Organazation Agreement: Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 154.

Relevance

While the topic of worker rights as human rights and linkage within the WTO has been deliberated from time to time over its lifetime, with the election of Donald Trump as the 45th president of the U.S. in 2016, and the consequences thereafter revived reflections on the need to reform the WTO. As Sara Dillion observed, the 2016 Trump presidential campaign in the U.S. tapped into a long-felt mainstream populist rhetoric regarding regional and world trade agreements, frequently characterized as being to the determent of U.S. workers. The Trump marketing campaign came out in opposition to what it referred to as "bad alternate offers" and threatened to drag the U.S. out of the most important trade commitments made over the last 50 years; indeed, free trade agreements inevitably pitted U.S. employees against much lower paid employees in less developed countries, especially China and Mexico.[22] Soon after the election of Donald Trump, the U.S. embarked upon a trade war targeting China and the European Union (hereinafter EU), which consequently moved discussions of reforming the WTO to center stage.[23] While no reforms of the WTO as an institution were achieved under the Trump administration (aside from the paralysis of the WTO), the year 2021 ushered in the 46th U.S. president, Joseph Biden. The Biden administration has embarked on an ambitious agenda, pursuing structural reforms domestically, while engaging internationally, which *could provide* an opportunity to reconnect with an issue pursued by the U.S. and other states time and time again; that of linking trade with human rights, specifically worker rights. While the issue of remuneration for work is not analyzed in this project, it is nevertheless related to labor law, and it is of my opinion that should my vision of worker rights be observed by all WTO members, the cost of production would increase in nation states with current failings in enforcing and adhering to worker rights; and that would not necessarily be bad.

While abuse and exploitation of workers has been discussed for years, indeed for centuries already, in the 21st century, awareness offshoring externalities led to increased awareness and apprehensions about working conditions in factories located

[22] Sara Dillon, 'Getting the Message on Free Trade: Globalization, Jobs and the World According to Trump' (2018) 16 Santa Clara Journal of International Law 101, 104-105.
[23] Christian Shepherd and Michael Martina, 'EU Pushes China on Trade, Saying It Could Open up If It Wanted - Reuters' <https://www.reuters.com/article/us-china-eu/eu-pushes-china-on-trade-saying-it-could-open-up-if-it-wanted-idUSKBN1K514O> accessed 4 August 2020.

in China and elsewhere.[24] More recently on 23 November 2018, working conditions were in the news, with workers at Amazon logistics centers in Europe staging a 24 hour strike in protest over labor contracts that guarantee healthy working conditions.[25] While the issue of worker rights as human rights is certainly not an entirely new phenomenon, and the acceptance of worker rights as human rights has been debatable for some time, with agreed consensus lacking among WTO members. Given discussions of reforming the WTO, now seems a ripe time to recount need to link worker rights to trade, with minimal worker rights, as human rights, defined and provided for within the framework of the WTO.

The topic is also of personal interest to me, as throughout my path in life, I've worked in a variety of occupations, starting with employment full time as a production worker in a non-unionized manufacturing enterprise, while enrolled in university studies for two years. At a later part in my professional career, I was involved in efforts to unionize a company, and faced retaliatory actions from management when my actions and activities were discovered. These and other experiences lend themselves to a personal connection with worker rights and thus, the interest in this topic emerged from my personal experiences and background. Given that worker rights as human rights has been the subject of much discourse and debate for decades and is still unsettled with discussion on reforming the WTO championed by scholars and increasingly being embraced by the U.S., the EU, China and other economically powerful nation states, I believe the time is right to invigorate the issue of worker rights as human rights within the context of world trade.

[24] Hilary K. Josephs notes there is no accepted definition of compulsory overtime nor is it clear if compulsory overtime would violate international law. For more see: Hilary K Josephs, 'Productions Chains and Workplace Law Violations: The Case of Apple and Foxconn' (2013) 3 The Global Business Law Review 211 <http://engagedscholarship.csuohio.edu/gblrhttp://engagedscholarship.csuohio.edu/gblr/vol3/iss2/5>, 213-218.

[25] Susana Vera, 'Amazon Workers Strike in Germany, Spain on Black Friday' <https://www.reuters.com/article/us-amazon-com-strikes-germany/amazon-workers-strike-in-germany-spain-on-black-friday-idUSKCN1NS1AU> accessed 4 August 2020.

Research Questions and Hypothesis

The research questions of this study can be broadly defined as, firstly, can worker rights be seen as human rights? If so, can and should worker rights as human rights be linked to trade? And if so, can worker rights as human rights be enforced through the current WTO dispute settlement procedure and its rules (hereinafter DSRP)? Even if the answer to the previous questions are in the affirmative, would it be more efficient for the WTO to adopt minimum protections for worker rights, including minimal OSHS standards and protections for workers as well? Furthermore, in absence of minimal protections for worker rights to what extent under the current DSU rules can a WTO member compel other WTO members to respect human rights of their citizens, human rights as defined as fundamental labor rights, including a binding commitment to protect workers' right to life through the imposition of minimal OSHS requirements? And what actions can the WTO take to enforce a positive decision from the adoption of a WTO dispute settlement decision regarding the protection and enforcement of worker rights?

My hypothesis is that worker rights, as defined as ILO fundamental labor rights, including the addition of minimal protection of workers' health and safety are basic, fundamental human rights. Further, it is my hypothesis that WTO members can currently initiate measurers to compel WTO members that do not guarantee, enforce and protect worker rights as human rights (or members with lackadaisical enforcement mechanisms) in the aforementioned areas, to compel them to protect workers' human rights. However, I am of the belief that due to past jurisprudence of the WTO, it is likely that these attempts will certainly fail. Thus, I am convinced it will be more efficient and effective for the WTO to adopt minimal worker rights as human rights, those rights being minimal OSHS standards and the ILO fundamental rights and principles as expressed in the 1998 Declaration as an additional annex to the WTO Agreements in order to provide for minimal levels of protection of workers' basic human rights in the aforementioned areas, and to use the existing WTO DSRP, with institutional cooperation with the ILO, as a mechanism of adjudicating disputes and the WTO as a means of enforcement of positive decisions.

Research Methods and Sources

The research methods of this thesis can be characterized as firstly being interdisciplinary. Considering the aims and objectives of this research, with the hypothesis, the methods used encompass an interdisciplinary approach in each part of the dissertation, constructed starting with the historical, theoretical and philosophical analysis of rights in general. The focus is from that of a historical development of human rights, as measured from the first codified rights, to movements which ushered in documents limiting the power of the sovereign over individuals, to the development of positive rights, which compel action rather than inaction. This analysis proceeds to identify its effects in the theory and practice of contemporary international human rights law, which is grounded in the development and evolution of rights principles, and concepts, which embody contemporary human rights. In this research, I intentionally use a broad and conceptual approach, focusing above all on various constructs and interpretations of early legal codes, early labor law, and I proceed to develop the concept of worker rights as human rights, drawing from a broad historical and socio-legal analysis as society progressed from Antiquity to the Industrial Era, to the Second World War, to the post Second World War Era, and to the Post-Cold War Era, which for the purposes of this work, I define as the Contemporary Era.

Furthermore, in my research, I shall analyze the underlying processes, which affect the international community, specifically through a comparative analysis of selected municipal norms and international human rights norms and regimes, municipal and international labor standards, as squared through a diverse exploration of theoretical conceptions of worker rights as human rights in order to establish a linkage between worker rights and human rights. Worker rights are predominantly protected by municipal legal norms and internationally by soft law instruments linked to international human rights norms, which are further enshrined in international agreements. Through a comparative historical analysis of municipal and international labor norms and through an analysis of labor standards as recommended by the ILO and other organizations, I purposely utilize both a black letter law analysis of both hard and soft legal norms in a comparative manner to square worker rights as human rights, as framed by the historical development of international economic law. Through a historical analysis of the jurisprudence of the WTO, I seek to envision the

likely, or unlikely actions undertaken by WTO members in regards human rights issues, with a particular emphasis on worker rights as human rights, which can be seen as an application of the legal-dogmatic approach. In addition to primary sources, an array of secondary sources, such as books and peer reviewed articles by noted scholars, conference proceedings, meetings, and publications of intergovernmental organizations and governmental agencies, and publications by non-governmental organizations and journalistic sources are used in this research. And further, considering the interdisciplinary approach in this dissertation, economic, historical, philosophical, socio-legal, literature is used to conduct the analysis.

From the onset, I am of the opinion that worker rights are indeed human rights and to have a right is meaningless unless the right is codified, enforced and protected. I believe that worker rights as human rights should have stronger provisions for international protection and enforcement in the globalized world of the 21st century. I believe the most efficient venue for actualizing the international enforcement and protection is through the WTO. It is through the aforementioned methods that this study will test the hypothesis and answer the related questions to support my thesis.

Structure and Content

This dissertation is structured along a chronological timeline that traces early conceptions of human rights, to the emergence of human rights in the aftermath of the Second World War, to contemporary international human rights law in the 21st century. An overview of worker rights as a path to human rights is presented followed by conducting a historical analysis of the development of worker rights at the municipal level, the spread of worker rights, which follows industrialization of states, and the internationalization of worker rights. The internationalization of worker rights illustrates the connection between worker rights and human rights, both having traveled a shared path, intertwined with differing philosophical concepts, whilst traveling along their paths, evolving over time.

Understanding the historical development of economic law is also fundamental to my task, as the product of one's labor is a good or a service that is exchanged for another, and as the world became more interconnected, trade between states increased and

worker rights spread. The emergence of the theoretical framework of free trade against differing economic and political models, which coincided with, and arguably was a result of, and as a response to, the first industrial revolution, are discussed and analyzed in detail with the aim to gain an understanding of the impetus of its development. The development of international economic law is analyzed through its early development in the late 18th century to the Second World War, from the aftermath of the war to the cold war, and culminating with the emergence of the WTO, a rules-based trading regime, which constitutes the contemporary era in this work.

The WTO is analyzed and discussed through an overview of the institution itself and the development of its jurisprudence, with special focus given to issues not directly related to pure economic concerns, which arguably are closely linked to human rights therein. I embark upon a hypothetical exercise, discussing utilizing the WTO to adjudicate violations of human rights. I then narrow my focus to my conception of workers' rights, and I discuss the current dilemma of the WTO, which creates opportunities. Lastly, I imagine worker rights as human rights and seek to analyze and present arguments for and against worker rights as human rights and the need for inter-institutional cooperation on trade-labor linked disputes at the WTO. It is my aim to connect arguments of the former, and make the case to connect worker rights to human rights. Indeed, this is the apex of this study, which demands a discussion of the conditions necessary for human rights, a discussion of basic rights, state sovereignty and human rights, world trade and human rights, and TNCs and human rights. The apex is best understood through having gained a deeper understanding of the path to human rights, the path to worker rights, global governance, and international economic law, as discussed in the proceeding chapters. I conclude by arguing for workers' rights as human rights and the necessity of protecting them by making the case for reforming the WTO in a manner whereby worker rights as human rights can be actualized through international enforcement linked to trade, with the WTO having the jurisdiction, aided by inter-institutional cooperation with the ILO. The recommendation is the inclusion of an additional annex for worker rights as human rights and a role for the ILO in adjudicating such matters within the WTO.

To achieve this end, this thesis begins with an introduction, overviewing the relevance of the topic, stating my hypothesis, methodology utilized and outlining the structure of this study. This thesis is divided into three main parts and a conclusion and recommendations part:

> Part I — The Path to Human Rights: From ancient times to the contemporary era.
>
> Part II — The Path to Worker Rights: From the first industrial revolution to the internationalization of worker rights.
>
> Part III — World Trade, International Economic Law and Human Rights: The development and evolution of world trade within the context of uneven consideration of worker rights and the relationship between the World Trade Organization and human rights.
>
> Conclusion and Recommendations — The conclusion overviews the main findings in Parts I, II and III and argues for considering worker rights as human rights and the necessity of inter-institutional cooperation between the World Trade Organization, the International Labor Organization in protecting workers' human rights.

The main objective of Part I (The Path to Human Rights) is to provide a theoretical and methodological framework for understanding the evolution of human rights. This is elemental to viewing worker rights as human rights in the contemporary globalizing and managed international trade environment. With every new beginning begins with some other beginnings end. I examine the topic from three points of view. First, I seek to identify and define early conceptions of rights and trace the path to human rights through a historical overview beginning with ancient times, charting a chronological path forward to the emergence of contemporary human rights norms. Second, I seek to understand the dichotomy of human rights, that is to say, to understand arguments for and against the universal understanding, and application of human rights. This is through accomplished through examining leading scholars' views, a textual analysis of contemporary human rights instruments, and declarations by international organizations and institutions. And third, I discuss the concept of basic human rights with the aim to connect worker rights to basic human rights.

The main objective of Part II (The Path to Worker Rights) is to trace and analyze the historical development of worker rights. This is achieved through an analysis of early

municipal laws regulating the employer-employee relationship which begins with municipal laws preceding, and those dating from, the first industrial revolution. The analysis is focused on early laws addressing collective bargaining and early laws protecting workers at work, both of which emerged with the technical advances of the times. However, the relationship between employer and employee can be traced much earlier, to the feudal system and the changing dynamics of society brought about by the first industrial revolution. The first industrial revolution is manifested through new innovations in the manufacturing process, which increased trade between states, which then developed and became more dynamic and connected than ever before. The advent of the aforementioned technological advances changed the social and economic order. Through the analysis of the earliest labor laws a foundation is established which suggest that principles of contemporary labor law date be can be traced to the industrial revolution.

It is my suggestion that these early laws were the of a combination of forces, through largely, as a result of societal responses associated with poor living conditions and dangers that workers were exposed to due to the hazards in the manufacturing processes associated with the industrial revolution, and a lack of regulation thereof. As technology spread, so did worker rights, as states were competing economically with one another, a global society was developing and people were becoming more connected. Societal awareness of differing conceptions of rights, be they economic or political, expressing one world view or the other, also contributed to the spread of worker rights and the internationalization of worker rights was actualized with the creation of an international institution dedicated to worker rights. With the internationalization of worker rights, and the development of human rights (as discussed in Part I) various initiatives to hold TNCs accountable for human rights (and fundamental worker rights) were advanced, with limited success and impact. Those efforts are overviewed to gain an understanding of the difficulties in holding TNCs accountable for violations of human rights in states in which they are active.

The main objective of Part III (The Path to International Economic Law) is to present a historical overview of world trade, the development of international economic law, focused on trade law, and its relationship with human rights. Chapters in this part will study the question of if and how worker rights were contemplated in earlier visions of

managed trade agreements. Theoretical foundations of free trade are discussed and also how the orthodox theory in some ways is perhaps outdated in the contemporary era. Indeed, sovereignty has changed in current international law in general and especially with respect to managed trade, yet why were worker rights as human rights not part of the post second world war trade agreements? I seek to examine the topic from three perspectives. First, I analyze the development of international trade, leading to managed trade agreements by focusing on globalization as a natural phenomenon throughout history, to be understood as progressing and deepening with greater stability and cooperation among nation states in global governance. Second, I analyze the development of international economic law, world trade and sovereignty in the post second world era, and international trade under GATT 1947. Third, I analyze the creation of the WTO after the collapse of the Soviet Union and the emergence of a new world economic order. I then proceed to analyze the organizational structure of the WTO and its jurisprudence. My focus is on problems within the operation and procedures of the WTO, which I analyze by examining the jurisprudence of the WTO, noting the deficiency of the WTO to address worker rights, thus leading to competitive advantages for WTO members that do not respect, provide for, or maintain effective enforcement mechanisms for worker rights, as human rights. I proceed to analyze selected WTO dispute settlement proceedings involving non-economic matters closely related to human rights. I then analyze the possibility of ad hoc use of WTO mechanisms as a means of protecting workers' human rights and reflect on the jurisprudence of the WTO concerning the outcome to hypothesize on the likely outcome of using WTO mechanisms as an outward measure in protecting – or punishing a WTO member for human rights violation and specifically that of workers' human rights. Lastly, discussed is the precarious position of the WTO in 2021, noting its past achievements and shortcomings, and the challenges and opportunities which, given the political will, await it. Indeed, is my assertion that uneven consideration has been given to worker rights throughout the development of world trade and remains so in the contemporary era.

The main objective of the Conclusion and Recommendations Part is to tie the findings of Part I, Part II and Part III together, in the hopes of making my case, that worker rights are indeed basic human rights, which should be protected through inter-institutional cooperation between the WTO and the ILO. To achieve this objective, I

proceed to discuss the philosophical conception of worker rights as human rights, focusing on the arguments and theories for the acceptance of worker rights as human rights. These arguments I reflect on through linking to earlier discussed notions such as the conditions necessary for human rights, the concept of basic fundamental human rights, the motivation for early labor laws, which led to the internationalization of worker rights. Furthermore, the relationship between transnational corporations and human rights is discussed, highlighting the need for international protection of human rights in general, and specifically worker rights.

By drawing upon the research in earlier parts of this dissertation, I argue that due to differing national and regional standards of WTO members in the observation, promotion and enforcement of human rights different, amounts to a competitive advantage afforded to TNCs with enterprises located in WTO members having ineffective protections for worker rights and human rights. This raises the question of state sovereignty in the instances of protection of human rights through interference with the sovereignty of a state is permissible. Indeed, state intervention can be used (and has been) as a policy tool of states to ensure that individuals have recourse to their basic rights, indeed to the most fundamental right, the right to life.

This dissertation is written using American English except in instances when directly quoting or referring explicitly to source material written in British English. And once again, my approach in this project, as outlined in the methods and sources section of this introduction, is interdisciplinary in nature, focused on tracing the path of worker rights, human rights, and the relationship with the managed trading regime of the WTO, with the aim to envision the way forward for a more just relationship among all stakeholders in the globalized world of the 21st century.

PART I

THE PATH TO HUMAN RIGHTS

Contemporary human rights are a recent development in history and can be traced to the period of the Second World War, which resulted in the establishment of the UN to secure peace and human rights.[26] However, as Hernández-Truyol, Berta Esperanza, and Stephen Joseph Powell recognized, the conception of the ideas of contemporary human rights traces back into antiquity, to the city states of ancient Greece and the Roman Empire, most prominently with the Stoics whose view of natural law doctrine that thought a force existed which served to bind human conduct with the law of nature, and further, that the actions of humans should be judged accordingly.[27] The aforementioned scholars are of the opinion that an underlying postulation of natural law is the equality of persons, based on a shared condition, that of human nature, and this higher source of law demands protections of individual rights.[28] Indeed, St. Thomas Aquinas held that the supreme law is that of the creator, God, and that laws made by human beings are subordinate to the creator, and that in the instances of a sovereign mistreating its subjects is amounts to grounds for intervention by another sovereign.[29] The observations by Hernández-Truyol, Berta Esperanza, and Stephen Joseph Powell indicate that while the conception of human rights is a recent development, yet present in the earliest recorded history are notions of the ideas that led to the contemporary conception of human rights.

To ascertain the merits, this Part seeks firstly to develop an understanding of the modern conception of human rights through a historical overview on the development of human rights ideas and through this process, strives to prove the "universalism" of human rights. The idea of the universalism of human rights is that human rights developed through the many diverse cultures and religions of the world and are not

[26] Micheline R Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2008) 16.
[27] Berta Esperanza Hernandez-Truyol and Stephen J Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York University Press 2009) 50.
[28] ibid.
[29] ibid 51.

limited to the Western tradition that is rooted in the European Enlightenment.[30] It is through a historical overview of the legal and philosophical teachings and influences of the world's first organized civilizations to the contemporary era that I task myself in tracing notions of how human rights culture in the 21st century developed and further, how human rights developed by virtue of this process are thus founded upon multi-cultural understandings of what constitutes human rights and thus are universal.

[30] Ishay (n 26) 17.

CHAPTER 1

THE DEVELOPMENT AND EVOLUTION OF HUMAN RIGHTS

To understand the evolution and development of contemporary human rights, one must first define what is a right and what is the theoretical basis for rights. There are a number of ways to define what entails a right, its function and its relationship to others. For example, Joseph Raz conceptualizes rights as being individualistic, grounded on what it does for the holder of the right, independent of its impact upon others. Raz envisions an account of a right as justified on the basis that a right holder's well-being, 'X has a right' if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'[31] Henry Shue maintains that 'a right provides a rational basis for a justified demand'[32] and further, Shue concludes that if one has a right, then the enjoyment of the right must be guaranteed, and conditions established, by society, so one can actually enjoy the right.[33] These are just two examples of the many different conceptions of rights offered as an illustration to the still unsettled conception of rights among moral and legal philosophers.

In consideration of the above-mentioned examples of rights and duties, one must inquire further that if individuals have rights, then who confers this right, that is to say is a right something that an individual possesses naturally, say due to one's physical existence? Or does a right arise as the result of an agreement between another party? If then a right something that is conferred upon an individual, then by what institution, perhaps by a sovereign or another individual? Further, are rights defined as what one is entitled to receive in the sense of protections, guarantees and actions, or are rights defined as to how an individual is to be protected from others in the sense of the prohibition of negative actions against an individual? And are rights limited to duties that exist between individuals or also between individuals and the sovereign? And finally, are rights limited in their application to a specific jurisdiction, or are rights

[31] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 116.
[32] Henry Shue, *Basic Rights* (2nd edn, Princeton University Press 1996) 13.
[33] ibid.

universal, that is to say, does an individual have rights regardless of wherever the geographical location of the person may be and if so, what might these rights be? Indeed, to arrive at a concept of rights involves answering many questions and further, in arriving at answers, there may be differing understandings and viewpoints. I will revisit these questions at the conclusion of this chapter and hopefully provide some direction as to how answering these questions relate to a conception of rights in general and of human rights specifically.

In this chapter my analysis is focused on the development of what can be said to encompass a "concept of rights" and human rights in particular, and this path is undertaken from a chronological perspective. I start my analysis with the earliest records of legal codes and proceed forward with my analysis to legal codes the contemporary era. My analysis however is limited to rights that in my estimation are notions of, or conceptions of contemporary human rights as enshrined in the UDHR. Throughout my analysis, I opine how the conceptions of rights in differing eras and cultures cannot be conceived as modern human rights, or I should say are lacking the individualist approach that characterize human rights and other specific delineations in how human rights are commonly understood in the contemporary era. While developing a list of "rights" can be important in an analysis of the development of human rights, I believe that it is more important to understand the content of the rights as a means of ascertaining what the right entails, that is to say, how it is to be conceived in light of addressing the many questions concerning rights that I posed in the previous paragraph.

To achieve this understanding, I defer to viewpoints from leading human rights scholars, legal philosophers, legal historians, and moral philosophers in conducting my analysis of what the limits are of "rights" and the content of the "rights" in general sense and rights as human rights. It is through this process that I arrive at an understanding of how human rights developed over the course of recorded history, how human rights are characterized as a relatively recent phenomenon (in terms of the historical record), and why human rights are so important. And it is through my study of the development of rights that I shall attempt to clarify the questions from the preceding paragraph about rights in general, the differing philosophical concepts of

human rights, and finally, to qualify which human rights are "basic, human rights" and are thus universal.

1.1. Ancient Times

To understand the evolution and development of rights and the notion of rights, and to find ideas of what are considered human rights in the contemporary era, I first turn to the earliest surviving legal code, Hammurabi's Code[34] to analyze how rights were codified in antiquity and the meaning of this codification. Hammurabi's Code, which describes among other things the regulations and legal relationship of individuals with one another in areas such as marriage and divorce, remuneration regulations of craftsmen and agriculture labors, the use of land, and duties and fees of professionals in ancient Babylon inducing doctors, builders, sailors and others.[35] As is evident in the oldest surviving account of laws from one of the earliest civilizations, the rights of individuals have been defined in personal relations with one another, relations between the individual and the sovereign, and relations between individuals in economic matters. Further, the code outlines aspects of what is viewed as contemporary human rights, in matters such as freedom of expression, protections of individuals, including slaves in ancient Babylon. The right to a trail by judges, the presumption of innocence, rights to present evidence in the accused's defense, and further, the rule of law – that laws that are so fundamental apply to everyone, even to the king are delineated in the code.[36]

[34] The inscriptions are not a legal code in the traditional sense, but rather are a record of proceedings that were published which ascribed legal rules and the authority of the sovereign. An important aspect was the need for the King to communicate with his subjects the ways and means for justice in the kingdom, as it was understood that the King had a divine mandate to provide for 'just' ways for members of the public to see. Further, the 'code' was widely studied by those wishing to become judges and magistrates. Most of the 'laws' are grounded on the principle of redistributive justice. For more see: Kathryn E Slanski, 'The Law of Hammurabi and Its Audience' (2013) 24 Yale Journal of Law & the Humanities. 97, 105-110; 'Law Code of Hammurabi, King of Babylon | Louvre Museum | Paris' <https://www.louvre.fr/en/oeuvre-notices/law-code-hammurabi-king-babylon> accessed 5 August 2020.

[35] Ishay (n 26) 19.

[36] Paul Gordon Lauren, 'Justice and Rights in Legal Texts from Hammurabi to the 18th Century' in Dinah Shelton (ed), *The Oxford handbook of international human rights law* (Oxford University Press 2013) 161-162.

Jewish law as recorded in the old testament of the *Bible* also touches on what we view as contemporary human rights, with regards to responsibilities owed to other individuals. Notions of autonomy, tolerance, security, and morality are illustrated in the Ten Commandments, which make no distinction between peoples, that is to say that the commandments applied equally to Jews and Gentiles.[37] Indeed just as with the Code of Hammurabi, the king was not above the law, and the body of Jewish law held that other sources of authority if contrary to Jewish law, where not deeded to be just law and where to be disregarded.[38] And just as Jewish law has elements of what are now human rights, we also see that under the Islamic religion, the responsibility for the protection of others, including the weakest members of society, and notions of social justice and respect for all human beings.[39] Further, in the New Testament of the *Bible*, the teachings of Jesus commanded Christians to be responsible to others, to live a compassionate life, and to care of the sick and elderly, the oppressed and to embrace social justice.[40] Indeed, as shown in the above examples, the Abrahamic religions all embraced teachings that would find a place in contemporary human rights law.

However, problematic in Islam is the source that is connected with the teachings and laws is not that of one's being human, but that of the divine (Allah) and the duties owed to the divine by the holders of such rights.[41] Nevertheless, it is evident, from the earliest records of the middle east region, that the idea of human beings having rights in respect to their dealings with one another and in the relationship between themselves and the sovereign, and that no one is above the law was present. Yet these ideas were not equal in application, that is, certain groups of classes of people could be and were excluded from the goodness of equality.[42] Despite the source not being from the individual but the divine these ideas nevertheless encompass conceptions

[37] Ishay (n 26) 20.
[38] Lauren (n 36) 166.
[39] ibid.
[40] ibid 168.
[41] Jack Donnelly notes that several authors argue that human rights concepts are at the core of Islamic doctrine and he argues that this is not correct. The focus of his argument is that what can be conceived as principles of human rights are actually commands by Allah and thus are not grounded in human rights. Though he does admit there is a strong case that the teaching of Islam does accord goodness and human dignity, yet it too is grounded in Islamic religion, not in an individual's being a human being. For more see: Jack Donnelly, *Universal Human Rights In Theory and Practice* (3rd edn, Cornell University Press 2013) 72-78.
[42] Micheline R Ishay, 'What Are Human Rights? Six Historical Controversies' (2004) 3 The Journal of Human Rights 359, 361-362.

and ideas of human rights in the contemporary era. Admittedly, while the source of such rights is not from a human being's humanity, the ideas of and conceptions of rights as expressed in the earliest recorded records from the ancient times indicate societies bound by the principles of equality, subsistence rights, respect for others, and the rule of law, even if limited to their own community.

In other parts of the ancient world, China and India, ideas emerged from philosophers of the religions Buddhism and Hinduism that touch on conceptions of contemporary human rights. In China, Confucius (551-479 BCE) stressed the importance of treating others in a manner that would impose no harm, in a manner of justice, practicing tolerance and stressed that laws should serve to achieve justice, and that individuals should interact with one another in a practice of goodness as the world was based on a common humanity, shared between all the peoples of the world.[43] Further, Confucius believed that a sovereign lacked legitimacy if it did not act in good faith and that a compassionate sovereign is one that provides for the well beings of its citizens and is one that will limit the affluent member of society to control and shape society.[44] The Confucian philosopher Mencius believed that rulers that oppressed the citizens and persecuted citizens forfeited the right to govern, that such a regime lost its legitimacy.[45] And further, Mencius believed that individuals were more important than the ruler or institutions 'The people are of supreme importance; the altars to the gods of earth and grain come next; last comes the ruler'.[46] The ideas expressed by Confucius and Mencius are fused with the concept of a just and legitimate sovereign, which places human beings above the ruler, maintains the rule of law, and is committed to limiting the power of the sovereign, which are all conceptions of contemporary human rights.

However, as Jack Donnelly notes, the Confucius concept of an individual's dignity and worth was that which had to be earned, by living a life that is in conformity with the morality code of the community as a collective, and could be lost.[47] Donnelly also notes how some authors have commented that the concept of human rights was not

[43] Lauren (n 36) 169.
[44] Ishay (n 26) 38.
[45] Lauren (n 36) 169.
[46] Mencius, *Mencius* (Chinese University Press 2003) 315; Lauren (n 36) 170.
[47] Donnelly (n 41) 80-81.

known in China until introduced by the West and further, that it is difficult for Chinese to define "rights" in language.[48] I agree that Donnelly's analysis is correct if taken from the contemporary conception of human rights arising from one's inherent dignity, as was his instance on the Islamic conception of rights not emulating from one's humanity, or dignity, but from the divine. However, I also think that the conception of dignity should include tenants of the teachings of other cultures' understanding of dignity.[49]

In ancient India, the *Arthashastra*, an ancient text on statecraft written largely by Kautilya (370–283 BCE) discusses how to govern an empire when facing challenging and confrontational opponents and has been compared by some scholars to the *Prince* by Machiavelli.[50] Further, some researchers contend that as described in the *Arthashastra*, the concept of the state was that of the king and comprised negative and positive functions, with the only moral considerations when making decisions was for the king to do what is right for his subjects.[51] The *Arthashastra* advises that kings are to do more than rule in a just manner, but should also respect the rights of their subjects, treating their subjects fairly through promoting and respecting property rights.[52] A significant part of the work addresses criminal law and criminal procedure, specifically in the handling of evidence and in the administration of courts and advises transparency in proceedings and in the work of the judiciary.[53] The advice rendered in the *Arthashastra* does indeed embody concepts of what can be understood as due process of law and fair and equal treatment of individuals, which are the rights an accused is afforded in a just legal system. However, it should be noted that in Hinduism there exist inequalities along a regimented caste system.[54] The third king of

[48] ibid.

[49] On the point of consideration for other cultures conception of dignity, I agree with Donnelly that one should be careful not to see human rights as something that they are not from a cross-cultural viewpoint, as so doing undermines human rights and lends support for the practices of repressive regimes. For more on a cross-cultural viewpoint on human rights see: ibid 87-88.

[50] Lauren (n 36) 170; Ishay (n 26) 29; Prem Poddar, 'The Differential Uses of Kautilya's Arthashastra' (2016) 14 Academic Quarter 96, 99.

[51] Shreya Bhattacharya and Kankana Saikia, 'Political Pragmatism and Ethics in Kautyla's Arthashastra: Contradiction or Complementarity' (2019) 2 Ethics, Politics & Society 111, 115.

[52] Lauren (n 36) 170; Ishay (n 26) 29.

[53] Lauren (n 36) ibid; Ishay (n 26) ibid.

[54] Surya Prasad Subedi, 'The Universality of Human Rights and the UN Human Rights Agenda: The Impact of the Shift of Power to the East and the Resurgence of the BRICS' (2015) 55 Indian Journal of International Law 177, 194.

the Mauryan dynasty, Asoka (304-232 BCE) ruled for almost 40 years and at times his rule was ruthless and characterized by carnage and brutal military conquest to govern and rule the multi-ethnic Indian subcontinent, yet in his later years he converted to Buddhism and expressed regret for his acts.[55] During the course of his rule, he initiated reforms to the judicial system, which are known as *The Edicts of Ashoka*,[56] which have been cited by many scholars as respect for what are contemporary human rights, including religious freedom, social justice, equal protection under the law, respect for the environment and human life.[57] As illustrated in the Fourth Pillar Edict Delhi Topra, 'there should be both impartiality in judicial proceedings and impartiality in punishments'.[58] Individuals in the multi-ethnic and cultural dynasty, regardless of their social or economic status or religious affiliation, were to be treated equally before the courts and in punitive sanctions.

Many scholars are of the opinion that the teachings of Stoic philosophy are linked to conceptions natural law and to human rights.[59] The Greek Stoics believed that humans are equal to one another by the virtue of being human[60] and those laws and institutions that did not respect the equality of human beings are contrary to nature and the natural order.[61] Further, the conception of the law of nature was placed above the needs of a specific sovereign or ruler, governed the universe and provided the

[55] Lauren (n 36) 171.
[56] ibid.
[57] ibid; 'Bibliotheca Polyglotta' <https://www2.hf.uio.no/polyglotta/index.php?page=library&bid=14> accessed 5 August 2020; Stephen James, *Universal Human Rights: Origins and Development* (LFB Scholarly Publishing LLC 2007) 8.
[58] James (n 57) ibid; 'Bibliotheca Polyglotta' (n 57) ibid.
[59] While the ancient Greeks, like all ancient civilizations did not have a word for 'rights' in the sense of the Enlightenment's conception of rights, there was an understanding of the concept of what a right entails. The Stoic's conceptions of individual rights are grounded in nature and in humanity's quest for solidarity. For more see: Phillip Mitsis*, The Stoic Origin of Natural Rights. Topics in Stoic Philosophy, Ed. Ierodiakonou. (1999). Oxford University Press.* (Katerina Ierodiakonou ed, Clarendon Press 1999) 154.
[60] Esperanza, Hernandez-Truyol and Powell (n 27) 50.
[61] While Stoic thinking did not have an explicit term for "rights" some scholars assert the Stoic perception of individual freedom and self-determination is based upon humanity, that is to say the natural sense of an individual being free to choose rests with the individual, and is grounded on rationality. Yet rights to life and health, for example rest with the prevailing social conventions and are not "natural rights". For more see: TL Tsolis, 'The Stoic Cosmopolis: A Vision of Justice and Virtue in a Multicultural Society' (2000) 2 Phronimon: Journal of the South African Society for Greek Philosophy and the Humanities 336, 336-340.

basic framework for rights.[62] However, other scholars have a different view and reject the position that Stoic philosophy contributed to later conceptions of natural law and human rights; for example, Jann Edward Garrett contends that there is no direct linkage between Stoic philosophy and contemporary human rights.[63] Garrett arrives at his position through a comparative analysis of the primary teachings of Stoicism and contemporary human rights culture. In his analysis he looks closely at the teachings and beliefs of ancient Greek and Roman Stoic philosophers. Garrett does make a compelling argument that the teachings of Stoic philosophy are incompatible with contemporary human rights namely, which in my opinion is clear as different classes of individuals were treated differently in ancient Greek and Roman society and further, that Stoic philosophy has no conception of economic and social rights.[64] Yet the Stoic conception is that individual rights derive from the relationship between individuals as members of the society, that is to say, individuals are bound act rationally and morally and equally in consideration to one's relationship with others in the community, and not to act in a manner that would harm a member of the community.[65] This is arguably linked to the inherent dignity of individuals as human beings; thus individuals are not to act in a way towards another that would infringe upon their dignity as human beings.

The Greek philosophers Plato (427–347 BCE) and Aristotle (384–322 BCE) both argued in their own way for a common nature of humanity that was recognized as being grounded in a legally established society, that of the state. But there were differences between Plato and Aristotle on the conception of the state itself, the relationship and role between individuals and the state, and justice. Plato argued that individuals should act justly and within reason, that that the purpose of law is to provide a framework for interactions with one another and with the institutions of the sovereign.[66] Plato developed a concept of humanitarian law that addressed rights owed to civilians in times of armed conflict that limited the actions of the sovereign

[62] Lauren (n 36) 172.
[63] Jan Edward Garrett, 'The Doubtful Descent of Human Rights from Stoicism' (2008) 26 The Nordic Journal of Human Rights 70, 77.
[64] This was not inherent solely to the Stoics. For example, as noted the concept of economic and social rights, as conceived in contemporary human rights is a recent development. And different communities treated different classes of individuals differently (and some still do) until recently. For more see: ibid pp 84-86.
[65] Mitsis (n 59) 158-165.
[66] Lauren (n 36) 172.

against conquered peoples with respect to, among other things, enslavement, destruction of property and death.[67] These aforementioned principles are today embodied in international humanitarian law. Plato also recognized that men and women should be afforded rights in areas where they are alike with regards to education, and occupation.[68] Aristotle saw a connection between the natural order and law, and felt that man-made law (positive law) must conform to the law of nature and if it did not, then natural law could be invoked to as a reason not to follow the man-made law that was in conflict with natural law. Aristotle viewed the need for the rule of law as a must to protect the interests of society from individuals. Perhaps most importantly is the notion of man as a social animal, indeed a political animal as expressed in Aristotle's *Politics*. Aristotle's definition of man as a social animal means in my opinion, that that man develops his highest potential in a social context, living together with one another in an organized society, governed by just rules-rules that have a connection to natural law and the natural order and the rules which govern society in which humans live should be connected to nature and natural law.

Like the ancient Greeks, the ancient Romans also embraced a natural equality between humans and a linkage between the universality of law, and the concept of justice between individuals in their dealings with one another, notably as expressed in the writings of Cicero, and that fundamental human rights cannot be taken away by the laws written by man.[69] The major contribution to the development of human rights law from ancient Rome was the codification of Roman Law, cases, commentaries and codes resulting in the *Corpus juris Civilis,* under the Emperor Justinian (482-565), which serves as the basis of civil law in many parts of the world today, especially in continental Europe. While the *Corpus juris Civilis* achieved little in terms of advance human rights through the abolishment of slavery, all it did for slaves was to enable them to petition for relief from cruelty suffered at the behest of their masters. However, the most important contribution from Ancient Rome in the evolution of human rights is the idea of equality of Roman citizens, which was a fundamental principle in the Roman jurisprudence, and this idea was incorporated into the *Corpus*

[67] ibid 173.
[68] ibid.
[69] ibid 174.

juris Civilis.[70]

1.2. Antiquity to the Enlightenment

After the collapse of the Western Roman Empire, continental Europe was fragmented, due to the collapse of a unifying legal order. Provisions marked the emerging legal orders in law to protect the weak against the strong in areas such as family rights, women's rights, property rights, and procedural law.[71] A compilation of Byzantine law, drawing heavily on the *Corpus juris Civilis* emerged in the Eastern Roman Empire under Emperor Leo III (685-741) who issued the *Ecloga,* which addressed the needs of daily living, furthering the establishment of equality before the law in criminal matters for all persons, regardless of status, and further, in civil law special provisions and protections for women and children were established.[72]

However, the most significant development in this time period that laid the beginnings of rule by constitutional law was the signing by King John of England of the Magna Carta in 1215, which mostly protected the rights of the aristocratic class. This document is viewed as a foundational legal document that establishes limitations on the sovereign and was a crucial point in establishing freedom and provisions that embody what we know as contemporary human rights, and further, the Magna Carta embodies almost every fundamental principle of the English Constitution.[73] King John had violated a number of ancient laws and customs to protect the rights of his subjects, and a rebellion occurred amongst feudal barons, and King John accepted limitations on his rule and acknowledged the right of all free citizens to inherit and own property, the right of the church to be free from interference by the crown, limitations on excessive taxation, due process and equality before the law, and the right of widows who inherited property to choose to remain single if they so desired.[74] Related to the Magna Carta is the Golden Bull of 1222, which is a document that

[70] Daniel R Coquillette, *The Anglo-American Legal Heritage* (2nd edn, Carolina Academic Press 2004) 1-35.
[71] Lauren (n 36) 175.
[72] ibid 176.
[73] Md Kamruzzaman and Shashi Kanto Das, 'The Evaluation of Human Rights: An Overview in Historical Perspective' (2016) 3 American Journal of Service Science and Management 5, 8 <https://www.researchgate.net/publication/318851323_The_Evaluation_of_Human_Rights_An_Overview_in_Historical_Perspective>.
[74] Lauren (n 36) 177.

limited the powers of the monarch in Hungary, codifying the rights of nobles to property and further, if the monarch acted contrary to the law, the Golden Bull established the right to disobey him.[75] These aforementioned documents, in England and Hungary limited the power of the sovereign while establishing rights of the subjects are seen as negative rights-that is limitations placed upon the sovereign in regards to relations with the subjects, which embody contemporary human rights.

Scholastic theologians developed the idea of the dignity of human kind as a gift from God. In *Summa Theologie*, Thomas Aquinas (1225-1274), the concept of natural law was developed whereby Aquinas believed that a relationship existed between man-made law (positive law) and natural law and this relationship centered on man-made law being in conformity with natural law, and if it was not so, then it was not a just law; it may appear to be law, it may have the form and substance of law, yet if it were in conflict with natural law, it is not law and people are justified in disobeying them. In this manner, the views of Aquinas in this respect are similar to the views of the ancient Greeks, Romans, Chinese and Indian scholars, which is foundational for the development of natural rights theory.[76]

The Renaissance, which most historians agree began in the 14th century, was a cultural and intellectual movement that heightened interest in the classical period (ancient Greece and Rome), especially embracing an interest in mathematics, natural science, education, literature and art. Importantly, an interest in humanism and reason led to changes in the Roman Catholic Church resulting in the Reformation in the 16th century, which rejected the institutional power of the Roman Catholic Church and stressed religious freedom. Further, advances in technology and mercantilism led European sovereigns to explore the world as never before, taking with them the rule of law and applying it wherever they established overseas empires. Yet with the establishment of colonies, indigenous peoples were oppressed by the conquering Europeans, which engaged in ruthless subjugation, inflicting colossal suffering and exploitation of the indigenous peoples. This conduct led many academics of the time to condemn the practices of the colonizers. Notably, Francisco Suarez (1548-1617) stressed that positive law must be based on natural law, that men are created equal,

[75] ibid.
[76] ibid.

and that by this virtue, sovereigns must be restrained in their actions, even in actions of war. Further, Suarez stressed the need to establish a body of norms that would be applicable in armed conflict.[77] The Renaissance paved the way for further developments in what we can say are principles of contemporary human rights. Marked by the awareness by academics of the negative impacts of colonization, and changes in Europe through the Reformation, rebellions and civil wars, as the sixteenth century approached, a movement was underway, the Age of Enlightenment, which would profoundly change the existing social and political order.

The Age of Enlightenment however marks the true of idea of human rights as the legitimization of the sovereign underwent profound changes between the 16th and 18th centuries. With the decline of feudalism, the rise of the monarch absolutism, organized along a rigid class structure, the environment was ripe for change. Ushered in were revolutionary movements in Europe and in the 'new world' through ideals of Christianity and classical (Greek and Roman) philosophy, and the influences of philosophers of the Enlightenment, most notably, Hugo de Groot, Thomas Hobbs, Immanuel Kant, John Locke, and Jean-Jacques Rousseau.

A leading figure in the development of international law, Hugo de Groot (1583–1645) was a Dutch legal scholar, had a career in public service as the Advocate Fiscal of Holland before being imprisoned for his theological views, and further, he is often referred to as the Father of Modern International Law.[78] Groot authored numerous publications that reflected his philosophy, which was anchored in natural law. His most significant contribution to the development of international law was *De Jure Belli ac Pacis*, published in 1625, in which he argued for the need of a body of laws that would apply to individual states and the relations with one another in the global context, stressing that while the main actors internationally are states, yet individuals and institutions nevertheless have rights and duties that place them in a special relationship to states, which envisions a great society of humankind.[79]

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[77] ibid 179-181.

[78] James G Apple and Christine E White, 'Leading Figures in International Law' (2007) 2 International Judicial Monitor <http://www.judicialmonitor.org/archive_1007/leadingfigures.html>; Lauren (n 36) 181.

[79] Apple and White (n 78).

Grotius developed the idea of self-defense in warfare, which was a departure from the past view of ancient "just war theory", in which his view of Jus ad Bellum placed stringent limitations on the right to war.[80] Further, his contribution to the development of international humanitarian law addressed the need not to cause un-necessary suffering in the conduct of war (*Jus in Bello*). And while he endorsed the idea of non-intervention by states in internal armed conflicts, he did argue that states could intervene on behalf of individuals in instances where it was necessary, due to protect them where it was clear that there arose a need in instances of violation of the natural law with regards to individuals' rights under natural law, which supports humanitarian intervention in the internal affairs of a state.[81] And further still, his views on the protection of non-combatants in times of armed conflict reflected his views on a society of mankind, with certain rights that all humans have by virtue of being human, namely, the right to life, food, and medicine, which are enshrined today in numerous documents as fundamental human rights.[82] As with legal philosophers discussed earlier in this section and the previous one, Grotius viewed natural law as the standard by which man made law (positivist law) should be measured and further under natural law theory, rights emulating from natural law exist detached of any institutional (political) establishment.[83]

The English philosopher Thomas Hobbes (1588–1689) contributes to the development of human rights through his philosophy on the development of the state. Hobbes, writing in the time of the English Civil War, wrote the *Leviathan*, which defends the absolute power of the monarchy. The *Leviathan* is the name of a mystical sea creature that would destroy ships at sea, and Hobbes used it as a metaphor of the state, and the need for the creation of a powerful state to impose order. For Hobbes, the starting point is in the "state of nature", in which man is governed by his state of reason and any action taken in self-perseverance is justified.[84] Indeed, Hobbes has a view of individuals as that of a rationally self-interested animal, which asserts rights in their own self-interest, envisioning the right of nature, "jus natural" where 'every

[80] ibid.
[81] ibid.
[82] ibid.
[83] Lauren (n 36) 182.
[84] Eleanor Curran, 'Hobbes's Theory of Rights - A Modern Interest Theory' (2002) 6 Journal of Ethics 63 <https://link.springer.com/article/10.1023/A:1015875902334> accessed 5 August 2020, 64-66.

man has a Right to every thing; even to one another's body'[85] and thus, with no limitation on rights, individuals enjoy absolute freedom, which inevitably leads to conflicts. Hobbes expounds that in order to escape the state of nature and enduring conflict between all, that individuals enter into a social contact whereby a sovereign is established that limits individual freedoms in order to ensure a stable orderly society. Thus, individuals cede their natural sovereignty – their natural rights to absolute freedom – for protection, and any abuses by the sovereign is a consequence for the betterment of all through ensuring peace and order. The sovereign must justify its exercise of power over the society and interest of individuals. The paramount contribution to human rights by Hobbes is in my view, the right to self-determination and preservation, and further the philosophical ideal of the state, as conceived by Hobbes, which laid the groundwork for the development of rights theory by later philosophers such as John Locke.

Furtherance in the development of human rights, and the English Constitution, the Petition of Right was produced in 1628 by the English Parliament and sent to Charles I.[86] It asserted four principles, (1) the prohibition of arbitrary taxes-taxes could only be leveled with consent of parliament, (2) the reaffirmation of habeas corpus-no subject may be imprisoned without just cause, (3) the declaration that martial law not be used in times of peace, and (4) a prohibition of quartering soldiers upon the citizens. The English Civil War (1642–1651), erupted in 1624 between supporters of parliament and the monarchy over an insurrection in Ireland, led to hundreds of thousands of causalities, military dictatorship and years of disorder, uprisings, and political movements.[87] One such movement, the Levellers, demanded the protection of negative rights in respect to freedom of religion, the right to property, the right to life, the right to elect representatives in parliament, and the right to equal protection under the law led to the English parliament passing the Habeas Corpus Act in 1679.[88] The Habeas Corpus Act is an integral part of the English Constitution, and it requires that the detention of an individual must be shown to be legal within a timely period

[85] Thomas Hobbes, *Leviathan* (1651) chapter XIV [1] [4].
[86] Petition of Right [1627] (UK) <https://www.legislation.gov.uk/aep/Cha1/3/1> accessed 5 August 2020.
[87] Lauren (n 36) 183.
[88] ibid; Paul Gordon Lauren, *The Evolution Of International Human Rights: Visions Seen* (1st edn, University of Pennsylvania Press 1998) 14.

(three days unless the offense is a felony or treason) by a review of the detention by a court, no matter who the detaining authority should be.[89]

The rights enshrined in the Petition of Right were further extended in the English Bill of Rights of 1688,[90] which limited the powers of the sovereign, defines the rights of Parliament, the right to petition the monarch without fear of retribution, and further, set out basic rights for all Englishmen, which are still applicable in England and Wales and in jurisdictions of the Commonwealth.[91] In addition to the aforementioned limitations on the monarchy, the English Bill of Rights provided that the only courts shall be civil courts, prohibiting religious courts, the right of the people to have firearms for personal protection, freedom of speech in debates and parliamentary proceedings, and the prohibition of excessive bail and cruel and unusual punishments.[92] An awareness of rights and natural rights theory was an outgrowth of the English Civil War. The above-mentioned legislative milestones attest to the significance of rights theory in shaping the English Constitution.

One of the most influential rights based philosophers of this era is John Locke (1632-1704), considered by many scholars as a founder of liberalism, which interprets human rights as the rights entitling individuals to civil, political, and property rights.[93] Locke asserted that these rights exist prior to the establishment of organized societies and further, that this applied regardless of the location of the individual, not only in Europe, but universally, throughout the world, to all people.[94] Professor Michael Goodhart and others argue that Locke's view of rights and freedoms represent the foundation of modern capitalism as expressed through neo-liberalism and highlight the challenges of human rights in an age of globalism and political order.[95]

Nonetheless, Locke's natural rights theory as expressed in his most noted work, *Second Treatise of Government* of 1690, in which he asserted that the binding

[89] Habeas Corpus Act [1679] (UK) <https://www.legislation.gov.uk/aep/Cha2/31/2/contents> accessed 5 August 2020.
[90] Bill of Rights [1688] (UK) <https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction> accessed 5 August 2020.
[91] Kamruzzaman and Das (n 73) 8-9.
[92] ibid; Lauren (n 36) 183-184.
[93] Michael Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' (2003) 25 Human Rights Quarterly 935, 938.
[94] Lauren (n 36) 184.
[95] Goodhart (n 93) 938.

together of humankind into orderly societies was for the protection of and enjoyment of the laws of nature – the natural rights that all humans have by virtue of their humanity – those being expressed as the right to life, liberty and property and the right to be free from infringements upon said rights, and further, that the basis for legitimacy to govern rest in the consent of the governed, and if the government infringed upon the consent of the governed, then the governed were within their rights to resist.[96] For Locke, the state must justify its exercise of power and that justification is with the contract, or consent of the governed. While Locke agreed with Hobbes about the brutality of the state of nature, he argued that an individual's natural rights are superior to that of the state, and indeed, as earlier stated, exist prior to the formation of the state, and further, could not be taken away nor relinquished by individuals themselves.

Locke's view of individual rights marked a departure from the medieval conception of rights and obligations linked to an individual's status in the hierocracy, bestowed at birth, grounded in the religious order and facilitated through local customs and norms[97] and thus served as a challenge to the established order. Locke disagreed with the absolute exercise of power by the sovereign, but of limited power, that expressed in the social contract by the governed, and further, if the state exceeded the power and trampled on individuals' rights, the contract was broken and the people were justified in revolting. Indeed, Locke's right based theory enabled the American Revolution of 1776, and the views of the founders of the United States when establishing the U.S. Constitution in 1787, and the Bill of Rights in 1789, and likewise influenced the French Revolution (1789) and the Declaration of the Rights of Man and the Citizen (*Déclaration des droits de l'homme eet du citoyen de* 1789).

The Swiss philosopher, Jean-Jacques Rousseau (1717–1778) writing at a time of economic transformation and societal change has been characterized as 'the last of the ancients and the first of the moderns'.[98] Rousseau conceived of human nature in a manner than can be associated with human rights – namely liberties, in a natural, social and moral sense. In 1762, Rousseau published *The Social Contract*, which is

[96] Lauren (n 36) 184.
[97] Goodhart (n 93) 947-948.
[98] Mads Ovortrup, *The Political Philosophy Of Jean-Jacques Rousseau The Impossibility of Reason* (Manchester University Press 2003) 105.

his major contribution political theory rights theory, in which he argues, like Locke, that man should never be forced to give up his rights, yet for Rousseau, in the state of nature, to protect individuals rights, a social contract is envisioned whereby individuals would surrender their rights not to a king, but to one another, a community of all peoples, which shall constitute a sovereign, in which all members have an opportunity to express their will in making laws for the good of one another, the public good.[99]

For Rousseau, individuals in the state of nature act as an animal, but are not truly free until entering into the social contract with one another, renouncing freedom in the natural state for moral order in the civilized state. Once organized into a society, each member is equal to one another in terms of decision-making. Freedom then is the basis of the state and is inconceivable without a state, but a state, in which decision making, is shared by all members equally and further, man is enslaved when his existence is dependent upon others, when this dependence is due to one's inability to satisfy one's needs.[100] Indeed for Rousseau, inequality is possible due to the natural human condition, in which individuals are increasingly dependent on their needs from others, resulting in an erasing freedom, as each is enslaved to the other for their basic needs.[101]

This is a significant departure from Locke, in that in the natural condition, individuals become less free less pleasant with the establishment of ownership, especially of land, and further, Rousseau views the establishment of cooperation to enhance one's wealth as the key source of discontent within society, leading to an undesirable outcome for individuals. To address this problem, Rousseau envisions a social contract creating a state where the goal is to protect individuals' freedoms, where power is exercised through rule of law, where all individuals in the society enjoy equal decision making and whose rights are protected through the rule of law, expressed through the general will of the people. And further, Rousseau believes that individuals should be

[99] Iwona Barwicka-Tylek and Dorota Pietrzyk-Reeves, 'Abstract Liberty in Jean-Jacques Rousseau: Between the Ancient and the Modern' (2017) 9 Cracow Studies of Constitutional and Legal History 39 <https://www.ejournals.eu/Krakowskie-Studia-z-Historii-Panstwa-i-Prawa/2016/Tom-9-Zeszyt-specialny/> accessed 5 August 2020, 40, 43-44 .
[100] ibid.
[101] ibid 48-52.

compelled to follow the norms of the general will, that doing so is a requirement to live in the society, and if one failed to do so, they must leave.[102]

The views of Prussian philosopher Immanuel Kant (1724–1804) contributed much to the idea underpinning contemporary human rights regarding dignity and honor, which Rachel Bayefsky's understanding of Kant means that human dignity applies to humans rather than institutions, and applies dignity equally to all human beings, and is inherent in all humans by the very virtue of being human, with no need for the imposition of dignity by a sovereign, institution or social ranking in society.[103] Kant is widely understood the concept of dignity to mean that individuals are not an means to an end, but rather an end in themselves.[104] Thus Kant necessitates that individuals are deserving of respect, applied equality, and assessed an unconditional worth towards one another, and further, Kant rejected the measurement of an individual's worth being premised by one's societal position or material wealth.[105]

Kant's conception of dignity is expressed in the *Groundwork* where he distinguishes between items with a value, worth, that can be exchanged, for items that are above having a price, and cannot thus be exchanged.[106] Kant further contends that individuals have rights not because a right is bestowed upon them by a sovereign or institution, but by virtue of their very being, by their humanity.[107] Further, Bayefsky opines that Kant emphasizes that dignity is something that individuals owe not only to one another, but also to themselves, and that respect for an individual's dignity is to be acknowledged by the state.[108] Insofar as honor, Kant does not equate honor to one's position in society or societal norms or wealth or rank, as compared to others, but of the value and opinion that one ascribes to oneself, in terms of the development of one's self; the effort therefore uphold autonomous reasoning of oneself, not of

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[102] ibid.
[103] Rachel Bayefsky, 'Dignity, Honour, and Human Rights: Kant's Perspective' (2013) 41 Political Theory 809 <http://journals.sagepub.com/doi/10.1177/0090591713499762> accessed 5 August 2020, 811.
[104] Lauren (n 88) 15.
[105] Bayefsky (n 103) 815-816.
[106] ibid.
[107] Aguinaldo Pavão and Andrea Faggion, 'Kant For and Against Human Rights' in Andrea Faggion, Alessandro Pinzani and Nuria Sanchez Madrid (eds), *Kant and Social Policies* (Springer International Publishing 2016) 50.
[108] Bayefsky (n 103) 823.

other's opinions of oneself.[109] As noted by Bayefsky, 'that human rights advocates need not reject honour, but can instead seek to influence the emergence of senses of honour tethered to practices that respect human rights'.[110]

Other enlightenment philosophers, to be, sure also had an influence in developing human rights through their contributions and ideas on how to structure a state by limiting and dividing power of the institutions of government through a system of checks and balances as a means to avoid authoritarianism. Notably Baron de Montesquieu (1689-1755) contended that only through the division of powers in governance could individual rights be protected.[111]

1.3. The Age of Democratic Revolutions to the First World War

The ideas of the aforementioned Enlightenment philosophers had profound impacts and influences throughout Europe and in the colonies of the United Kingdom. Revolutions in France and in the "new world" drew inspiration from the writings of the Enlightenment and enshrined their ideals in the governing documents of governments established in the wake. Nearing the turn of the eighteenth century, the ideas of natural rights, representative governance, and individual freedom gave inspiration to the American colonies to issue the Declaration of Independence (hereinafter American Declaration) on 4 July, 1776, declaring that 'all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness'.[112] The American Declaration demonstrates ideas from Locke had a profound influence upon the author

[109] ibid 825-826.
[110] ibid 826.
[111] Barron de Montesquieu, *The Spirit of Laws* (2nd edn, The Colonial Press 1899) Parts V XI XII.
[112] While Thomas Jefferson's authorship of the Declaration of Independence is disputed, the Declaration of Independence avoided using the word "property" and substituted the word "happiness" because ownership of individuals (slaves), an accepted institution in much of the world at the time, was not necessarily viewed as constituting a condition of happiness, and further, not all signers of the Declaration of Independence were slaveholders, yet all believed in the right to property. See for more: Judith Blau and Alberto Moncada, *Justice in the United States : Human Rights and the U.S. Constitution* (Rowman & Littlefield Publishers 2006); 'Text of the Declaration of Independence | Declaration Resources Project' <https://declaration.fas.harvard.edu/resources/text> accessed 5 August 2020.

of the Declaration, Thomas Jefferson, upon George Mason (Author of the Virginia Declaration of Rights) and led them to proclaim in their writings that Americans were indeed free people, owning their rights to no monarch but from the laws of nature, and that the rights were applicable not only to Americans but to all men.[113] The main ideas in the American Declaration are the rights of individuals and the right to revolution. The colonies engaged in a war for independence with the Great Britain from 1775 – 1783 that ended with the signing of the Treaty of Paris in 1783, recognizing thirteen free and independent states.[114] In 1787, the U.S. would adopt a second governing document, the Constitution of the U.S. creating a federal system of government, with a division of power as envisioned by Baron de Montesquieu and a Bill of Rights.

The U.S. Constitution established a federal government with three distinct branches: An Executive, a Legislative, and a Judicial. The system of checks and balances was designed to ensure that no one branch of government would hold absolute power. The U.S. Constitution, and the Bill of Rights, have many provisions that can be said to encompass contemporary human rights, though admittedly, when adopted, those provisions cannot be said to be "human" in the sense that they applied equally to all persons, regardless of race, gender or social status, as at the time of adoption, one third of the thirteen states allowed for ownership of individuals (slavery), women were not allowed to vote, and neither were nonwhite male property owners. Nevertheless, through U.S. Constitutional law, the rights have been extended to all persons, indeed even to non-U.S. nationals and form the basis for many national constitutions and later human rights agreements, including the UDHR and the International Covenant on Civil and Political Rights, The American Declaration of Human Rights in 1948, and others.[115]

Protected in the Bill of Rights, are positive rights such as freedom of speech, assembly, religion and the press, as well as negative rights such as the prohibition of unreasonable search and seizure, the prohibition of cruel and unusual punishment, and

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[113] Lauren (n 88) 17.

[114] Susan Rosenfeld (ed), 'Definitive Treaty of Peace Between the United States of America and His Britannic Majesty (Signed 3 September 1783) "Treaty of Paris of 1783"', *Encyclopedia of American Historical Documents* (Infobase Publishing 2004) 296, art 1.

[115] Richard B Lillich, 'The Constitution and International Human Rights' (1989) 83 The American Journal of International Law 851 <https://www.jstor.org/stable/2203374> accessed 5 August 2020, 252-253.

compelled self-incrimination. Further, the Bill of Rights prohibit laws that establish religion, and establishes due process in judicial proceedings, thus prohibiting the depravation of any individual's life, liberty or property without due process of law. Also, it provides for a speedy public trail by a jury of one's peers and the protection of double jeopardy in instances of criminal law.[116] While the U.S. Constitution and the Bill of Rights were imperfect documents, considering that slavery was permissible, that slaves were counted as 3/5th of a person (for voting purposes in Congressional districts pro rata to the population of a state) and that voting was restricted to only white male property owners.

Revolution spread to continental Europe in France when the people of France rebelled, storming the Bastille prison, abolishing feudalism, and overthrowing the monarchy in 1789, establishing the First Republic. Influenced by the thinkers of the Enlightenment and the American Revolution, the French revolutionaries sought to follow the example of the United States and declare their own declaration of natural rights, hoping that it would have a profound impact throughout the world.[117] On August 26, 1789, the National Assembly of France approved the Declaration of the Rights of Man and of Citizen[118] (hereinafter French Declaration). The French Declaration defines rights as universal and natural and includes rights to "liberty, property, security and resistance to oppression" and further, declared in the first article that 'men are born free and equal in rights'.[119] Thomas Piketty notes that while influenced by the American Revolution, the French wen further, in seeking to 'create a political and social order based entirely on equality of rights and opportunities.'[120] The French Declaration also provided for the right to property, the right to freedom of expression, protection from arbitrary arrest and punishment, the right to participate in

[116] See for more the Bill of Rights and U.S. Constitution in:Susan Rosenfeld (ed), 'Constitution of the United States, 1787 and the Bill of Rights', *Encyclopedia of American Historical Documents* (Infobase Publishing 2004).
[117] Lauren (n 88) 117.
[118] 'Avalon Project - Declaration of the Rights of Man - 1789'
<https://avalon.law.yale.edu/18th_century/rightsof.asp> accessed 5 August 2020.
[119] ibid.
[120] Discussing the geographical focus on his study on inequality in the twenty-first century, Thomas Piketty proclaimed understanding the dynamics at play in France is the key to understanding future, and the French Revolution in contrast to that of the U.S. provided for 'legal equality in relation to the market' while in the U.S. slavery would endure until abolished and thereafter, racism would persist for another century. For more see: Thomas Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press 2014) 18-19.

the political process, equality before the law, and other protections that were later enshrined into municipal law and the French Declaration becoming an integral part of the French Constitution.[121] English writer, Thomas Paine published *Rights of Man* soon after the French Declaration in 1791, in which he draws inspiration from the American and French revolutions, arguing further for natural rights and introduced the expression human rights.[122]

Both the American Declaration and the French Declaration went on to have a monumental impact throughout the world, from the onset of their publication to the current day, from the slave revolt in Haiti, to the feminist movement, to the establishment of the UN and the issuance of the UDHR in 1948, the ideals expressed in the declarations drawn upon the thinkers of the Enlightenment, which drawn their views upon earlier philosophers of natural law.[123] While the declarations are visionary, in practice there did exist limitations to their realization, most notably in the resistance of the establishment, be it a monarchy, religion or the wealthy, to recognize equality for all persons, especially indigenous peoples of the Americas, women, and slaves. Indeed, the most colossal challenge to applying the concepts of human rights, as expressed in the declarations to all persons lay in that of racial differences, and the view of the world by the West as non-white peoples being backwards, savages, degenerates, furthered with the desire to maintain supremacy in the relationships with persons of color.[124]

Slavery was abolished in England in 1833.[125] However for the U.S. it would take a civil war to end slavery throughout the U.S., as slavery was abolished in several northern states, yet the southern states with an agrarian economy was steeped in the institution of slavery. The American Civil War began on April 12, 1861 and ended on April 9, 1965. On January 1, 1863, U.S. President Abraham Lincoln issued the Emancipation Proclamation, which freed slaves only in states under rebellion, effectively changing their status legally from property to free individuals in states

[121] ibid; Lauren (n 88) 18.
[122] Thomas Paine also published a pamphlet entitled *Common Sense* in 1776, in which he was critical of the British monarchy and argued for the independence of the American colonies. Paine was a notable anti-slavery advocate. For more see: Lauren (n 88) 19-20.
[123] James Nickel, *Making Sense of Human Rights* (Blackwell Publishing 2015) 8.
[124] Lauren (n 88) 21-26.
[125] Slavery Abolition Act 1833 (Repealed 19.11.1998) (UK) <https://www.legislation.gov.uk/ukpga/Will4/3-4/73/contents> accessed 5 August 2020.

(and territories of states) in rebellion.[126] With the ratification of the 13th Amendment to the U.S. Constitution on December 6, 1865, slavery was abolished throughout the U.S.[127] The American civil war was horrific, with more loss of American lives than in all other armed conflicts combined in which the U.S. was a belligerent.[128] In 1862, Columbia law school professor Francis Lieber was asked by president Lincoln to produce a set of rules that would regulate the conduct of the U.S. military in warfare.[129] Among many provisions of the resulting document, General Orders No. 100, issued in May of 1963, which became popularly known as the Lieber Code, were rules regulating the treatment of prisoners, distinguishing combatant from non-combatants and the treatment afforded to both, military necessity, prohibitions of torture, and means of war (*jus in bello*).[130] The significance of the Lieber Code is that it was adopted by many nations with few if any modifications and further, it influenced efforts to codify international humanitarian law.[131]

The First Geneva Convention of 1864 was the result of a diplomatic conference amongst sixteen states in Geneva Switzerland soon after the establishment of an organization that would become the International Committee of the Red Cross.[132] The First Geneva Convention provided for universality and tolerance with respect to nationality, religion, and race in matters related to the conditions of wounded in armed conflicts. Further, the First Geneva Convention laid the groundwork for further developments of international humanitarian law, which with, subsequent revisions protections were extended to maritime conflicts and prohibitions on armaments, and protections for noncombatants, drawing on the principles established in the Lieber

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[126] Abraham Lincoln, 'Emancipation Proclamation, 1863' in Susan Rosenfeld (ed), *Encyclopedia of American Historical Documents* (Infobase Publishing 2004) 874.
[127] 'Avalon Project - U.S. Constitution : Amendments XI - XXVII' <https://avalon.law.yale.edu/18th_century/amend1.asp#13> accessed 5 August 2020.
[128] 'American War and Military Operations Casualties: Lists and Statistics' <https://crsreports.congress.gov> accessed 12 August 2020.
[129] 'Oxford Public International Law: Lieber Code' <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2126#> accessed 5 August 2020; Burrus M Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 The American Journal of International Law 213 <https://www.jstor.org/stable/2998030> accessed 5 August 2020 214-215.
[130] 'Avalon Project - General Orders No. 100 : The Lieber Code' <https://avalon.law.yale.edu/19th_century/lieber.asp> accessed 5 August 2020.
[131] 'Oxford Public International Law: Lieber Code' (n 129).
[132] This Fact Sheet and others, 'Fact Sheet No . 13 , International Humanitarian Law and Human Rights Introduction' (1991) <http://www.ohchr.org/Documents/Publications/FactSheet13en.pdf>.

Code.[133]

The significance of the First Geneva Convention for the development of human rights is that through the principles of universality in treatment of peoples in armed conflicts, with regards to race, religion and nationality, enshrined in the Convention, for the first time in modern history, an international convention was signed by initially sixteen European states, which obligated the signatories to treat combatants and non-combatants equally, by virtue not of their nationality, race nor religion, but by the virtue of being human. Indeed, before the emergence of contemporary human rights as a separate and distinct set of norms, humanitarian law was the means by which individuals, combatants and non-combatants where protected through an international agreement.[134] Further, the First Geneva Convention would be modified and applied to conflicts on land and water as a result of The Hague Peace Conference of 1899, resulting in The Hague Regulations on Land and Naval Warfare.[135] Perhaps the most significant outcome resulted not in hard legal protections of individuals, but in the idea that not just states, but individuals mattered, that there did exist universal rights, and that persons should be afforded protections from the infringement upon their rights by states.[136]

The turn of the century was marked by the industrial revolution leading to advances in technology, a reshaping of the world economic order, cultural movement of the "modernists", and a global awareness like never before, as the world became more interconnected.[137] Global awareness, coupled with the movement of the "modernists" which was a fundamentally transnational philosophy[138] that advocated for 'political systems based on law and justice, constitutional limitations of authority…individual liberty, economic and social freedoms, availability of medical care and educational opportunities, and equal protection of the rights of all'[139] which are indeed human

[133] ibid; 'Treaties, States Parties, and Commentaries - Lieber Code, 1863' <https://ihl-databases.icrc.org/ihl/INTRO/110> accessed 12 August 2020.
[134] Roger Normand and Sarah Zaidi, *Human Rights at the UN : The Political History of Universal Justice* (Indiana University Press 2008) 35-36.
[135] ibid 35-41.
[136] ibid 42.
[137] Lauren (n 88) 73-75.
[138] David Bradshaw, Laura Marcus and Rebecca Roach, *Moving Modernisms : Motion, Technology, and Modernity* (First edit, Oxford University Press 2016) 14-15.
[139] Lauren (n 88) 75.

rights, some old dating from the earliest times as discussed earlier, and others drawing upon the ideas of the philosophers of the Enlightenment. Yet some modernist ideas, such as health care and education for all, have not yet been universally recognized as human rights.[140] Still, this era marked a turning point in the development of human rights, as from the ending of the eighteenth century and into the first decades of the twentieth century, numerous organizations dedicated to the promotion of human rights generally, and for specific human rights issues (women's rights, rights for people of color, worker rights, et al.) were established, many of which are still influential in expanding awareness and advocating internationally for human rights.[141]

Further, political movements centered on human rights issues began to emerge in the early 20th century, notably in Europe with the founding of the Labour Party in Britain in 1900[142] which actively sought protections for workers and regulations of the work environment[143] and the surging in support for the oldest political party in Germany, the Social Democratic Party in 1863, which was, among other issues, actively seeking reforms in equal voting rights, the equality of genders, and labor protections and regulations.[144] In the U.S. the progressive movement at the political level exemplified the struggle for elevating social problems such as poverty, class struggle, corruption, and protections for workers and regulations for the work environment.[145]

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[140] Andrea S Christopher and Dominic Caruso, 'Promoting Health as a Human Right in the Post-ACA United States' (2015) 17 AMA Journal of Ethics 958, 558-559.

[141] Established near the turn of the century and soon thereafter was the Ligue des Droits de l' Homme (1898), International Association for Labour Legislation (1889), International Association for the Protection of Workers (1900), Niagara Movement (1905), National Association for the Advancement of Colored People (1909), Women's Freedom League (1907), Industrial Workers of the World (1095). See for more: Lauren (n 88) 75-98; 'International Association for Labour Legislation, 1889 | UIA Yearbook Profile | Union of International Associations' <https://uia.org/s/or/en/1100048629> accessed 5 August 2020; 'Oxford Public International Law: International Labour Organization (ILO)' <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e490#> accessed 5 August 2020; 'Social Welfare History Project Niagara Movement (1905-1909)' <https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/niagara-movement-1905-1909/> accessed 5 August 2020.

[142] 'Labour's Legacy - The Labour Party' <https://labour.org.uk/about/labours-legacy/> accessed 5 August 2020.

[143] Lauren (n 88) 81.

[144] Michael Reschke, Christian Krell and Jochen Dahm, *History of Social Democracy History of Social Democracy SOCIAL DEMOCRACY READER* (2013) 35-41.

[145] Maureen A Flanagan, 'Progressives and Progressivism in an Era of Reform' <https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-84> accessed 5 August 2020.

More radical movements also emerged in pursuit of social and economic justice, centered on Marxist ideology of class struggle, expressed by the exploitation of the working class by the bourgeoisie, and the need to reorder society so workers could fully be emancipated and realize their rights.[146] Inspired by the V. I. Lenin, Marx, Engels, the Second International in was established in 1889, 13 years after the First International was dissolved due to power struggles and divisions within.[147] These more radical movements ushered in a series of revolutions, beginning with the 1905 Russian Revolution, resulting in the suspension of liberties in the wake of bloodshed, revolts and terror, which eventually forced the monarch Alexander II to issue the October Manifesto and the 1905 Russian Revolution was soon followed by revolts in Turkey, Mexico and China, based on principles of equality, social justice and individual freedom.[148]

1.4. The First World War to the Second World War

The First World War (hereinafter WWI) erupted soon after the assassination of Archduke Franz Ferdinand and his wife, Archduchess Sophie in Sarajevo on 28 June 1914.[149] The conflict would eventually engulf over 32 states, divided into alliances spanning the world, with the conflict raging for over four years using the most modern and efficient means and methods of warfare known for the time, resulting in an epic destruction of humanity, with estimates of 8.5 million causalities and estimates of more than 30 million wounded maimed or disfigured.[150] The International Committee of the Red Cross, facilitated correspondence between prisoners of war and their families, acting as intermediaries between the belligerents, reminding them of their obligations under the Geneva Convention, and visiting the wounded, undertook humanitarian missions in WWI.[151] WWI was a total war and

[146] Lauren (n 88) 81-82.
[147] James Joll, *The Second International, 1889-1914* (Weidenfeld & Nicolson 1955) 22-24; Lauren (n 88) 81-82.
[148] Lauren (n 87) 82.
[149] 'Sarajevo Incident | International Encyclopedia of the First World War (WW1)' <https://encyclopedia.1914-1918-online.net/article/sarajevo_incident> accessed 5 August 2020.
[150] Charles Townshend (ed), *Oxford History of Modern War* (Oxford University Press 2000) 137; Lauren (n 88) 83-86.
[151] Lauren (n 88) 83-86.

belligerent states were actively engaged at marshaling resources on and off the battlefields to conduct operations; women were used in the workplace in production efforts for the war effort. And minorities in colonies were enlisted in the war effort, often-indirect support of military operations on the battlefields. The involvement of women in the war effort led to demands for women's rights, primarily the right to vote, which was extended during WWI to women in Denmark and Iceland in 1915, Estonia, Latvia and Lithuania in 1918, and Poland in 1918.[152] Despite the advances in rights for women and awareness of human rights, individual rights were however limited during WWI, due to security concerns, resulting in curtailed liberties and abuses in the United Kingdom, France and the U.S.[153]

The hostilities of WWI ended on 11 November 1918 when Germany formally surrendered. Seven months later on 28 June 1919, the resulting terms of peace, hereinafter known as the Treaty of Versailles[154] was signed. However earlier, on 8 January 1918 in a speech before the U.S. Congress, U.S. President Woodrow Wilson issued his Fourteen Points, which was his vision for peace negotiations and further, his vision for a new world order, with power vested in an association of nations premised upon the equality of nations, regardless of size or wealth, united together for economic prosperity, to preserve peace, and for the protection of humanity.[155] Wilson

[152] Ruth Rubio-Marín, 'The Achievement of Female Suffrage in Europe: On Women's Citizenship' (2014) 12 International Journal of Constitutional Law 4 <https://academic.oup.com/icon/article-abstract/12/1/4/628588> accessed 5 August 2020, 22-23.

[153] For example, in the United Kingdom the Defense of the Realm Act gave unlimited power to the government to infringe upon the rights and freedoms of citizens suspected of undermining the war effort or adding the enemy and Constitutional rights were suspended in the U.S. with the 1917 Espionage Act and the 1918 Sedition Act. See for more: Lauren (n 88) 89-90.

[154] Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Uruguay, and Germany (signed at Versailles, 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188.

[155] A summation of Wilson's Fourteen Points, which would greatly influence the post WWI world order is: I: Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, with diplomacy to proceed always frankly and in the public view; II: The absolute freedom of navigation upon the high seas; III: To the extent possible, removal of all economic barriers and the establishment of an equality of trading conditions among nations consenting to peace and committing themselves to its maintenance; IV: Adequate guarantees given and taken to reduce national armaments to the lowest point consistent to ensure domestic safety; V A free, open minded, and absolutely impartial adjustment of all colonial claims, valuing the interests of the peoples concerned with equal weight; VI: Assurance of the sovereignty of Russia; VII: The restoration of Belgium; VIII: Return of the Alsace Lorrain to France; IX Readjustment of Italian

also wanted to limit armaments and forbid secrete agreements among nations so as to ensure peace in the global community of nations. As Lauren observes, a fundamental important point for human rights was Wilson's idea of self-determination of people, which Lenin would later declare should apply to all peoples, that it is a universal right closely linked to liberation movements associated decolonization.[156]

Colonel House, an advisor to Wilson and a U.S. Commissioner at the Paris Peace Conference[157] was of the opinion that the most important outcome from Wilson's Fourteen Points was the actualization of the fourteenth point, which envisioned the creation of an association of nations, an association where nations could meet regularly to discuss world problems, to work together to ensure world peace and stability, and further to maintain and ensure territorial integrity and collective security of the members.[158] At the Paris Peace Conference, the terms and conditions of the Versailles Treaty were negotiated, which, as noted by Lauren, proved to be a lengthy process, marked by difficult negotiations, due to a number of factors, namely, newly independent states (Estonia, Latvia and Lithuania for example); conflicting political ideology, (Communism for example); the emergence of non-European states, which represented a shift in the world order; demarcating control over peoples who were asserting their right to self-determination; the rights of minorities; and worker rights.[159] Indeed much was at stake, as the implications of the negotiations would result in a reshaped global economic and power structure and the focus was thus on collective interests rather than on the interest of individual states.[160]

As noted by Brendan Simms and Constance Simms, and others, one of the most

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borders along recognizable lines of nationality; X: Autonomous development offered to the peoples of Austria-Hungary; XI: Independence to the Balkan states and Serbia to be given access to the sea; XII: The promise of sovereignty to the Turks and autonomous development extended to other nationalities under Turkish rule; XIII: Independence for Poland and access to the sea; XIV: A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to large and small states alike. The complete speech is available at: Woodrow Wilson, 'Fourteen Points, 1918' in Susan Rosenfeld (ed), *Encyclopedia of American Historical Documents* (Infobase Publishing 2004) 1275.

[156] Lauren (n 88) 91.

[157] Francis M Carroll, 'House, Edward Mandell (1858-1938)', *The Encyclopedia of Diplomacy* (John Wiley & Sons, Ltd 2018) 1 <http://doi.wiley.com/10.1002/9781118885154.dipl0426> accessed 18 August 2020.

[158] *Papers Relating to the Foreign Relations of the United States, 1918, Volume I, Supplement 1, The World War* (United States Government Printing Office 1918) 405-413.

[159] Lauren (n 88) 92-97.

[160] Normand and Zaidi (n 134) 43-44.

important outcomes of the Paris Peace Conference was that Wilson's fourteenth point was realized in the peace treaty through the Covenant of the League of Nations, (hereinafter League) which encompassed the first twenty-six articles of the Versailles Treaty.[161] While colonies were maintained by many European states, and much of Wilson's visions reflected in the Fourteen Points were not attained, the establishment of the League was nevertheless a significant achievement in global governance.[162]

Wilson envisioned the League as not being an empty forum but an institution what would seek to influences not merely between states, through the establishment of transnational bodies, address social issues within states themselves, such as health, refugees, the legal status of women, and slavery.[163] Indeed, through the League, important outcomes were realized, including a number of individual agreements, which imposed a duty to protect minorities within states benefiting from demarcation realignments, which were collectively known as the "Minorities Treaties" and which placed protections and guarantees for minorities under the League of Nations.[164]

Of particular significance in the advancement of human rights after WWI, which is especially relevant for this work, was the establishment of the International Labor Organization, which was a permanent body within the League.[165] This was achieved through efforts of The Commission on International Labor Legislation, which on 31 January 1919 was established by the Paris Peace Conference, with membership composed of labor representatives from nine states, which met for 35 times to discuss and address labor issues from a standpoint of justice and humanity.[166]

The first outcome of the meetings, which considered positions from a wide range of delegates (labor, government, special interest groups, et al.) was the recognition of linkage between peace and social and economic justice, and that further, to realize peace premised upon a nexus of social and economic justice and international

[161] Brendan Simms and Constance Simms, 'Wilson's Fourteen Points and Their Consequences for Europe' (2018) *Aspen Review Central Europe* 1 <https://www.aspenreview.com/article/2018/wilsons-fourteen-points-consequences-europe/> accessed 18 August 2020, 14.
[162] Normand and Zaidi (n 134) 43-45.
[163] Simms and Simms (n 161) 15.
[164] ibid; Lauren (n 88) 95.
[165] Normand and Zaidi (n 134) 56-57.
[166] *Report of the Commission on International Labor Legislation of the Peace Conference. The British National Industrial Conference: Report of the Provisional Joint Committee.* (1919) 5-6; Lauren (n 88) 96.

organization focused on worker rights should be established.[167] A Draft Convention of 41 articles, was produced which among other things, firmly dedicated the mission of the organization to improving the working conditions of workers; defined how the organization would function; defined membership in the organization to consist of representatives of sovereign states, labor, and management with each having equal status in the organization. And further, the Draft Convention mandated an annual International Labor Conference and that the permanent organization operate through a governing body, the ILO, which should be an integral part of the League, with a precondition for states seeking membership in the League to participate in the ILO and further, that states pledge to be morally bound to the principles of the ILO.[168]

The second outcome of the meetings was a statement of general principles, which outlined nine fundamental principles of workers, which became to be known as the "Labor Charter".[169] The significance of the Labor Charter were certain minimum levels of worker rights that each member of the League was obligated to subscribe to and further, was described as the "Magna Carta" for labor.[170] While the general principles noted the difficulties to ensure strict compliance in terms of labor conditions due to differences in economic development, climate, culture and habits of states, it stated that nevertheless, League members recognize the need to establish minimal regulations for labor, in areas such as working hours, child labor, safety conditions, that rights of women, and further, the Labor Charter, in keeping with the ideal of labor to be a concept of justice and humanity declared in the first principle that 'labor should not be merely a regarded merely as a commodity or article of commerce.'[171]

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[167] Lauren (n 88) 97; Normand and Zaidi (n 134) 56-57.

[168] Lauren (n 88) 97; *Report of the Commission on International Labor Legislation of the Peace Conference. The British National Industrial Conference: Report of the Provisional Joint Committee.* (n 166) 16-28; Normand and Zaidi (n 134) 56-57.

[169] Lauren (n 88) 96-97; Iwao Frederick Ayusawa, 'International Labor Legislation' (Columbia University Press 1920) 107-108.

[170] Ayusawa (n 169) 108.

[171] The nine fundamental principles of the Labor Charter are 1: The guiding principle above enunciated that labour should not be regarded merely as a commodity or article of commerce; 2: The right of association for all lawful purposes by the employed as well as by the employers; 3: The payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in their time and country; 4: The adoption of an eight hours day or a forty-eight hours week as the standard to be aimed at where it has not already been attained; 5: The adoption of a weekly rest of at least twenty-four hours, which should include Sunday wherever practicable; 6: The abolition of child labour and the

What is most significant for this research is how the "Magna Carta" for labor marked a clear departure from past attitudes on worker rights, encompassing principles of human rights for workers, namely in the areas of gender equality, freedom of association, dignity, and social justice.[172] The Draft Convention and the Labor Charter were incorporated into the Treaty of Versailles, which marked a significance milestone for worker rights, that being that notwithstanding differences in wealth, culture, status, and customs amongst signatures to the Treaty Versailles and through the creation of the League, a universal commitment to minimal standards and protections for workers was recognized and further, that League members would strive to actualize the "Magna Carta" for labor, while further advancing and expanding protections for workers through annual conferences and the work of the ILO.[173]

While the establishment of the League was a milestone in the march to global governance, it proved to be an ineffectual organization in actualizing a global world order as envisioned by Wilson, due to many factors, notably that the U.S. never ratified the Treaty of Versailles nor joined the League.[174] Further, the League was paralyzed in advancing human rights due to resistance by European states to relinquish dominance in international affairs through acceptance as equals non-European states, particularly with regards to race, by explicitly preventing a proposal by the Japanese delegate Baron Makino of a "racial equality clause" in the Covenant of the League.[175] And still further, the League itself was paralyzed through the lack of

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imposition of such limitations on the labour of young persons as shall permit the continuation of their education and assure their proper physical development; 7: The principle that men and women should receive equal remuneration for work of equal value; 8: The standard set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers lawfully resident therein; 9: 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. For more see Avalon Project : The Versailles Treaty June 28, 1919 <https://avalon.law.yale.edu/imt/partxiii.asp> accessed 5 August 2020.

[172] Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

[173] Lauren (n 88) 97-99; Normand and Zaidi (n 134) 57.

[174] Normand and Zaidi (n 134) 62-63.

[175] Jan Herman Burgers, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century' (1992) 14 Human Rights Quarterly 447 <https://www.jstor.org/stable/762313> accessed 5 August 2020, 449; Seth Mohney, 'The Great Power Origins of Human Rights' (2014) 35 Michigan Journal of International Law <https://repository.law.umich.edu/mjil/vol35/iss4/4> accessed 5 August 2020; Mark Mazower, 'The Strange Triumph of Human Rights, 1933–1950' (2004) 47

power inherent with the inefficiency of its structure and decision-making, coupled with resistance to "internationalism" and the threats to sovereignty to nation states, led to a very ineffective institution. As Paul Lauren observes 'challenges of such continued resistance by so many governments insisting on their national sovereignty, in addition to the structural limitations of the League of Nations itself, made the struggle for human rights exactly that – a struggle.'[176] Nevertheless, the League did contribute to the development of human rights, most notably, through the protection of national minorities, through the organizational structure of the League, premised upon equal status for its members, and through the establishment of the ILO and its principles (Labor Charter).[177]

Further advances in human rights were made through the League's attention to the plight of the indigenous peoples colonial territories in Africa, The Near East, and the Pacific, through the creation of the Mandates Commission, which administered oversight in the treatment of indigenous peoples in the mandated territories, particularly in their rights of freedom of religion, self-determination, and the rights of workers.[178] Further, The Mandates Commission drafted and negotiated numerous treaties on slavery in the mandates territories, leading to the League to create a Temporary Slave Commission in 1924[179] whose work led to the creation of the International Convention on the Abolishment of Slavery and the Slave Trade of 1926.[180] Significant for human rights is that the aforementioned convention stipulated a concise and exact legal definition of slavery and the slave trade, it required the signatories to abolish slavery and forced labor in territories under their control, and further, that the abolishment of slavery and forced labor was to be universal – not just limited to colonial territories.[181]

Historical Journal 379 </core/journals/historical-journal/article/strange-triumph-of-human-rights-19331950/520E36506E5C34CD23643F8707CC16F6> accessed 5 August 2020, 382; Lauren (n 88) 123-129; Normand and Zaidi (n 134) 61-63.

[176] Lauren (n 88) 130.

[177] Shelton (n 172) 341.

[178] Lauren (n 88) 117.

[179] Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, vol 1 (Martinus Nijhoff Publishers 2008) 32.

[180] Lauren (n 88) 118.

[181] ibid.

Progress in gender equality was made through the League by advancing the rights of women, focusing on human trafficking, prostitution, and attaining full and equal rights for women, which resulted in the International Convention for the Suppression of the Trafficking of Women and Children in 1921, and the International Convention for the Suppression of the Traffic of Women of Full age in 1933.[182] The rights of children were recognized soon thereafter with the 1924 Declaration of the Rights of the Child, which proclaimed that all countries owe a universal protection of children, regardless of race or nationality.[183] And further, beyond the League, efforts at advancing human rights were undertaken by institutions and individuals alike, notably by international lawyer Andre Mandelstam, through his scholarship and work with the International Law Institute, which in 1929 adopted the 'Declaration on the International Rights of Man'.[184] Further efforts to enumerate and expand human rights were undertaken by the British author H.G. Wells who drafted an international bill of human rights entitled "*The Declaration of Rights*", which was later published by the Times of London in 1939 and the Daily Herald of London in 1940.[185] Arguably this ideas expressed by Wells were influential in making the case for the UDHR a few years later.

While there were achievements in human rights, the interwar period was marked by international strife largely due to an ineffective League, whose most powerful members shed away from the idea of universalizing minority rights and further, were reluctant to intervene in the treatment of minorities in states in Eastern Europe, which were to be protected through the League.[186] Despite the advances made in human rights during this turbulent period, the League proved to be ineffective due to its structural problems and a myriad of other factors beyond its control, namely, newly

[182] ibid 119.
[183] ibid.
[184] The Declaration consisted of a preamble and six articles, the first three of which imposed a duty on states to recognize the equal right of individuals within its territory of the right to life, liberty and property, religious freedom and the right to the use of their own language. The other articles defined obligations owed to its own nationals. The Declaration states in the preamble "the judicial conscience of the civilized world demands the recognition for the individual of rights preserved from all infringement on the part of the state." For more see: Burgers (n 175) 447-477; Normand and Zaidi (n 134) 75.
[185] David Weissbrodt, Fionnuala D Ní Aoláin and Mary Rumsey, *The Development of International Human Rights Law*, vol 1 (Taylor and Francis 2017) 74-77; Normand and Zaidi (n 134)76-77.
[186] Mazower (n 175) 382-383; Lauren (n 88) 116-117.

created states in Europe and old states as well wrestled with constitutional crisis within reflecting different views of governance – communism, capitalism, fascism – which coupled with a worldwide economic collapse in 1929, would increasingly draw nations inward at finding solutions, rather than working together.[187]

Perhaps the most significant obstacle to the success of the League and the realization of individual rights was the emergence of fascism in Italy, Spain and Germany. The worldwide depression, constitutional crisis, particularly in Germany through circumventing parliament, and a clash between the fascist ideology, communist ideology and resistance to internationalism all contributed to the rise of fascism.[188] Of the competing governing ideologies during the interwar period, fascism was the most Eurocentric in terms of superiority in dimensions of race, the position in history and destiny.[189] As noted by Paul Lauren 'Not one of these regimes believed in internationalism, "universal laws of humanity" the League of Nations, gender equality, or racial equality; and certainly none cared about protecting the rights of individuals'.[190] With the enactment of the Enabling Act of 1933[191] the complete power of the German state was vested solely in Hitler, as noted by Lauren, this act enabled Hitler to establish a dictatorship.[192] Soon thereafter, discriminatory policies were instituted against Jews which included removal of Jewish civil servants, lawyers, physicians, and further limitations and suppression of rights for the Jewish people, as Nazi ideology, based on race and blood, viewed Jews as aliens to the German race,

[187] The revolution in Russia ushered in the first application of Marxist ideology to a nation state. The Union of Soviet Socialist Republics was expanding in territory and ushering in radical reforms tied with Marxist ideology, while the League, based on Wilson's liberalism and centered on capitalism offered a vision of freedom through very different means; namely through maintenance of the established order. Thus, these two systems, diametrically opposed to one another sought to expand their ideology and worldview, resulting in clashes in newly independent states in choosing what form of government would rule. See for more: Normand and Zaidi (n 134) 67-69; Lauren (n 88) 136.
[188] Normand and Zaidi (n 134) 69-71.
[189] ibid.
[190] Lauren (n 88) 130.
[191] Among other things, the act enabled laws to the enacted by the government without the legislative process, for certain laws to be enacted notwithstanding a conflict with the constitution, treaties not requiring the approval of the legislature. The official name of the act in English is 'Law to Remedy the Distress of the People and the Reich'. Gesetz zur Behebung der Not von Volk und Reich 1933 (Ermächtigungsgesetz Germany) art 1-4.
[192] Lauren (n 88) 131.

and they also were seen collectively as betraying the German nation in WWI and in furthering Marxist ideology.[193]

1.5. The Second World War to the United Nations

The Second World War erupted in September 1939 with the invasion of Poland by Hitler's Third Reich. The League had failed to constrain the Axis alliance and soon after the invasion of Poland the world was again at war that would eclipse the magnitude of suffering and causalities of WWI, resulting in estimates as large as 50 million killed during the Second World War (hereinafter WWII).[194] WWII raged for over six years and was a total war in every sense imaginable. One of the tools used by the allied powers was to attack the fascist ideology, by appealing to human rights, to rally support for the war effort.[195] On 6 January 1941, nearly one year before the formal entry of the U.S. into WWII, U.S. President Franklin Roosevelt in an address before the U.S. Congress, discussed the necessity to secure 'four essential freedoms'[196] for all, not only for the domestic interests of the U.S. but of the people of the world, noting the relationship that exists between international peace and freedom at home.[197] The Four freedoms alluded to two characteristics of rights; negative rights whereby self-expression being right of individuals without governmental limitation or restrictions and positive rights, envisioning a world order where freedom from fear of conflicts and a commitment to peaceful existence by nations with one another, through a means of limitation of armaments whereby no nation could be in a position to pose a threat to another, which was a vision of limitation of national sovereignty in

[193] Normand and Zaidi (n 134) 71-72; Lauren (n 88) 131.
[194] Normand and Zaidi (n 134) 82.
[195] ibid 83.
[196] Roosevelt's four freedoms are, 1: freedom of speech and expression everywhere in the world; 2: freedom of every person to worship God in his own way – everywhere in the world; 3: freedom from want – which translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world; and 4: freedom from fear – which when translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor – anywhere in the world. For more, see complete speech: Franklin Roosevelt, 'Four Freedoms, 1941' in Susan Rosenfeld (ed), *Encyclopedia of American Historical Documents* (Infobase Publishing 2004) 1413.
[197] Lauren (n 88) 141.

the post-world war order, through an institution grounded upon the principle of universal human rights.[198]

On August 14, 1941, just months before the formal entry of the U.S. into WWII as a belligerent, Roosevelt and Churchill met to formulate a common strategy and vision for the war effort.[199] The outcome was an eight-point declaration which enumerated the principles which the U.S. and UK jointly shared, and which would form the basis for the post WWII world order. In this declaration, known as the Atlantic Charter, the U.S. and the UK envisioned human rights such as improved labor standards and social security and for people to live their lives free from want and fear, and while the Atlantic Charter did not specifically mention human rights, it did allude the right of self-determination of all people.[200] This would later prove to be a point of contention, in that the UK viewed it as applicable only to people under the occupation of the Nazi regime, while the U.S. viewed this principle to be applicable to all people, which would form the basis to de-colonialize territories held as colonies in the post WWII order, resulting in newly independent states being created in the aftermath of WWII. Further, arguably, it did serve the interests of the U.S. by strengthening the position of the U.S. in the post WWII world order, by eliminating the global empire of the UK, resulting in a new world order based upon the premise of anti-colonialism which contributed to a strengthened U.S position as a global hegemon.[201]

Some scholars consider that the ideological foundation for the contemporary international human rights regime were laid by Roosevelt, and further, that Roosevelt had been planning for a global governance even before entry into WWII. And it has been noted that the undertaking for the post WWII world order was largely an affair undertaken solely by the U.S., largely due to its geographical isolation from the effects of war. Sumner Wells, the Under-Secretary of State and later architect of the UN "stressed human rights, economic opportunity and anticolonialism" to the

[198] Normand and Zaidi (n 134) 89.
[199] 'Milestones: 1937–1945 - Office of the Historian' <https://history.state.gov/milestones/1937-1945/atlantic-conf> accessed 6 August 2020.
[200] Winston Churchill and Franklin Roosevelt, 'The Atlantic Charter, 1941' in Susan Rosenfeld (ed), *Encyclopedia of American Historical Documents* (Infobase Publishing 2004) 1418.
[201] Normand and Zaidi (n 134) 90-92.

American people, which was his vision of the post WWII world order.[202] The United Nations Declaration, issued on 1 January 1942 expanded the Atlantic Charter, through a restatement and commitment in the aims of the Allied powers to the war effort and the vision for the post WWII world order, with an explicit mention of human rights in the preamble.[203] The United Nations Declaration was a formal statement outlining the war efforts of the 26 signatories and the importance is that this declaration would form the basis for the United Nations, which would emerge as the new global governance in the aftermath of WWII. This importance cannot be understated, as with the Declaration, all signatories had committed themselves in a united front to the war effort, and furthermore, upon the conclusion of the war, to establish an organization based largely upon Roosevelt's four points and the Atlantic Charter which would usher in an era of global governance grounded upon human rights.[204]

As WWII raged on, the allied governments met frequently in planning of the post-world order through number conferences, cumulating in the Dumbarton Oaks Conference for an organization to replace the League upon the ending of WWII.[205] At Dumbarton Oaks, the allied governments discussed the details for the organization that would emerge as the UN, with the blueprint for the organizational structure largely based upon the U.S. plans undertaken early in the war.[206] While human rights had been at the heart of the rhetoric of the allied powers, during the Dumbarton Oaks Conference, human rights were not amongst the core issues, as much of the discussion focused on power and control, and similar impediments that had arisen during the Paris Peace Conference decades earlier, (particularly with regards to issues such as the rights of indigenous peoples, self-determination, equality of race, and challenges to sovereignty, et al.) emerged yet again, leading to a draft charter with little

[202] ibid 84.

[203] In the preamble to the Declaration by the United Nations, it is stated that "Being convinced that the complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights, and justice in their own lands as well as in other lands" See for more: Avalon Project - A Decade of American Foreign Policy 1941-1949 - Headquarters of the United Nations <https://avalon.law.yale.edu/20th_century/decade03.asp> accessed 6 August 2020.

[204] It was most probably not envisioned at the time the Declaration was issued that the reference to human rights in the preamble would lead to the human rights exalted though the UN of today. See for more: Normand and Zaidi (n 134) 92-93.

[205] UN, '1944-1945: Dumbarton Oaks and Yalta | United Nations' (*UN*) <https://www.un.org/en/sections/history-united-nations-charter/1944-1945-dumbarton-oaks-and-yalta/index.html> accessed 6 August 2020.

[206] Normand and Zaidi (n 134) 112.

consideration given for human rights.[207]

The resulting draft UN charter lacked the inclusion of human rights in a significant manner enraged proponents of human rights, from NGOs, to small states, to large states alike and reignited debate about the need to include human rights in the final charter of the organization that was to replace the League. Latin American states, Jewish interests, smaller states, NGOs, and academics drafted numerous declarations on human rights in preparation for the United Nations Conference on International Organization, also known as the San Francisco Conference, determined not to let human rights be sided in the upcoming conference.[208] It was against this background that the San Francisco Conference convened on 15 April 1945, with delegates from 50 states in attendance to finalize the structure, objectives of the new organization and to draft the charter of the UN.[209] Roosevelt however, would not live to see his vision realized, yet the U.S. delegation he appointed would remain intact, an assurance U.S. President Truman made to Eleanor Roosevelt (the wife of President Roosevelt), thus securing the commitment of the U.S. to the creation of an organization founded upon the principles espoused by Roosevelt's Four Points, an organization that would be committed to embracing the concept of world peace, freedom and human rights.[210]

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[207] U.S. efforts to include in the draft charter a statement or principles of human rights were thwarted by the Soviet Union and the United Kingdom and further, a Chinese proposal to recognize the equality of all races was rejected by the U.S. For more see: Weissbrodt, Ní Aoláin and Rumsey (n 185) 84; Lauren (n 88) 161-164; Normand and Zaidi (n 134) 110-114; Benjamin Cohen, 'Human Rights Under the United Nations Charter' (1949) 14 Law and Contemporary Problems <https://scholarship.law.duke.edu/lcp/vol14/iss3/4> accessed 6 August 2020.

[208] Delegates from the U.S. government and Latin American delegations from twenty states participated in the Inner-American Conference on Problems of War and Peace in Mexico City in 1945 where numerous declarations were put forth referencing human rights protections, rights and duties of nations, rights and duties of individuals, liking economic and social rights with civil and political rights. Further, the governments of New Zealand and Australia upon reviewing the draft charter stressed the need for the new organization to be founded upon equality between nations and the need for self-determination and for a need to advance social and economic justice. The U.S. Department of State reached out to representatives from various groups, including labor, education, academic, law, and religion to discuss the need to include human rights as a paramount mission of the new organization, stressing the need to go further than the draft charter at Dumbarton Oaks by including an international bill of rights, the establishment of a commission on human rights, and a means and mechanism of enforcement of human rights through the new organization. For more see Lauren (n 88) 162-181; Normand and Zaidi (n 134) 117-119.

[209] UN, '1945: The San Francisco Conference | United Nations' <https://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> accessed 6 August 2020; Normand and Zaidi (n 134) 122.

[210] Normand and Zaidi (n 134) 121-122.

Through the input of numerous NGOs and deliberations and input from smaller states, the negotiations pressed forward, yet it was difficult due to the opposition of the UK and the Soviet Union to insert provisions for human rights and the enforcement thereof in the Charter.[211] However, through tough negotiations, it was agreed upon that in the Charter for the UN, a commitment of states to recognition and promotion of human rights, absent an enforcement mechanism would be the outcome, with a commitment to the establishment of a Human Rights Commission within the UN to draft a declaration on human rights.[212] After two months of negotiations, the UN Charter was presented on 25 June 1945, a charter in which "human rights" were mentioned seven times, including in the preamble, which read, in part that 'we the peoples of the united nations determined…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small.'[213] The UN Charter was signed on 26 June 1945 and on 24 October 1945 upon the ratification of the Charter by China, France, the UK, the U.S., the Soviet Union and a majority of the other signatory states, the UN Charter entered into force, resulting in the UN coming into existence.[214]

While the inclusion of human rights in the Charter of the UN was indeed a significant achievement, especially considering the difficulties in negotiations among the delegations, and that the UN as structured would be more effective than the League, and further, through the Economic and Social Council's mandate in Article 68 for a commission to promote human rights were all progress in moving the human rights agenda to the forefront and creating an effective international organization tasked with global governance, the realization and actualization of human rights was severely limited by Article 27, the Domestic Jurisdiction Clause, which prohibited intervention by the UN in internal matters that are within the domestic jurisdiction of the member states.[215] Chapter X of the UN Charter addresses the formation of the Economic and Social Council and its functions.[216] Vested in the powers of the Economic and Social

[211] ibid 129-131.
[212] ibid 132-133.
[213] UN, 'Preamble | United Nations' <https://www.un.org/en/sections/un-charter/preamble/index.html> accessed 6 August 2020.
[214] UN, '1945: The San Francisco Conference | United Nations' (n 209).
[215] Normand and Zaidi (n 134) 135.
[216] UN, 'Chapter X | United Nations' <https://www.un.org/en/sections/un-charter/chapter-x/index.html> accessed 6 August 2020.

Council are, among others, are recommendations for the respect and observance of human rights and further, Article 68 is the basis for the establishment of a Human Rights Commission to facilitate the work of the Economic and Social Council. The United Nations Human Rights Commission, (hereinafter UNHRC) composed of members from eight states and chaired by Eleanor Roosevelt, in January 1947 began to work on drafting an international bill of human rights.[217] The UNHRC opted to propose a declaration rather than a treaty, which would have entailed obligations by states and due to a number of factors been difficult to implement.[218]

The resulting work of the UNHRC is the UDHR, which constitutes one component of the international bull of human rights, with the other components being the International Covenant on Civil and Political Rights[219] (hereinafter ICCPR) the International Covenant on Economic, Social and Cultural Rights[220] (hereinafter ICESR) and their additional protocols.[221] Both the ICCPR and the ICESR give legal force to the UDHR, and both contain the clause 'Recognizing that these rights derivate from the inherent dignity of the human person.'[222] The ICCPR is focused on rights tied to civil liberties, freedoms and political ideals[223] while the ICESR, is focused on economic, social and cultural rights.[224]

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[217] Gordon Brown, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (2016) <https://www.jstor.org/stable/j.ctt1bpmb7v> accessed 18 August 2020, 29-30.

[218] A multinational treaty would have been difficult to ratify, due to numerous factors ranging from philosophical differences as to what constituted human rights, to philosophical differences concerning the means of governance, and further, reflecting the reality of the emerging cold war, the visions of newly created states (in the aftermath of de-colonialization) and the differences in economic status between UN members. See for more: Lauren (n 88) 217-235; Normand and Zaidi (n 134) 144-146.

[219] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[220] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[221] Normand and Zaidi (n 134) 145; Brown (n 217) 31.

[222] This statement is found in the preamble to both Covenants. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[223] Of particular importance for this work is Article 22, which provides for freedom of association. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[224] Of particular importance for this work is Article 6, which provides for the right to work, Article 8, which provides for the right to join and form trade unions and Article 11, which provides for the right

While the instruments were indeed drafted, signed and thus binding on the signatories, there was a contrast between the two aforementioned Covenants in terms of which states eventually signed onto to them. The ICESR tended to be signed by states allied with the Soviet Union, while the ICCPR was championed most by states embracing the free market, most of which tended to be developed states, and popularly characterized as "western states" with all the connotations it brings. This differing in view of human rights enshrined in the aforementioned Covenants not only reflected the political or world view outlook of states, but also the economic strength of states, with certain human rights seen to be aspirations once a state has attained a certain level of economic development. Perhaps the most pressing issue regarding human rights is concerned not only with what out of the lengthy list of human rights are universal, that is to say, are applicable equally to all human beings, irrespective of locality or customary or spiritual norms and traditions. Having overviewed the long march to human rights, I now turn in the next chapter to the question of the universal nature – or lack thereof – of human rights.

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to an adequate standard of living. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

CHAPTER 2.

THE DICHOTOMY BETWEEN UNIVERSALISM AND RELATIVISM

As illustrated in the previous chapter, the concept of human rights from a philosophical standpoint is that human rights are moral rights that all humans have by the virtue of their humanity. The implication is that human rights are universal. Does this mean that human rights are legal protections for persons, in all nation states? Indeed, the scope and extent of human rights is not easy to define in absolutist terms. To assert that the moral doctrine of human rights is universally valid from a philosophical and legal standpoint in absolutist terms is contentious, as there are differing viewpoints on the universality of human rights, which has been subject to debate by scholars for over a quarter of century.[225]

Furthermore, there is disagreement among scholars as to what human rights in the International Bill of Rights are actual "rights" with some scholars characterized as holding a minimalist conception of human rights and others characterized as holding a maximalist conception of human rights. The dichotomy between the aforementioned conceptions of human rights is that ICCPR rights should be implemented rapidly, while ICESR rights are merely aspirations to which States commit themselves to attaining for their citizens someday. And still other scholars argue that concept of human rights have been too frequently promoted and expanding to the point that they devalue human rights culture; thus, if everyone ascribes some sort of "unjustness" as a violation of their human right and then advocate for a "new" human right and demand it be accepted, it leads to the idea of human rights not being taken seriously.

In this chapter I will analyze arguments for both the universality and relativist conceptions of human rights. This is important and central to my thesis if I am to connect workers' rights to human rights and then successfully argue the need to enforce and protect them through the WTO enforcement regulations. I begin with an analysis of the universal and the relative view of human rights and then I turn to

[225] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 Human Rights Quarterly 281, 282.

conduct an analysis of the source of human rights, that is, the concept of human rights not from the prospective of human rights norms as defined by the International Bill of Human Rights, but through an analysis of differing philosophical concepts of human rights. I shall limit my analysis in this section however, as the literature is rich with differing philosophical conceptions of the universality of human rights. Nevertheless, through a textual analysis of contemporary human rights documents, while drawing upon views of noted scholars, I shall proceed to build my case.

2.1. Conceptional Differences

Universalism and Cultural Relativism offer diametrically differing theories on the universality of human rights, and as Jerome J. Shestack observed over 20 years ago, these opposing theoretical positions shake 'the moral foundation of human rights.'[226] Universalism asserts that human rights, such a liberty, justice, and equality, for example, are universally valid to all human beings, not restrained by geographical location and are thus absolute in application.[227] As Michael Goodhart notes, cultural relativism has a differing view, which holds that human rights are relative to a particular culture, limited to its boundaries, and thus not universally applicable and available to individual members of a particular group as a right, and further, that a culture can only be judged by its own values and principles, rejecting any notion of absolute values or principles.[228] Moreover, culture relativists, drawing from social and cultural anthropology, view differing peoples and cultures as having different wants and understandings of individuals, grounded on cultural differences, with a unique concept of what it means to be human and what rights then do humans have.[229]

The foremost implication arising due to these diametrically opposed views is a lack of agreement over how to actualize human rights through binding international standards, as states which embrace the relativist viewpoint frequently justify actions

[226] Jerome J Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20 Human Rights Quarterly 201, 228.
[227] ibid 236.
[228] Goodhart (n 93) 939.
[229] Mark Goodale, *Surrendering to Utopia : An Anthropology of Human Rights* (Stanford University Press 2009) 43.

and measurers taken, which are deemed by states that embrace the universalists viewpoint to be means and actions or lack thereof, resulting in the suppression of human rights, and or through lack of positive action, to actualize human rights in order to comply with international human rights norms. Examples abound where the cultural relativist argument is used by tyrannical regimes as a justification for an array of human rights abuses.[230] Human rights are premised on the inviolability of "being human", and as illustrated in the earlier sections of this chapter, the path to human rights has not been easy. Choices must be made to actualize human rights based on the natural condition of "being human" irrespective of where an individual is domiciled or habitually resides, or travels. Choices must be made, and as Michael J. Perry accentuated over twenty years ago:

> The idea of human rights consists of two parts: the premise or claim that every human being is sacred (inviolable, etc.) and the further claim that because every human being is sacred (and given all other relevant information), certain choices should be made and certain other choices rejected; in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being.[231]

Perry suggests that in order to reject the sacredness of an individual 'one can contend that not every human being is sacred, but only *some* human beings – the members of one's tribe, for example, or of one's nation.'[232] Perry affirms that to do so is then to define other persons – those who are not sacred – as lacking characteristics needed to be considered human, and thus they could then be deemed not to truly be human at all, which can then be (and has been) used through positive law to justify the oppression, discrimination, even genocide of the group lacking the characteristics to be deemed human.[233]

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[230] Shestack opines that rulers resort to 'cultural relativist arguments to justify limitations on speech, subjugation of women, female genital mutilation, amputation of limbs and other cruel punishment, arbitrary use of power, and other violations of human rights conventions.' Shestack (n 226) 231.

[231] Michael J Perry, 'Are Human Rights Universal? The Relativist Challenge and Related Matters' (1997) 19 Human Rights Quarterly 461, 462.

[232] ibid 463.

[233] Perry gives an example of how the Nazi regime defined Jews as pseudo humans and cites Richard Rorty noting examples ranging from the Crusades to Black Muslims to Thomas Jefferson to the then ongoing Balkan conflict in defining a group of humans as not having the qualities to be human, and in doing so, justifying deferential and horrific treatment. Dehumanizing a group or a class is the first step to genocide. See for more: ibid 463-465.

It is admitted by some scholars that frequently authoritarian regimes use the cultural relativist position to justify violations of international human rights norms and in addition to cultural distinctions of non-Western states, on a variety of dimensions which are strikingly different from the West, the significant reasoning for human rights violations of said regimes is centered on the sovereignty of the nation state, based on the Westphalian model, which has been internationalized in the WWII and post-cold war era.[234] International human rights norms while promogulated through international agreements and covenants are applied and enforced almost exclusively through municipal law.[235]

The emergence of newly created states via anti-colonialism in the aftermath of WWII, and after the collapse of the Soviet Union, resulted in economically weak states. Eager to become a part of the global community, these newly created states signed and ratified Western-grounded human rights agreements, often with no intentions to abide by the human rights norms enshrined in the agreements.[236] Thus the consequences are profound; a state can rely on the principle of sovereignty in their domestic affairs, assured of non-intervention by other states or the UN for having committed atrocious human rights violations, and further, assert the distinctiveness of their culture, which entails differing standards from that of the Western-grounded human rights standards, premised on cultural relativism as an philosophical basis for rejecting human rights based on universalist western ideals.[237]

However, as discussed earlier, contemporary human rights emerged in the aftermath of WWII though the establishment of the UN and the creation of an International Bill of Rights. Through the establishment of the UN, states had acknowledged that for the maintenance of a peaceful world order that states must answer for their actions, and be held accountable under international law when their actions were in breach of

[234] Adamantia Pollis, 'Cultural Relativism Revisited: Through A State Prism' (1996) 18 Human Rights Quarterly 316, 321-322.
[235] While implementation and enforcement is mostly a domestic affair, there are exceptions such as crimes against humanity, war crimes, genocide, and that within the European Union, international human rights are implemented and enforced through by a supranatural body. See for more: Donnelly (n 225) 283.
[236] Pollis (n 234) 321.
[237] ibid 322.

international law.[238] As Donnelly notes, the UDHR was drafted using the contributions from an array of nations, taking input from philosophers and legal scholars from differing cultures, so as to ensure the UDHR would truly be a universal document, with universal application and, is acknowledged as the 'foundational international legal instrument'[239] of international human rights law. The UDHR, along with the ICCPR and the ICESR, and their additional protocols, form the International Bill of Rights, which is the foundation of International Human Rights Law.

2.2. Instrumental Analysis

To ascertain the universally of human rights I now turn to the instruments of the International Bill of Rights for a closer analysis. The UDHR, while being non-binding at the time of adoption, has nonetheless come to attain some legal status in international law.[240] The preamble of the UDHR reaffirms the commitment of states to faith in human rights, as expressed in the UN Charter, and further, proclaims the UDHR as a common standard, and calls for all peoples and all nations to endeavor to actualize the rights and freedoms enshrined in the UDHR as 'universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.'[241] Moreover, Article II of the UDHR is more precise in elucidating the universality of the UDHR which proclaims that:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion,

[238] The language in the preamble of the UN Charter, is clear in stating that through the adoption of the UN Charter, states are affirming their commitments for the maintenance of world peace by establishing an institution and mechanism whereby states will be held accountable for upholding obligations imposed through international law and treaty obligations; that states affirm the equality of men and women, large and small states, the dignity of a human person and belief in human rights; and further, that the unification of states is required to maintain world peace, promote economic and social advancement for all people, and practice tolerance. See for more: United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[239] Donnelly (n 225) 288.

[240] Hilary Charlesworth, 'Oxford Public International Law: Universal Declaration of Human Rights (1948)', *Max Planck Encyclopedias of International Law* (2008) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887> accessed 6 August 2020.

[241] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR).

> political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[242]

The other two components of the International Bill of Rights, the ICCPR and the ICESR, in their preambles reaffirm the obligation of states to the UN Charter and further, assert that states are obliged to give 'universal respect for, and observance of, human rights and freedoms'[243] which unambiguously supports the conception of the universality of human rights. While some may contest the binding nature of the UDHR[244] these two components of the International Bill of Rights (the ICCPR and the ICESR) do constitute binding instruments of international law, as evinced by the number of signatories and parties to both conventions and their additional protocols.[245]

In the wake of the re-ordering of the world after the collapse of the Soviet Union, the World Conference on Human Rights was convened by the UN in Vienna from 14-25 June 1993.[246] Delegates of 171 states with an objective to devise a common plan and position for actualizing and strengthen human rights attended the Conference.[247] The outcome was a document adopted by consensus on 25 June 1993 entitled 'Vienna Declaration and Programme of Action' (hereinafter Vienna Declaration).[248] In the

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[242] ibid art 2.

[243] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) preamble; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 993 UNTS 3 (ICESCR) preamble.

[244] Charlesworth (n 240).

[245] As of 16 February 2019, the ICCPR has 172 parties and 74 signatories; the Optional Protocol to the ICCPR has 165 parties and 35 signatories; the ECESR has 169 parties and 71 signatories; the Optional Protocol to the ECESR has 24 parties and 45 signatories. 'United Nations, United Nations Treaty Collection (UNTC)' <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en> accessed 19 August 2020.

[246] 'United Nations: Key Conference Outcomes on Human Rights (14-15 June 1993)' <https://www.un.org/en/development/devagenda/humanrights.shtml> accessed 19 August 2020.

[247] ibid.

[248] UN, "Vienna Declaration and Programme of Action" World Conference on Human Rights (Vienna 14-25 June 1993) Adopted by the World Conference on Human Rights on 25 June 1993, UN Doc A/CONF.157/23' (1993) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G93/142/33/PDF/G9314233.pdf?OpenElement> accessed 19 August 2020.

preamble, the Vienna Declaration reaffirms the principles of the UDHR and declares that the UDHR is the source for subsequent human rights instruments, which serves as, a common set of measures to which all nations and peoples should strive to achieve.[249] Following the preamble, in the first section, fifth paragraph the Vienna Declaration unequivocally defines human rights as universal, and declares that the international community must apply human rights equally, in the same manner, in the same understanding; the language is clear and precise in these regards:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historic, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote, and protect all human rights and fundamental freedoms.[250]

As additional evidence supporting the universality of human rights, the Vienna Declaration further references human rights as universal eleven times in the context of the application, actualization, respect, and standards for human rights and fundamental freedoms in general, and for specific rights.[251] The significance of the

[249] ibid preamble 2-3.

[250] ibid section I, 5 [5].

[251] Starting at paragraph 6, the Vienna Declaration notes that through the efforts of the United Nations System, for universal respect and observance of human rights contributes to the achievement of world peace; paragraph 8 notes that democracy premised upon the will of the people to determine their political, economic, social and cultural systems and that it is through the promotion of human rights, universally, at the national and international level in determining the above mentioned ends is met; paragraph 10 affirms the right to development as a universal and inalienable right; paragraph 18 affirms the rights of women and of the girl-child as being inalienable and an indivisible part of universal human rights; paragraph 32 reaffirms the importance universality in the consideration of human rights issues; paragraph 34 in reference to the need of the UN to assist countries (those that ask for assistance) in disseminating human rights and strengthening human rights in national legislation and through establishment institutions at the national level refers to "universal human rights"; paragraph 37 in noting the importance of regional human rights agreements to promote and protect human rights and the need to corporate with UN institutions, stresses the need to reinforce universal human rights standards which are referenced in international human rights instruments; paragraph 63 reaffirms that all human rights and fundamental freedoms are universal and extend to individuals with disabilities; paragraph 72 reaffirms the right to development is universal as established in the Declaration on the Right to Development; paragraph 76 refers to universal human rights standards as contained in international human rights instruments in the context of the need to allocate more resources for education, training, and workshops to be facilitated through the Center for Human Rights; and paragraph 94 recommends the speedy adoption of the Vienna Declaration so as to empower

Vienna Declaration's view of human rights as universal is attested by the fact that it was adopted through consensus by 171 states, and further, that the Vienna Convention expanded the mechanism of enforcement of international human rights law through the recommendation that the UN General Assembly establish a High Commissioner for Human Rights.[252] On 20 December 1993, the UN General Assembly followed through with the recommendation and established the United Nations High Commissioner for Human Rights.[253]

Further, numerous regional human rights instruments allude to the universality of human rights as evidenced in the wording in the American Declaration on the Rights and Duties of Man,[254] the Convention for the protection of Human Rights and Fundamental Freedoms,[255] the American Convention on Human Rights,[256] the Charter of Fundamental Rights of the European Union,[257] the African Charter on Human and

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individuals, groups and organizations to protect universally recognized human rights and fundamental freedoms. See for more: ibid 5-27 [6] [8] [10] [32] [34] [37] [63] [72] [76] [94].

[252] Part II, paragraph 18 of the Vienna Declaration recommends the establishment of the High Commissioner for Human Rights to be taken into consideration at the forty-eight meeting of the UN General Assembly. See for more: ibid 16 [18].

[253] UNGA Res 48/141 (20 December 1993) UN Doc A/RES/48/141.

[254] Adopted six months before the UDHR, in the preamble to the American Declaration on the Rights and Duties of Man, it is noted that the American States recognize that the rights of man are based upon the human personality, not an individual's nationality, thus, the rights enshrined in the American Declaration on the Rights and Duties of Man, which predates the UDHR, are universal in application. This declaration, while not legally binding on its signatures nevertheless laid the foundation for the American Convention on Human Rights decades later. See for more: American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter- American System OEA/Ser L V/II.82 Doc 6 Rev 1 a; Grossman Claudio M and Grossman Claudio M, 'American Declaration of the Rights and Duties of Man (1948)', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

[255] Stated in the preamble is the aim to secure recognition and attainment of the UDHR by the signatory states, and further, the preamble reaffirms the belief in the UDHR's fundamental freedoms and rights which are premised upon a common understanding of human rights by which the safety and security of justice and peace in the world is secured. For more see: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) preamble.

[256] The preamble acknowledges and reaffirms the principles of the UDHR, the American Declaration on the Rights and Duties of Man, and other international human rights instruments and submits their application is both worldwide and regional in scope, and declares the American Convention of Human Rights shall apply to everyone. For more see: American Convention on Human Rights, Organization of American States (OAS) (entered into force July 18, 1978) OAS Treaty Series No 36 (1969) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser.L.V/II.82 doc.6 rev.

[257] The preamble affirms that the EU is founded on indivisible universal values of human dignity and freedom, while reaffirming the ECHR and the jurisprudence of the European Court of Human Rights.

Peoples' Rights,[258] the Asian Human Rights Charter,[259] the Cairo Declaration on Human Rights in Islam,[260] and the Universal Islamic Declaration of Human Rights.[261] The concept of universalism of human rights as illustrated in the aforementioned regional human rights instruments is a formidable indication that human rights norms as conveyed by the International Bill of Rights are accepted as universal. Furthermore, while the last two regional human rights instruments are applicable to Islam, and describe Islamic human rights, and the instruments are, due to their differing methodology, difficult to compare to each other, they have been nevertheless described by scholars as being "complementary" to the UDHR, and universal in their application, notwithstanding certain reservations by Islamic states due to religious restraints.[262]

For more see: Charter of Fundamental Rights of the European Union, European Union (EU) 26 October 2012, 2012/C 326/02.

[258] It is stated in the preamble to have regard for the UN and the UDHR and recognizes that 'fundamental human rights stem from the attributes of human beings' See for more: African (Banjul) Charter on Human and Peoples' Rights, Organization of African Union (OAU) entered into force 21 October 1986 OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

[259] The Asian Human Rights Charter is a self-described 'peoples charter' which was drafted with input from peoples of a variety of Asian states, NGOs, and a committee composed of Asian legal scholars and jurists, intended to refute the position of some Asian leaders that 'human rights' are not applicable to Asia; indeed the Asian Human Rights Charter rejects the position of cultural relativists, explicitly stating in section 2.2 of the General Principles, a section titled 'Universality and Indivisibility of Rights' that rights are universal, that individuals are entitled to rights based on being human, that while recognizing that there are indeed differences in cultures, history, and traditions, but that does not 'detract from the universalism of rights.' For more see: Ralph Wilde, 'NGO Proposals for an Asia-Pacific Human Rights System' (1998) 1 Yale Human Rights and Development Law Journal 137, 138-139; Asian Human Rights Charter, Asian Human Rights Commission (AHRC); Asian Legal Resource Centre (ALRC) 17 May 1998 <https://www.refworld.org/docid/452678304.html> accessed 19 August 2020.

[260] While the Cairo Declaration on Human Rights in Islam is focused on human rights in Islam, in the preamble, it is stated that the declaration is to guide all of humanity notwithstanding the differences in 'beliefs and ideologies' For more see: Cairo Declaration on Human Rights in Islam, Organization of the Islamic Conference (OIC) 5 August 1990 <https://www.refworld.org/docid/3ae6b3822c.html > accessed 19 August 2020.

[261] Universal Islamic Declaration of Human Rights, Islamic Council (IC) 19 September 1981 < http://www.alhewar.com/ISLAMDECL.html> accessed 19 August 2020.

[262] As Nik Salida Suhaila and Nik Saleh explain, the Universal Islamic Declaration on Human Rights (UIDHR) and the Cairo Declaration on Human Rights in Islam (CDHRI) both have an Islamic view on human rights, affirming "the *Quran* and the Prophetic tradition" as the source for human rights, with the differing between the two being that the CDHRI is a state centered and the UIDHR is non-state centered, being proposed by opposition political parties and stressing more the civil and political freedom, while the CDHRI is more focused on fundamental rights and freedom. Their analysis concludes that aside from conflicts related to gender equality, which are based on religious rules, that the Islamic human rights instruments complement and the concepts expressed in the International human rights instruments, and are universal in their application. For more see: Nik Salida and Suhaila

I now turn my analysis to selected regional human rights instruments, which have a differing view of the universality of human rights. These instruments seek to rely on cultural relativism to reject universalism and view universalism of human rights as a means to infringe upon national sovereignty. For example, the Asean Human Rights Declaration[263] reflects the cultural relativist position, which reinforces the "Asian Values" argument of the 1990s.[264] The Asian Values argument was formalized in the "Bangkok Declaration" which was the outcome of the Regional Meeting for Asia of the World Conference on Human Rights in Bangkok from 29 March 1993 to 2 April 1993.[265] The 2004 Arab Charter of Human Rights,[266] which essentially was a revision of the 1994 Arab Charter of Human Rights,[267] while reaffirming the universality of human rights norms enshrined in the International Bill of Rights,[268] was nevertheless regarded by the UN as deviating from international standards.[269]

It is submitted that the aforementioned human rights documents in the preceding paragraph are unacceptable as sincere human rights declarations and charters, as while claiming universality of human rights, it is clear from a textual analysis, views of

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Nik Saleh, 'A Conceptual Analysis of "Rights" In the International and Islamic Human Rights Instruments' (2012) 2 American International Journal of Contemporary Research 155, 155-156, 161-162.

[263] The Asean Human Rights Declaration, in Article 7 states that 'human rights are universal, indivisible, interdependent and interrelated' yet goes on to state further in the article that 'the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historic, and religious backgrounds.' For more see: ASEAN Human Rights Declaration, Association of Southeast Asian Nations (ASEAN) 18 November 2012, art 7 < https://www.refworld.org/docid/50c9fea82.html> accessed 19 August 2020.

[264] Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia' (2014) 33 Journal of Current Southeast Asian Affairs 107, 113-114.

[265] 'Report of the Regional Meeting for Asia of the World Conference on Human Rights, UN Doc. A/CONF.157/ASRM/8 - A/CONF.157/PC/59 (1993).'

[266] 'Arab Charter on Human Rights 2004, League of Arab States (LAS) 22 May 2004 <http://Hrlibrary.Umn.Edu/Instree/Loas2005.Html> Accessed 19 August 2020.'

[267] Arab Charter on Human Rights 1994, League of Arab States (LAS) 15 September 1994 <https://www.refworld.org/docid/3ae6b38540.html> accessed 19 August 2020.

[268] Arab Charter on Human Rights 2004 (n 258) preamble, art. 1.

[269] On 30 January 2008, weeks after the revised Arab Charter entered into force, the UN High Commissioner for Human Rights issued a statement decrying the Arab Charter as being inconsistent with international standards based on equating Zionism with racism, differing treatment of genders and non-citizens and the use of the death penalty for children. See for more: 'Arab Rights Charter Deviates from International Standards, Says UN Official | | UN News' <https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official> accessed 6 August 2020.

human rights scholars and the UN, that positions on universality articulated therein are not in compliance with contemporary human rights norms. Thus, I argue that human rights are universal and while some may be more aspirational than others, basic, fundamental human rights are universal, not bestowed by a state through positive law, but universal by the virtue of an individual's status as a human being, irrespective of one's national origin, gender, or any other characteristic of division.

CHAPTER 3.

HUMAN RIGHTS IN THE CONTEMPORARY ERA

Contemporary human rights emerged in the aftermath of the Second World War. The rights enshrined in the UDHR and given binding force on states party to the ICCPR and the ICESR are known collectively as the International Bill of Rights. The UDHR was an monumental step in advancing international human rights law and at the time of adoption, the UDHR was not legally binding.[270] However since its adoption, it has been referenced in the preambles to most international human rights treaties,[271] it has been described as customary international law,[272] it is referenced in international court decisions,[273] and its principles have been incorporated into the ICCPR and ICESR.[274] Moreover, the UDHR forms the basis of the 'foundation of international human rights law'.[275] The UDHR was adopted on 10 December 1948 by a unanimous vote by the UN General Assembly.[276] Considering the diversity of world's people, cultures, communities, religions and differing notions on philosophy of governance, and indeed rights, it is most remarkable that the UDHR was adopted and it is a testament to the work undertaken by the UNHCR, largely due to the diversity of membership, and the quest to consider divergent viewpoints in shaping a human rights declaration that would be acceptable to the global community-the quest for a universalist document-which was achieved.[277]

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[270] Brown (n 217) 34.

[271] Johannes van Aggelen, 'The Preamble of the United Nations Declaration of Human Rights' (2000) 28 Denver Journal of International Law and Policy 129, 132.

[272] Jochen Von Bernstorff and others, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 The European Journal of International Law 903, 913; van Aggelen (n 271) 132-133.

[273] Scott L Porter, 'Tulsa Journal of Comparative and International Law Universal Declaration of Human Rights: Does It Have Enough Force of Law to Hold States Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice, The THE UNIVERSAL D' (1995) 3 Tulsa Journal of Comparative and International Law 141, 157.

[274] Charlesworth (n 240).

[275] UN 'The Foundation of International Human Rights Law | United Nations' <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> accessed 6 August 2020.

[276] UNGA Res 217A (III) (10 December 1948) UN Doc A/RES/3/217/A.

[277] Before the UNHCR begin its work, a panel of leading philosophers chaired by Cambridge Historian E.H. Carr was appointed to solicit information from scholars, thinkers, and statesman alike from different religions, philosophical views, and cultures worldwide so as to better understand how to define rights and the role of society in assuring adherence to human rights, with the aim to synthesize

3.1. The International Bill of Rights

The UDHR consists of 30 articles, and has been described structurally as a set of general principles based upon four pillars.[278] The general principles are "dignity, liberty, equality, and fraternity"[279] and while drawing on rights documents and theory from earlier eras,[280] the UDHR purports to be a novel undertaking, going further than earlier rights theorists, while, alluding to the concepts of natural law, in that the "rights" are "inherent" rather than bestowed on humans by some conferring authority.[281] Furthermore, in advancing this novel direction in human rights, the UDHR can be seen as a fusion of new rights with older, more established rights, a combination of individual and collective rights, and a means to connect individual and collective rights enshrined in the UDHR to greater actualization and recognition afforded thereby to individuals through each states commitment, within the international order, to creating conditions whereby the rights and freedoms enumerated in the UDHR may be realized. The universalist approach of the UDHR asserts that individuals possess rights by being human, that these rights are applicable worldwide owning to a universal standard.[282]

Soon after the UDHR was adopted, it was clear that this historical document was insufficient to guarantee human rights, because UN general assembly resolutions are

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from these many divergent viewpoints a theoretical basis for human rights that would be universally acceptable. When appointed, the UNHCR was composed of 18 members, five of which were China, France, UK, U.S. and the Soviet Union, with the remainder being rotated between different countries as to ensure equal representation from all parts of the world. Further, the UNHCR considered no only the recommendations and outcomes from the aforementioned panel, but also human rights instruments and draft proposals at the municipal and regional level. See for more: Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights' (1998) 73 Notre Dame Law Review 1153, 1156-1162.

[278] ibid.

[279] As noted by Glendon, René Cassin, the French representative on the UNHC described structure of the UDHR liken to a temple, the general principles are stated in Articles 1 and 2 and supported by the four pillars, Articles 3-11 compose personal liberties; Articles 12-17 concern the relationship between individuals and others and groups; Articles 18-21 concern political, religions and public freedoms; and Articles 22-27 concern economic and social rights. The last three Articles, 28-30 are the foundation, which constitutes a nexus between individuals and society. See for more: ibid 1163; Mary Ann Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' (2004) 2 Northwestern Journal of International Human Rights 2, 3.

[280] van Aggelen (n 271) 129.

[281] Glendon (n 277) 1164.

[282] Lauren (n 88) 239-240.

only advisory and not binding upon states.[283] Therefore, the next step was to attempt to create a mechanism to make the rights enumerated in the UDHR binding upon states, through treaties that would be binding upon states when signed and ratified. It was originally thought that one treaty embodying all of the rights enumerated in the UDHR would suffice. However, it soon became apparent that there were significant disagreements between states concerning which rights enumerated in the UDHR states would immediately be willing to guarantee. The division seemed to be over rights a categorization of rights, frequently referred to as "negative rights" which could be more easily accepted and implemented by states because they did not require large financial commitments, which lesser economically developed states could not commit to undertaking.[284] Further, there was also the divide that developed democratic states were more willing to guarantee political rights then many of the lesser economically developed socialist influenced states, who were more interested in requiring states to provide large state sponsored social guarantees in areas such as education, health care, and similar institutional services, which required large financial expenditures.

Due to this division among states, it was agreed that there would be two instruments drafted, one that enumerated the so-called "negative rights" and one that enumerated the so-called "positive rights". This division led to two documents being drafted, the ICCPR and the ICESR and within these two documents, all of the provisions contained in the UDHR were supposed to be enumerated. However, one right, the right to property, did not end up in either document, due to the inability among states with differing economic and social systems to agree on how to define property and what the right to property should entail.[285] In order move forward the drafting the two

[283] The UDHR is, legally speaking a UN General Assembly Resolution and thus not binding on states. However, as noted earlier in this Part, the legal status has been debated, with some viewing the UDHR as part of customary international law, thus making it binding on all states. For more see: Lori Damrosch, *International Law, Cases and Materials* (4th edn, West Academic Publishing 2001) 593-594.

[284] Janet Dine, *Companies, International Trade and Human Rights* (1st edn, Cambridge University Press 2005) 171-173.

[285] The UDHR in Article 17 guarantees the right to property: 'Everyone has the right to own property alone as well as in association with others.' Art. 17, 1. and 'No one shall be arbitrarily deprived of his property.' Art. 17, 2. There is no corresponding right to property in either the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights. This right was left out because during the drafting of the covenants it became clear that this was too

covenants, it was agreed by that the provision on property would be left out of both covenants, to be dealt with later with a subsequent protocol. Interestingly, the right to self-determination was actually written into both covenants, because the right to self-determination could be seen as a personal political right on the one hand and on the other hand it could also be seen or defined as a collective group right, so it fit into both covenants.[286] However, as discussed in the previous section, the universality of human rights is challenged by the cultural relativist, resulting in a dichotomy between human rights scholars and cultural relativist scholars that endures to this day.

3.2. Regional Human Rights Instruments

Contemporary human rights encompass not only the aforementioned International Bill of Rights, but also regional human rights documents that adhere to the universalist conception of human rights, many of which were discussed in chapter 2 of this Part. It should be noted that prior to the acceptance of the UDHR, the American Declaration, adopted on 2 May 1948, at the ninth international conference of American States in Bogotá Columbia[287] is the first international human rights document, however, and like the UDHR, it was not a legally binding document.[288] Nevertheless, the importance of the UDHR cannot be understated; it was the foundation for international human rights, and paved the way for the development of human rights law.

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controversial at the time due to differing concerns about the right to property rights. For more see: John G Sprankling, 'The Global Right to Property' (2014) 52 Columbia Journal of Transnational Law 464, 470-471..

[286] The right of self-determination is not stated in those precise words in the UDHR but can easily be derived from the articles that guarantee other essential freedoms, including the right to participate in the government of his country, which is stated in Article 21 of the UDHR. The right of self-determination is mentioned directly in the International Covenant on Economic, Social and Cultural Rights in Article 1, paragraph 1., which states, "All peoples have the right of self-determination." The same exact words are found in the International Covenant on Civil and Political Rights in its Article 1, paragraph 1.: "All peoples have the right of self-determination." For more see: Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A (III) (UDHR) 1948.

[287] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 a.

[288] Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection? For Regional Rights Protection?' (2010) 9 Washington University Global Studies Law Review 639, 642.

With the adoption of both covenants remained the problem of enforcement. States that became parties to one or both covenants undertook the obligation of honoring the rights enumerated in those conventions, meaning that states were legally obligated to follow the requirements of the conventions, which, unlike the UDHR, were binding. However, the enforcement mechanism was sadly lacking. No separate judicial institution was created to enforce the covenants. The only enforcement possibilities were provisions whereby states could register complaints with the UNHRC against other states regarding violations of the covenants.[289] The violations could be studied and reports could be made and issued outlining any violations that were found, but there would be no mandatory requirements upon states to actually follow any of the recommendations for means to alleviate violations. Thus, this became at best a propaganda tool that could be used by states to cajole other states to end human rights violations. This was at best a very imperfect system and more action was needed.

The answer that came sooner or later with certain geographical regions adopted their own comprehensive human rights instruments, some more effective than others. The first was Europe with the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, (hereinafter ECHR) which open for signature in 1950, and in force in 1953.[290] The ECHR created legally binding obligations on the signatories, and a mechanism and procedure to resolve violations of the ECHR.[291] The ECHR established the European Court of Human Rights, which enabled member states of the council of Europe could bring human rights violations before the court.[292] Throughout the years by adopting a series of protocols states developed and modified the rules and opportunities for the use of this court. One key

[289] Article 28 of the ICCPR establishes a Human Rights Committee that may consider reports from states as provided in Article 40 and communications from states that are parties alleging violations of human rights by other states, as provided in Article 41. However, the Committee may only bring the violation to the attention of the offending state but that would be the extent of any "enforcement". Additional protocols provide for little more additional enforcement other than establish additional reporting requirements. For more see: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[290] European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) CETS No: 005.; Lauren (n 88) 244.

[291] European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) CETS No: 005, art 19.

[292] Ezgi Yildiz, 'Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights' (2020) 34 Temple International & Comparative Law Journal 309, 323.

modification was and with the additional protocol 11, for the first-time individual nationals of the European states party to the convention could submit violations of their human rights by their own state of which they are a national to the court.[293]

The European convention on human rights included an article whereby human rights could be suspended or derogated from in cases of a national emergency, in times of war, and when marshal law is declared.[294] The European convention thus allows for most of its articles to be suspended or derogated from under emergency situations. Clearly however, the right to life could not be suspended nor could other provisions, such as freedom from torture and freedom from slavery.[295]

The American Convention on Human Rights was opened for signature in 1969 and entered into force in 1978, 25 years after the ECHR.[296] Like the ECHR, it too also has a provision which allows for the suspension or derogation from certain rights, yet is more expansive in the rights which cannot be suspended, reflecting more contemporary values and the importance attached to them. For example, in the American convention, it is not possible to derogate from the requirement of holding democratic elections.[297] The American convention provided for the creation Inner

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[293] Section IV of the European Convention on Human Rights, Articles 38 *et seq.* provided for the creation of the European Court of Human Rights. Protocol 11 to the European Convention on Human Rights provided for the right of individual petition to the court. Thus, this court became the first international human rights court to permit individual persons to file their complaints directly with the court. In accordance with Protocol 11, individual petitions could be ruled inadmissible only upon the unanimous ruling of a three judge Committee. The right of individual petition was, however, severely restricted, if not crippled by the new procedure established by Protocol 16, Article 27, which allows a single judge to dismiss an application made by an individual and further provides that the decision is final and not subject to any appeal. For more see: European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as amended by Protocol No. 11, CETS No: 155 (1994) and Protocol No. 14, CETS No: 194 (2004).

[294] Article 15, paragraph 1 states that 'In time of war or other public emergency' … states parties may, under specified conditions, derogate from nearly all of the provisions of the Convention. For more see: ibid.

[295] The only exceptions stated in Article 15, paragraph 2, are that no derogation is permitted from Articles 2, 3, 4 (paragraph 1) and 7. Everything other than the right to life, the right not to be subjected to torture, the right not to be held in slavery and the prohibition of *ex post facto* criminal liability may be suspended under certain conditions. Frequently human rights are most endangered in the very circumstances that give states the authority to suspend right, which is concerning. For more see: ibid.

[296] American Convention on Human Rights, opened for signature Nov. 22, 1969, 9 I.L.M. 101 (1970) (OAS Doc. OEA/SER. K/XVI/1.1 Doc. 65 (1970)).

[297] It allows the suspension or derogation from most of its provisions "In time of war, public danger, or other emergency" as provided in Article 27, paragraph 1. Article 27, paragraph 2 provides the list of

American Court of Human Rights, which like the European Court of Human Rights, initially did not allow individuals to bring individual cases to the court directly.[298]

In states which immediately accept international treaties as part of their municipal or national legal systems, these so-called Manistique states, where no separate legislation is required to incorporate human rights treaties, it is perhaps more effective and efficient to enforce human rights through national court systems. In addition, many states through their constitution enshrine many of the human rights as our enumerated in the various international and regional human rights instruments. The U.S. is a very clear example, in the U.S. constitution provides for greater human rights protection in some areas than even the international or regional human rights instruments. In the U.S. for example, the protection of freedom of speech is arguably much better protected than in any of the UN or regional human rights documents.

In addition to the International Bill of Rights and regional human rights instruments, additional international human rights instruments exist with specific rights enumerated within them can also said to encompass the body of contemporary human rights. For example, one important international document relates to the rights of women, The Convention on the Elimination of All Forms of Discrimination Against Women[299] (hereinafter Women's Convention), which has as of 1 February 2021, 189 states are parties to the convention. However, reservations are permitted and as a result, this convention has more reservations made to it than any other international

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exceptions, articles that may not be suspended, and it includes the same rights that may not be suspended by the European Convention on Human Rights, but adds many others, including the rights of freedom of conscience and freedom of religion protected by Article 12 and the right to participate in government protected by Article 23. However, several rights that are important to workers may be subject to suspension. These rights include the right of assembly (Article 15), the right of freedom of association (Article 16), the right to property (Article 21), and the right to progressive development (Article 26). ibid.

[298] Initially, individuals could not bring cases before the Inter-American Court of Human Rights, as access to the Court was limited to Organization of American States member states. Reforms in the 1997 granted victims the right to participate in proceedings, and in 2001 this was expanded to allow for victim's next of kin or representatives the right to directly participate in proceedings. For more see: Ezgi Yildiz, 'Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights' (2020) 34 Temple International & Comparative Law Journal 309, 326-327.

[299] Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention) UN Doc. A/34/46 (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

treaty.[300] Even though many Arab and Muslim dominated states have also signed and ratified this convention, most of them have made a reservation, perhaps worded very innocently, whereby the state will adhere to the provisions of the convention in so far as they do not conflict with the family laws of the reserving state. Frequently, family law in these states relegate women to the position of property and do not protect their rights in anyway whatsoever, this includes all marital rights and property rights that women may possess and should possess and do possess in civilized states but do not exist in states making such a reservation.[301] It is also noteworthy that other states may respond to the reserving states reservation in at least two different ways. One way is that they do not except the reservation. Further they do not consider the reserving state to be a party to the convention as a whole, because the reservation is incompatible with the main idea or principle of the convention itself.[302] Alternatively, a state may accept the reservation, although not agreeing with the wording of the reservation, but considering that the reserving state is still a party to the convention. This results in a situation where any objections or any differences regarding which articles are accepted by both states means that those provisions do not exist as between those two states. However, it is perhaps the policy of the states that accept those reservations to be that it is better but a state is a party to the convention and obligated to follow whatever provisions the state is willing to follow.

Another important convention which encompasses contemporary human rights is the Convention on the Rights of the Child, aimed at protecting the rights of children, *inter alia*, the context of child labor.[303] This convention is signed by almost every state until recently there were only two exceptions those being Somalia and the United States. In attempting to bring to the forefront essential human rights for people in general and for workers in particular it should be noted that in the contemporary world there seems to be pressure to create more so-called new human rights. One new human right that is, in my opinion legitimate is the right to a safe environment, which

[300] Irene Pietropaoli, 'Islamic Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (2019) 14 Human Rights 83, 86.
[301] For an overview of the position of women in many Islamic states, *see generally:* ibid 86-89; *and* Ingrid Nicolau, 'Women's Rights in Islam' (2014) 6 Contemporary Readings in Law and Social Justice 711.
[302] ibid 95-96.
[303] Convention on the Rights of the Child, UN Doc. A/Res./44/25 (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

includes a safe climate, which could be environmental, but also a safe climate could refer to safe working conditions. There are other rights, which are being proposed such as the right to be forgotten, or the right to a specific gender or the right to food or the right to water.

3.3. Basic Human Rights

While the International Bill of Human Rights is an impressive document, many authors have observed that many of the human rights enumerated were not to be actualized immediately, but are mere aspirations to which nation states should strive to attain in time, as conditions warrant. This is especially so, as many have commented when it comes to the so-called "second and third generations" of human rights. A number of scholars are of the opinion that there are only so many basic human rights and that other human rights cannot be attained until these "basic rights" are achieved.[304] And while international human rights norms are viewed as binding on nation states, the actual implementation and enforcement of international human rights norms is entirely a national matter.[305]

Many scholars have argued for a list of basic human rights. For example, William J. Talbott has argued for nine basic rights that should be universalized to guarantee the other rights, and that these constitute basic human rights.[306] There is much discussion

[304] Henry Shue illustrates this view best in his monumental work, Basic Rights Shue (n 32).

[305] As Jack Donnelly correctly notes, internationally recognized human rights are internationally accepted as binding norms that are implemented and enforced nationally, that is to say, by Sates. The exception being that enforcement by States that are a party to a regional human rights regime are, or should be enforced by the regional human rights regime to which they are a party. However, not all regional human rights regimes are effective at enforcing human rights within the regime, hence the implementation and enforcement of human rights differs among States party to such regimes. The most effective regional human rights regime is the European Convention on Human rights. And further, enforcement of internationally accepted human rights norms is limited at the international level to actions authorized by the UN. For more see: Donnelly (n 41) 34, 127, 140-141, 179.

[306] The rights that William Talbott suggests to be universal basic rights are: 1. A right to physical security; 2. A right to physical substance (understood as a right to an opportunity to earn subsistence for those who are unable to do so); 3. Children's rights to what is necessary for normal physical, cognitive, emotional, and behavioral development, including the development of empathic understanding; 4. A right to an education, including a moral education aimed at further development and use of empathic understanding; 5. A right to freedom of the press; 6. A right to freedom of thought and expression; 7. A right to freedom of association; 8. A right to a sphere of personal autonomy free from paternalistic interference; and 9. Political rights, including democratic rights and an independent

about human rights in the 21st century and many authors have observed there seems to be a proliferation of human rights in the 21st century, which leads to weakening the idea of human rights. Further, all too often of the idea of justice is associated with rights and with human rights in particular. However, as many scholars have noted this is not necessarily a correct connection as while some issues of justice are directly connected with human rights, not all are; for example, as James Griffin noted, it may be an injustice impacting me if my opponent cheats at a game of cards or someone free rides on public transit while I have paid for a ticket, but it is wrong to think about these instances of injustice leading to the creation of human right to ensure that I am afforded "justice".[307] Further, in the opinion of Richard Ford, the proliferation of human rights tends to make the idea of human rights seem trivial in the eyes of many people, and they are of the opinion that this perception weakens the idea of the existing human rights culture.[308] I mention basic rights at this point as a concept to keep in mind throughout this work. I will return to the concept of basic rights at the end of this work.

judiciary to enforce the entire package of rights. For more see: William J Talbott, *Which Rights Should Be Universal?* (Oxford University Press 2005) 163.

[307] James Griffin explains that certain matters of justice are important and are linked to human rights. For example, the Enlightenment notion of justice in procedural law (in court proceedings) does concern human rights, as without due process of law, an individual's liberty may be infringed upon. However, conceptions of distributive justice, and retributive justice (aside from what is needed for minimal provision for one's survivability), are not human rights from the view of the personhood account, that human rights protect individuals' status as normative agents. For more see: James Griffin, *On Human Rights* (Oxford University Press 2010) 40-41.

[308] Richard Ford notes with expansions of human rights leads to a critical analysis of the human rights as not being natural or inevitable, but are politicized to serve the prevailing social agenda of a given period in time. This over characterization of political claims as human rights leads to the dilution of the meaning of rights and further, pressures of political tradeoffs lead to rights being mere talking points, amounting to what Jeremy Bentham referring to as "bawling on paper". For more see: Richard T Ford, *Universal Rights Down to Earth* (1st ed., WW Norton & Co 2011) 10-11, 15.

PART I. SUMMARY

Part I sought to trace the earliest conceptions of what can be seen as elements of contemporary human rights. As demonstrated through my historical analysis of early legal codes, philosophical conceptions of rights, and later, human rights instruments and regimes, I submit that human rights are universal, that individuals have human rights by virtue of their humanity, and that human rights are thus grounded in nature. I further submit that not all human rights enshrined in the International Bill of Rights are realized unequally in terms of implementation in domestic law, as the actualization of them are predicated on the level economic development; yet all are aspirations to which all UN members to and strive to attain.

Further, this chapter has shown that early conceptions of rights persist that rights emulate from a culture's conception of the "creator" or from an established "state", rights are then founded on authority, be it human or spiritual, thus early conceptions of rights were those rights bestowed by a higher authority. From the Abrahamic religions, to Buddhism, to Hinduism, rights were conferred upon subjects and adherents. The first association with rights and nature, as in natural law can be traced to the early Greek philosophers. The conception of natural law was further refined at the period known as the Reformation, which was marked by resistance to the institutional power of the Catholic Church. Further, the Reformation ushered in limitations on sovereign authority, outrage at the treatment and oppression of indigenous peoples by colonizers and religious freedom, all of which are conceptions of contemporary human rights.

The Age of Enlightenment marked a radical conception of "rights" as individuals' rights in relationship with one another and most importantly, with the sovereign. The idea of human rights can be traced to the concept of rights bestowed not by an authority, but by one's humanity, that is, one being human, which was grounded in dignity of the person, ideas expressed by Enlightenment era philosophers such as Locke, Rousseau, Hobbs, Kant, et al. Their writings influenced democratic movements and revolutions, which proclaimed individual rights, in for example the U.S. Declaration of Independence, and the Declaration of the Rights of Man and Citizens in France.

As shown, in the 19th century, chattel slavery was abolished in the U.S. and UK, international humanitarian law developed, and political movements developed in Europe and the U.S. advocating for social welfare, worker rights, and equity. After the First World War, the League of Nations was founded, devoted inter alia to maintaining the peace. The International Labor Organization was an institution of the League and while the League was short lived, the ILO continues as an institution dedicated to achieving social justice for workers. The Second World War exposed the level of depravity of mankind. In the aftermath of WWII, a stronger institution – grounded on human rights – and dedicated to maintaining the peace was founded, the United Nations. The Universal Declaration of Human Rights was enacted in 1948. The International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights are the operational instruments actualizing the UDHR and together they constitute the International Bill of Rights. The aforementioned are the foundation of contemporary human rights norms, with numerous human rights treaties and regimes enacted thereafter.

As discussed, arguments emerged on the universality of human rights, which still endure to this day. As shown through my textual analysis of international and regional human rights regimes and treaties, the universality of human rights as enumerated in the International Bill of Rights is recognized by signatory parties to the aforementioned regimes and treaties. Further, the drafters of the International Bill of Rights were an inclusive and diverse group of leading activists, government officials, philosophers, and legal scholars, from differing nations, cultures, religions, and conceptions of government and political ideology.

Reflecting on questions posed in the introduction of this chapter, I submit a human right is something that an individual possesses naturally, due to one's physical existence. While human rights are not conferred upon an individual by a sovereign or religious authority, they are nevertheless institutionalized internationally, regionally, and locally. Human rights are implemented and enforced largely through municipal legislation. Human rights can be both, positive, defined as what one is entitled to receive in the sense of protections, guarantees and actions, and also negative, in limiting actions taken against an individual by the state and others. And finally, I submit that human rights as enshrined in the international bill of rights are universal,

yet I admit that attaining all human rights is relative – to a degree both the level of development and level of commitment, and thus political and social rights needed to actualize first to pave the way for the actualization of economic and social rights.

PART II.

THE PATH TO WORKER RIGHTS

This part is focused on the development of worker rights, as measured from early-codified worker rights in England to worker rights in the contemporary era. The focus primarily be upon municipal labor law, and how it developed in light of changing dynamics of social arrangements due advances in technology associated with the industrial revolution, and a changing political order. Special emphasis will be placed upon the work done by the ILO with regards to international standards for worker rights and other international organization's role in developing international corporate and labor standards.

This part begins with an overview of the historical development and evolution of labor law from a chorological standpoint from the late 18th century to the early 20th century. Labor law is limited in this thesis to legislative measurers enacted to regulate the workplace environment and working conditions, contractual agreements that govern the relationship between the worker and the employer, and the fundamental principles of the ILO Declaration. Indeed, the totality of labor law encompasses a wide scope of actions ranging from the limitation of time within a work day[309] to time off from work[310] to the means and minimal amount of remuneration[311] to OSH conditions in the workplace[312] to measurers prohibiting discrimination in the hiring process and dismissal process[313] to collective bargaining.[314]

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[309] Sangheon Lee, Deirdre McCann and Jon Messenger, *Working Time around the World : Trends in Working Hours, Laws and Policies in a Global Comparative Perspective* (International Labour Office 2007) 1-2.

[310] Janet C Gornick and Alexandra Heron, 'The Regulation of Working Time as Work-Family Reconciliation Policy: Comparing Europe, Japan, and the United States' (2006) 8 Journal of Comparative Policy Analysis: Research and Practice 149, 151.

[311] Kate Andrias, 'The New Labor Law' (2016) 126 Yale Law Journal 2, 51.

[312] ibid 37.

[313] Sandra F Sperino, 'Revitalizing State Employment Discrimination Law' (2013) 228 Faculty Scholarship at University of Cincinnati College of Law Scholarship and Publications 545 <http://scholarship.law.uc.edu/fac_pubshttp://scholarship.law.uc.edu/fac_pubs/228> accessed 9 September 2020, 547.

[314] Andrias (n 311) 14.

This Part then proceeds to discuss the progress of the internationalization of worker rights, its forces and drivers, and outcomes. The last chapter discusses the concept of fundamental labor rights and efforts at enforcement through initiatives of the UN, ILO and OECD. Frequently these initiatives are encompassed in human rights instruments, both binding and voluntary, with differing levels of success.

An in-depth overview and analysis of the aforementioned would entail significant research beyond the scope of this work. Further, my purpose is to link worker rights to basic human rights, thus issues such as remuneration are beyond the scope of this linkage. My analysis in this Part is thus limited to early conceptions of OSHS protections for workers in the workplace, which shall include limitations on hours worked, as this touches upon the health of the worker, and collective bargaining, which impacts a worker's ability to provide for economic subsistence. In conducting my analysis, I strive for a black letter approach to ascertain the development of labor law. I also incorporate a broad socio-legal historical analysis to discover the institutional functionalism in the administration of early labor laws and societal pressures spurring the evolution of labor law forward encompassing the political, economic, and humanitarian standpoints of the times.

CHAPTER 1.

THE DEVELOPMENT AND EVOLUTION OF WORKER RIGHTS

The starting point of my analysis is with the evolution and development of worker rights in England and in selected English colonies from the pre-industrial age to the early 20th century. The first section of this chapter begins with a detailed analysis of the early laws regulating the employer and employee relationship, which is characterized as the master servant relationship. After overviewing the early laws regulating the employer-employee relationship, I discuss the rapidly changing methods and means of production, known as the industrial revolution, which radically changed societies worldwide. I then proceed to overview the development of laws regulating the conditions and environment in which employees labored. While my primary analysis is upon early English laws, I will also overview the development of labor law in selected countries of continental Europe, the U.S. and Asia. It is through a comparative black letter analysis of labor laws set against the changing societal order and the socio-legal pressures in selected States, that it is possible to identify a pattern of consistency in the development of labor law, which touches upon basic human rights.

1.1. The Master – Servant Relationship

Beginning with the first labor laws in England, the relationship between an employer and employee is characterized as that of a master and servant, with workers being compelled to work according the terms dictated in public law and by the terms dictated by employer in private law.[315] The first English common law legislative act that regulated labor is the Ordinance of Laborers in 1349 followed in 1351 by the

[315] Labor law comprises rules taken from private and public law. The relationship between an employer and employee is characterized as a dependence and subordinate relationship-the employee is dependent upon the employer in an economic sense and the employee is subordinate to the employer in having to labor in the terms and conditions as directed by the employer. For more see: René H Mankiewicz, 'THE CONCEPT AND DEVELOPMENT OF LABOUR LAW' (1950) 5 Bulletin des Relations Industrielles 83, 83-84.

Statute of Laborers.[316] Employers compelled Parliament for the passage of the first labor laws due to a shortage of laborers after the demise of feudalism and the black plague, which empowered workers to demand higher wages, which with the supply of workers limited pitted employer against employer in bargaining for workers.[317] These early laws mandated that men and women under the age of 60, which needed to work for economic subsistence (wages), must work at wages prescribed by law, and that employers could not deviate from the specified amount.[318]

In the American colonies the laws were much the same as in England, with the notable exception being that indentured servants were not paid a wage as in England, and further, while the working conditions in America were harsher, and English law forbid the beating of a servant, laws in some American colonies provided for physical abuse so long as it was not deemed to be excessive.[319] The Master-Servant relationship would endure in the American colonies until the American Revolution, after which in the U.S., at beginning of the nineteenth century, indentured servitude slowly withered away and by the 1820s, it was viewed as involuntary labor and lost its legitimacy.[320]

However, in England, the Master-Servant relationship would endure well into the later part of the 19th century and was one of the obstacles of workers attempting to organize trade unions with the intention of collectively bargaining with their employers for better pay and working conditions.[321] A revision of the Master-Servant law was enacted with the 1867 Master-Servant Act, which sought to lessen the harsher aspects of the master-servant relationship, yet in legal proceedings, magistrates invoked a rather broad interpretation to the meaning of "aggravated

[316] LR Poos, 'The Social Context of Statute of Labourers Enforcement' (1983) 1 Law and History Review 27, 29-30; Nicholas Falcone, *Labor Law* (Wiley 1962) 11.
[317] Falcone (n 316) 11-12.
[318] Poos (n 316) 29-30; Falcone (n 316) 11-12.
[319] Robert J Steinfeld, *The Invention Of Free Labor: The Employment Relation In English And American Law And Culture, 1350-1870* (University of North Carolina Press 1991) 45-46.
[320] ibid 160.
[321] An effective strike may entail workers striking without notice, which could be seen as a breach of employment contract law, which was governed by the Master-Servant Laws, which provided for criminal punishment for breaches by employees resulting in imprisonment. Further, workers would forfeit wages earned before the breach. See for more: Michael J Klarman, 'The Judges versus the Unions: The Development of British Labor Law, 1867-1913' (1989) 75 Virginia Law Review 1487, 1493.

breaches" within the statute, thus workers continued to be subject to criminal sanctions.[322] The master-servant law was repealed and replaced in 1875 with the Employers and Workman Act, which sought to redefine the relationship in terms of equality concerning breaches of contract between employer and employee.[323]

1.2. Collective Bargaining and Trade Unions

In 1548, the English Parliament passed an act that imposed criminal penalties upon workers attempting to bargain collectively.[324] In 1562, labor laws were consolidated into a single act that expanded the regulation of workers by establishing rules regulating apprenticeships, and defined a combination of workers organizing together to bargain collectively with their employer as a conspiracy, subject to criminal proceedings.[325] Workers nevertheless did organize, conscious that only through collectively bargaining could they hope to seek economic redress. In an early case, workers were convicted of conspiracy for colluding together for the purposes of refusing to work for a set wage, *Rex v. the Journeyman Tailors of Cambridge,* 1721[326] and afterwards, groups of workers continued to be convicted of conspiracy for colluding together to bargain with their employer.[327]

The Combination Acts of 1799-1800 were a series of acts passed in response to fears of popular uprisings owing to the times, which troubled the privileged class.[328] As

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[322] ibid.

[323] The Employers and Workman Act eliminated the much abused 'aggravated beaches provision, imprisonment of workers for failure to pay damages in the event of a breach would only apply in instances where the worker was unwilling rather than unable to comply. For more see: ibid 1496-1497.

[324] CDH Cole and AW Filson, *British Working Class Movements: Select Documents 1789 - 1875* (Macmillan 1965) 85-86; Falcone (n 316) 12.

[325] Falcone (n 316) 12.

[326] Cole and Filson (n 324) 88; Falcone (n 316) 14.

[327] David R Lowry, Anthony F Bartlett and Timothy J Heinsz, 'Legal Intervention in Industrial Relations in the United States and Britain: A Comparative Analysis' (1979) 63 Marquette Law Review 1, 3.

[328] A socioeconomic shift was emerging in England in the late 18th century, resulting in an empowered worker class which many in the privileged class feared would be spurred on by the French Revolution. Further, as a consequence of the urbanization associated with the industrial revolution, resources of the state were strained, the number and frequency of social gatherings of workers increased, and the workers were protesting not only working conditions or prices of goods, but they were expressing the view that they were politically oppressed and the established privileged order was the source for their

shown in the aforementioned case, workers colluding together were indeed subject to prosecution as conspiracy under earlier legislation, and defendants were subject to harsher sentences if convicted, yet the procedure for a successful prosecution was difficult and frequently, those accused devised means to evade prosecution.[329] Thus the impetus was present for an act, which would simplify and ensure conviction for workers "combining" to agree upon wages.[330]

The effect of the Combination Acts was to consolidate, codify and expand existing legislation to prohibit trade unions and collective bargaining by criminalizing a 'combination' of workingmen colluding together to determine by agreement the wages they would receive for work.[331] The Combination Acts were repealed in 1824, resulting in strikes throughout England and in 1825, certain combinations were legalized, yet tightly regulated, with a number of criminal provisions under which many actions which constitute contemporary legitimate union activities were subject to criminal prosecution.[332] Moreover, despite the statutory provisions of the 1825 Act, in some instances, attempts at collective bargaining under the common law could be interpreted as impediments and infringements on trade, and workers organizing could be criminally indicted for actions undertaken to restrain trade.[333]

The Trade Union Act of 1871[334] effectively legalized trade unions. The act provided that unions did not restrain trade and that members of a trade union could not be prosecuted for conspiracy based on membership in a trade union. The criminal law was also amended so that threatening to initiate a strike was not deemed to be prosecutable offense for intimidation and threats.[335] However, in 1872, workers threatening to strike were indicted and convicted of criminal conspiracy, leading to

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oppression. For more see: Frank W Munger, 'Suppression of Popular Gatherings in England, 1800-1830' (1981) 25 The American Journal of Legal History 111, 115-117.

[329] Conference Report – 'From Suppression to Containment: Trade Union Law 1799-1825' (1984) 49 Labor History Review 7 <https://Online.Liverpooluniversitypress.Co.Uk/Doi/Pdf/10.3828/Lhr.49.1.7> Accessed 27 February 2019.'

[330] ibid.

[331] John V Orth, 'English Combination Acts of the Eighteenth Century' (1987) 5 Law and History Review 175, 177-181.

[332] Klarman (n 321) 1491-1492; Lowry, Bartlett and Heinsz (n 327) 5-6.

[333] Lowry, Bartlett and Heinsz (n 327) 5-6.

[334] Trade Union Act 1871 (UK).

[335] Lowry, Bartlett and Heinsz (n 327) 7.

the appointment of a Royal Commission in 1874, resulting in a law that further clarified that works threatening a strike were not liable for criminal conspiracy, yet the protections did not extend to civil conspiracy.[336] Court decisions through the years 1893 to 1905 resulted in rulings that, *inter alia,* held that trade unions could be sued in a civil action, and funds from the union could be used to satisfy the judgment, the effective use of picketing was denied, resulting in diminishing the power of trade unions and the use of picketing as an effective collective bargaining tactic.[337] Outraged by decisions that neutered the power of trade unions, workers dissent became widespread, and through pressure from trade unions and concerned citizens alike, the government in 1906 passed the Trade Disputes Act,[338] which sought to remedy workers dissatisfaction in the weakening position of trade unions.[339]

As illustrated through my brief analysis, the earliest laws in England established compulsory labor, at rates defined by law, and criminalized workers organizing for the purposes of collective bargaining. Through the apprenticeship legislation and the regulations against collective bargaining, the master servant relationship was established and would endure well into the industrial age, and lay the groundwork for class struggle and distinction that continues to endure to the present day for workers throughout the world.

1.3. The First Industrial Revolution

In Europe during the 17th and 18th centuries, most work was done in family settings with the family constituting the work unit and the division of labor was typically organized along a patriarchal structure, with all family members being a part of the

[336] In *Regina v. Bunn* workers were convicted of criminal conspiracy for threatening to strike for the purposes of reinstating a worker that had been fired for union activities. The appointment of the Royal Commission resulted in the Conspiracy and Protections of Property Act 1875, which clarified that two of more persons colluding to strategize for collective bargaining does not constitute criminal conspiracy if such actions if undertaken by a single individual would not be punishable as a crime. See for more: ibid.

[337] JJ Posner, 'English Trade Disputes Act of 1906' (1922) 10 California Law Review 395, 396-398.

[338] Trade Disputes Act 1906 (UK).

[339] Under the 1906 Trade Disputes Act, trade unions were immune to damages from civil tort actions. The act also provided protection for picketing and a degree of immunity under civil action for union members' actions. And further, the act more precisely defined trade dispute and actors engaged in trade dispute. For more see: Posner (n 337) 399; Lowry, Bartlett and Heinsz (n 327) 11-12.

work unit, and each member responsible for certain tasks related to their hierarchical position in the family unit.[340] In the early 17th century, most of the work in England, Europe, and America was confined to agricultural work[341] with the exception of skilled craftsmen organized into guilds.[342] Indeed, the 17th century, English society had not yet transformed to one characterized by wage-earning[343] but it was soon to do so with the industrial revolution, which began in England in the latter half of the 18th century.[344] The result was that England became a global leader in commerce, finance and industry. A further result with a global impact was the development of two new social classes that emerged throughout the world, that of workers and industrialists.[345]

As noted in the previous section, in pre-industrial England and the American colonies, labor law was characterized in law as a master-servant relationship, which entailed a differing legal status between those who labored, the servant, and those whom the servant worked for the master, with the masters being placed in the hierarchy well above their workers.[346] Whatever the terms of the agreement for preforming labor, (for a term, a task, or hourly remuneration), the worker was bound to perform the task, being under a legal injunction whereby enforcement thereof could be compelled through law.[347] Further, the common law forbade collective bargaining until reforms in the latter half of the 19th century. Being bound to the employer, through law, in a

[340] Rudi Volti, *An Introduction to the Sociology of Work and Occupations* (2nd edn, SAGE Publications 2012) 22-23.
[341] Laura Levine Frader, *The Industrial Revolution: A History In Documents* (Oxford University Press 2006) 19-20.
[342] Volti (n 340) 29-30.
[343] Donald Woodward, 'Wage Rates and Living Standards in Pre-Industrial England' (1981) 91 Past and Present 28, 45.
[344] Frader (n 341) 41.
[345] The first industrial revolution began in England ushered in by advances in manufacturing technology. The new machines were too expensive for small manufactures to purchase and operate efficiently, resulting in merchant factories investing profits from the Atlantic slave trade into machines housed in large factories concentrated in urban centers. An abundant supply of labors existed (men, women, children) in urban areas through migration because of enclosures (land reforms) and a population boom. The working conditions were harsh and brutish with workers having to keep up with the 'pace of the machine…rather than work at their own page'. What started in England spread to other parts of the world, resulting in a 'social and economic gap' giving rise to two distinct new social classes-that of the worker and the factor owner and financiers, collectively the industrialists. See for more: ibid 41-43, 97.
[346] All who labored for another were referred to as servants regardless if they maintained their own residences and labored for another, or were housed and provisions provided for by the employer. This terminology extended to craftsmen and apprentices. See for more: Steinfeld (n 319) 16-23.
[347] ibid 41.

master-servant relationship, factory workers were subject to strict rules that regulated their lives from the beginning until the end of each workday.[348] Further, working conditions in the factories were unhealthy and unsafe.[349] The unsafe, unhealthy and unsanitary working environment and ridged, strict work rules encompassed all workers, men, women, and children. Indeed, children worldwide, some as young as five, were especially exploited by the industrialists through frequent physical discipline, exposure to the same harmful conditions as adults, and paid less than adults.[350]

The industrial revolution, while ushering in changes in society for workers previously engaged in agriculture, also had a negative impact on guilds. Through the growth of markets, new technical innovations, and more efficient manufacturing techniques, much of the work that had been done by skilled craftsmen was being replaced by the new means and methods of production.[351] Through pressures of the industrialists and outright hostility in some states to organizations that believe in autonomy and self-regulation, by the mid 19th century, guilds were abolished by legislative means in many states.[352]

In the early 19th century, as the industrial revolution expanded, capital became ever increasingly concentrated in the hands of industrialists while workers labored 12 hours or more a day, frequently in unsafe conditions, while subject to strict control and private regulations. Workers began to protest the deplorable working conditions, lack of public regulations, and working conditions. Strikes and walkouts of workers took place in the U.S. and England. Societal awareness of the exploitation of workers was raised through reporting and dissemination of factory working conditions through the press. Evangelical religious leaders questioned the morals of the industrialists in their exploitation and treatment of workers. Robert Gray argues that it was a

[348] Frader (n 341) 58-60.
[349] ibid 60.
[350] Children worked most often in mines and in textile factories. Children were sought out to perform tasks that were better suited due to their having small fingers, or hands, or being able to fit in small places (mines for example). The abuse and exploitation of children, worldwide during the industrial age is chronicled through photos and written accounts of the time. With no prohibitions on child labor, the industrialists were free to maximize their profits with little concern for the well-being of the most vulnerable, children. See for more: ibid 65-70.
[351] Volti (n 340) 33.
[352] ibid.

convergence of factors that led to the movement in the mid 19th century for factory reforms through legislative means in England to address the exploitation of workers.[353] These early factory reforms are the foundation of modern OSHS laws.

1.4. Factory Reforms in England

It would be a daunting and unnecessary task to overview the entirety of English factory legislation, yet the most significant English factory acts will be briefly overviewed, as it is from this point which the beginnings of worker rights can be traced. A number of measurers were enacted in nineteenth century England to regulate employment in factories. These are the first labor laws that place limitations on hours worked in a day, times when work is allowed, safety and health protections for workers, and mandated factory inspections. Initially, these first laws focused on the regulation – rather than the abolition – of child labor, because families depended on income from their children as a means of subsistence, because certain industries – particularly the textile factories – could not operate without child labor.[354]

The first law passed in England to address working conditions in factories was the Health and Morals of Apprentices Act 1802.[355] While this Act only applied to textile mills and specifically to apprentices, and did not have an effective enforcement mechanism, it is nevertheless significant because it was the first legislation to address environmental conditions in factories.[356] Among the requirements of the Act were health and safety protections for workers, regulation of working hours and times, and annual inspections of factories.[357] The plight of workers was curiously championed by

[353] Robert Gray, 'The Languages of Factory Reform in Britain, c.1830-1860' in Patrick Joyce (ed), *The Historical Meanings of Work* (Cambridge University Press 1987) 145.
[354] Clark Nardinelli, 'Child Labor and the Factory Acts' (1980) 40 The Journal of Economic History 739, 740.
[355] Health and Morals of Apprentices Act 1802 (UK).
[356] WB Creighton, 'The Industrial Safety, Health and Welfare Act 1981 (Vic.) - Radical Advance or Passing Phase'' (1983) 9 Monash University Law Review 195, 196.
[357] The Act applied to textile mills with three or more apprentices or 20 or more employees. The Act required sanitary cleaning twice a year for each room or apartment in the factory premises, that a sufficient number of windows and openings be present in factory and apartment rooms so as to ensure a supply of fresh air and that each apprentice be supplied with two complete sets of clothing necessary for work. In addition to the aforementioned sanitary requirements, the Act also limited the work time to no more than 12 hours a day, limited the working hours, mandated educational instruction (reading,

some industrialists, notably mill owner Robert Owen, who believed that limiting the hours of workers would be beneficial to both the industrialists and the workers, and further, that children younger than ten should not be employed whatsoever, and older children should only work part time.[358] Owen sought to expand regulation beyond apprentices and into other industries, seeking to improve working conditions and reduce the hours workers were subject to in absence of regulation, and largely through his efforts,[359] regulation was expanded through the enactment of the Cotton Mills and Factory Act of 1819.[360] The Act expanded employment regulations by setting a minimum age of nine to be employed in cotton mills and manufacturing processes involving the spinning of cotton. The act further limited working times and hours for children under the age of 12, mandated breaks for eating, mandated sanitary cleanings of factory walls and ceilings, and provided for punitive fines for factories that failed to comply with the law.[361] Twelve years later the Factory Act of 1831[362] was enacted, which, *inter alia,* expanded the regulation of workers beyond specific occupations, increased the scope of regulation to encompass workers up to 18 years of age[363], and

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writing arithmetic), distinct sleeping apartments for men and women and religious instructions on Sunday for one hour. And the Act provided for annual inspections of mills by persons appointed by justices of the peace to inspect mills for compliance with the Act and punitive sanctions in the form of fines for failure to comply with inspections or for violations of the Act. For more see: A Aspinall and E Anthony Smith (eds), 'Statutes at Large, LV, 42 Geo. III, c. 73', *English Historical Documents, XI, 1783-1832* (Oxford University Press 1959) 723-724.

[358] BL Hutchins and A Harrison, *History of Factory Legislation. London,* (3rd edn, PS King & Son 1926) 21-22.

[359] Robert Owen sought to persuade his fellow industrialists to support governmental regulation for workers but he was unsuccessful. Nevertheless he continued to fight for regulation by appealing to leading members of the English parliament to expand the regulation of the workplace, and while some agreed, stiff opposition of Sir R. Peel proved to be an obstacle in enacting the regulations Owen sought. Yet progress was made through the establishment of parliamentary commissions tasked with deciding on the merits of Owen's arguments that the health of children suffered from laboring in factories and further, in the interest social economy, regulation was indeed warranted to alleviate the unhealthy and unsafe working conditions and to improve the lives of workers. Owen submitted his own draft of employment regulations, which inter alia would have further restricted the hours and ages of employment of children to levels that would not be actualized via legislation until decades later. Testimony before committees attesting to the unhealthy and unsafe working conditions at the time amounted to a battle of experts, much like the contemporary legislative process. For more see ibid 23-27.

[360] Cotton Mills and Factory Act of 1819 (UK).

[361] A Aspinall and E Anthony Smith (eds), 'Statutes at Large, 59 Geo. III, c. 66, LXXIII', *English Historical Documents, XI, 1783-1832* (Oxford University Press 1959) 734-735.

[362] Factory Act of 1931 (UK).

[363] DH Blelloch, 'A Historical Survey of Factory Inspection in Great Britain' (1938) 38 International Labor Review 614, 621.

noted that regulations are necessary 'to preserve the health and morals of such persons.'[364]

Spurred on by earlier achievements, a "ten hours movement" emerged in the early 1830s[365] driven by ideas of the time that were considered radical; notions of fair employment, labor as property, and a resistance to unregulated labor, feeling it would be a challenge to the traditional notions of patriarchal values.[366] The debates in the early 1830s focused on the adverse results of long hours of labor on the health and morals of children, the impact of the lack of formal schooling of children, and how girls are negatively impacted in fitness for marriage and motherhood.[367] Robert Gray and others contend that is was largely through the activist efforts of the ten hours movement that compelled the English government to set up a Royal Commission charged with investigating the employment of children in factories.[368] The legislative outcome of the Royal Commission was the Factories Regulation Act of 1833.[369] The Act applied to textile mills, restricting children aged 9-14 from working for more than 8 working hours a day, mandating the employer to provide education for children, limiting work to no more than 12 hours a day for all person under the age of 18 and creating a system of factory inspectors to enforce the Act.[370]

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[364] The Act restricted persons under the age of 21 from working at night and defined what constitutes night working hours. The Act limited working hours to no more than 12 on any work day nor no more than 9 on a Saturday for persons under the age of 18. For more see: A Aspinall and E Anthony Smith, 'Statutes of the United Kingdom 1 and 2 William IV, c- 39, (1831)', *English Historical Documents, XI, 1783-1832* (Oxford University Press 1959) 739.

[365] Resolutions declared in parliamentary districts in which the activists of the ten hours movement pledged not to support any candidate that would not support a Ten Hours Bill, largely premised on enhancing the welfare of children by limiting working hours. For more see: Hutchins and Harrison (n 358) 48-55.

[366] Gray (n 353) 146.

[367] ibid 150.

[368] Robert Gray, *The Factory Question and Industrial England, 1830-1860* (Cambridge University Press 1996) 59-60.

[369] Factories Regulation Act of 1833 (UK).

[370] The Act changed the enforcement from amateur enforcement though appointment of inspectors by local justices of the peace to the creating of an administrative body of full-time factory inspectors, empowered to enforce the Act through inspections, at any time deemed needed, and further, for reporting of their findings that would constitute expert advice resulting in increased factory legislation to address deficiencies in the Act. The Act also mandated increased record keeping by the factories in respect to minors employed and required the Employer to provide education to children under 13. For more see: WD Hancock and GM Young (eds), 'Statutes of the Realm, 3 & 4 Wm. IV, c. 103', *English Historical Documents, XII(1), 1833-1874* (Oxford University Press 1956) 949-952.

To fuel the engines of industrializing England, coal was needed and women and children were frequently employed in the coal mining industry, where the working conditions were harsh and unsafe and without regulatory oversight provided by the aforementioned factory act. In 1842, a Parliamentary Commission was established to study the conditions working conditions in the mining industry, and the Commission's report provided evidence of the appalling working conditions of women and children in coal mines.[371] The resulting legislative action was the enactment of the Mines and Collieries Act of 1842[372], which may be seen as an extension of the Factory Act of 1833.[373] The Act prohibited women and from working in coalmines and restricted boys under 10 years of age from working in coal mines. While mine inspections were mandated, the Act did not address mine safety, which would inevitably be first addressed in the Coal Mines Inspection Act of 1850,[374] and further refined in the Coal Mines Regulation Act of 1860.[375]

Aside from sanitary cleanings and ventilation requirements for factory premises, health and safety issues had been ignored in factory legislation. The Factory Act of 1844[376] is especially significant for this research because it addressed worker safety. The act required that dangerous machinery be fenced off to protect workers from being injured by the machinery,[377] further limited the working hours of children,

[371] Women and children labored in the worst conditions imaginable, ventilation was poor, women often labored with no clothing, crawling on their hands and feet harnessed to heavy carts loaded with coal uphill, dragging them up through mine passages alight by candles encased in their headgear. The perilous conditions caused many accidents and no doubt shortened the life of women and children subject to laboring in such conditions. For more see:
Ivy Pinchbeck, *Women Workers and the Industrial Revolution* (FS Crofts & Co 1930) 248-255; WD Hancock and GM Young (eds), 'Report of the Commissioners on the Labour of Women and Children in Mines, Parliamentary Papers, 1842, XIII', *English Historical Documents, XII(1), 1833-1874* (Oxford University Press 1956) 972-980.
[372] Mines and Collieries Act of 1842 (UK).
[373] Alan Heeson, 'The Coal Mines Act of 1842, Social Reform, and Social Control' (1981) 24 The Historical Journal 69, 76.
[374] Coal Mines Inspection Act of 1850 (UK).
[375] Coal Mines Regulation Act of 1860 (UK).
[376] Factory Act of 1844 (UK).
[377] The text in the Act requiring machinery to be fenced was awkwardly worded, as it was specifically addressed to areas 'near to where children or young people are liable to pass or be employed' which led to the interpretation that it would require the fencing of all machinery to include dangerous machinery operated by men, thus extending protections to adult men. This resulted in the government passing a Factory Act in 1856, which in section 21 clarified that the areas of the factory subject to fencing be limited to 'those parts thereof with which children and young persons and women are liable to come in contact, either in passing or their ordinary occupation' effectively leaving adult male workers without

restricted children and women from cleaning working machinery, and imposed additional regulations concerning meal times, record keeping, and extended most provisions of the 1833 Factory Act to women so as to prevent evasion of the law.[378] The succeeding factory acts further refined working hours for women and children,[379] limited the minimum ages of employment for children, and extended safety and sanitary provisions and inspections of earlier factory acts to other divisions of industry.[380] The 1878 Factory and Workshop Act consolidated the prior acts into one code.[381] The Factory Act of 1891 imposed more stringent requirements for fencing dangerous machinery and the Factory Act of 1901 raised the minimum age for employment to 12 and required fire escapes for factories.

As can be seen from the historical overview of the development of labor law in England, labor law can be said to encompass three main groupings - (1) the relationship between the employer and employee, characterized by the master-servant relationship and early prohibitions on collective bargaining; (2) regulation of the environmental conditions of the workplace and the safety of employees; and (3) regulation of the conditions of employment for women and children.

1.5. Early Labor Law in Continental Europe

Legislation for the protection of workers came later in continental Europe. The industrial revolution started in England and spread around the world, and thus the development of the factory system was delayed in continental Europe. And further, the governments of continental European states were slower to react to the abuses of workers in the emerging factory system due to differing conceptions of governance, wealth, stability and societal pressures. However, the legislation that did emerge was

protections from the dangerous machinery. This would endure until passage of The Factory and Workshop Act of 1878 which in sections 5 and 6 would require fencing to protect 'any person' so as to include adult men. For more see: W Stanley Jevons, *State in Relation to Labour* (Macmillan and Co 1882) 67-68.

[378] George M Price, *Administration of Labor Laws and Factory Inspection in Certain European Countries* (U S Government Printing Office 1914) 29.

[379] ibid 30.

[380] The earlier Factory Acts were extended to printing, bleaching, and dying factories and to the production of alkali and the manufacture of lace, among others. See for more: Jevons (n 377) 58-59, 67-68; Price (n 378) 30.

[381] Jevons (n 377) 60; Price (n 378) 32.

focused on similar provisions as the English legislation-protection of workers health and safety, collective bargaining, and regulating the employment conditions of women and children. My overview of the development of labor law continental Europe will be more limited in scope and breadth, and will focus on Germany and France. I selected Germany and France for comparison for two reasons; first, because both countries were slow to industrialize, yet once the process stated, they both industrialized at a rapid pace, and second, because each country was undergoing a period of political alignment, albeit on different courses at the time; Germany that of a loose federation that was unifying and France, which was undergoing dramatic social revolutions. Nevertheless, the development of labor laws in each country was largely focused on similar issues and driven by similar forces.

1.5.1. Germany

Germany was not unified until the conclusion of the Franco-Prussian War in 1871. Before and after the unification of Germany, working conditions for factory workers was every bit as oppressive and harsh as that of England. Prior to the unification of Germany, labor law was made in what I shall refer to as different German states and applicable only therein. While reports of the dangers of child labor were evident as early as 1818,[382] it was the 1837 publication of the suicide of a young girl who was a factory worker that raised public awareness of the plight of child workers in Prussia.[383] Public pressure resulted in the provincial legislature petitioning the King of Prussia to regulate the employment of child workers, resulting in a law enacted in 1839 regulating the working conditions of children.[384]

The 1839 law was the first legislation in continental Europe regulating child labor.[385] The law regulated the working times for children, prohibited children under the age of 9 from working, mandated five hours of education weekly, prohibited work on Sundays and holidays, provided for enforcement by local police officers, school

[382] Clark Nardinelli, *Child Labor and the Industrial Revolution* (Indiana University Press 1990) 127.
[383] Price (n 378) 104.
[384] ibid.
[385] Elisabeth Anderson, 'Ideas in Action: The Politics of Prussian Child Labor Reform, 1817-1839' (2013) 42 Theory and Society 81, 82.

teachers and members of the clergy, which, however, was not effective due to the reluctance of the local authorities to enforce the law.[386] Subsequent Prussian legislation proved to be more effective, beginning with the Law of May 16, 1853, which raised the minimum age of employment for children from 9 to 12 years, while limiting the working hours of children to six hours a day, and requiring children to be free for three hours of education daily.[387] The most significant aspect of the 1853 law was a section specifying procedures for the appointment of factory inspectors, which proved to be more effective than the 1839 law.[388] Other German states followed the lead of Prussia in enacting child labor laws. The laws, however, were not effective, largely due to inadequate enforcement mechanisms.[389]

The founding of the North German Union resulted in the Industrial Code of 1869[390], which provided for a unified industrial code within the North German Union states. The aforementioned code expanded provisions of the earlier German state factory laws to mining operations, and important for this research are the provisions that tightened working conditions and limitations for children, provisions requiring employers to install safeguards on machinery so as to protect workers from hazards to life and health and the empowerment of factory inspectors to have the same powers as police officers, and to inspect factories at will.[391] In 1878, the code was amended to mandate the appointment of factory inspectors in all German districts, with powers equated to those of police to enforce the industrial code.[392] In 1891, in reaction to ever

[386] ibid 104-105; Nardinelli (n 382) 127.

[387] Price (n 378) 106.

[388] The appointment of factory inspectors was optional, yet more effective than the earlier law as the inspectors were officially appointed to inspect factories-as their primary duty, not as an additional duty as was the instance with the earlier law. Not all districts appointed inspectors, and the few that did had mixed results in the effectiveness of the inspectors. Still, this was a marked improvement over the earlier law, yet factory conditions were deplorable, especially in districts that continued to rely on inspections by local officials. For more see: ibid 107-108.

[389] Nardinelli (n 382) 127.

[390] *Gewerbeordnung für den Norddeutschen Bund* 1869 (North German Confederation).

[391] The appointment of factory inspectors was still optional, resulting in lackadaisical factory inspections in districts where enforcement was left to the local officials, and even with the appointment of factory inspectors, often the technical expertise was lacking to determine what safety measures should be utilized to ensure adequate health and safety protections for the workers. See for more: Price (n 378) 109-111.

[392] It was recommended that factory inspectors have scientific knowledge and technical education, or experience in working in large industrial works so as to ensure adequate protections were undertaken in factories to prevent injuries to workers that would negatively impact life and health of the worker. See for more: ibid 112-113.

increasing popular demands for expanded protections for workers, the German government amended the code to further tighten restrictions on child labor, extend the scope of factory inspections to other industries, and to further expand the tasks of factory inspectors and create a bureaucracy to manage factory inspections.[393]

Following the unification of Germany, Chancellor Otto von Bismarck supported the creation of an effective social protection system for German workers through the enactment of an employer's liability law in 1871 which imposed liability on employers for expenses related to accidents that were not the worker's fault.[394] This was followed with the enactment of insurance laws of 1884, which created associations of workers specific to a trade, known as *Berufsgenossenschaften*.[395] These associations, *inter alia,* were given the power to self-regulate the protection of workers in the given trade through establishing rules and regulations devised to protect the health and life of workers.[396] Further, these associations were legally empowered to enforce the rules through factory inspections to ensure compliance with safety rules and to impose fines on both employers and employees for not complying with safety rules and regulations.[397] In 1888 an old age and invalidity law was enacted requiring equal contributions from the employer and employee. Through the creation of the aforementioned social protections, Bismarck was able capitalize on principles that appealed to German workers.[398]

1.5.2. France

Compared to England, advances in manufacturing technology associated with the industrial revolution were slow to arrive and become accepted in France.[399] Reforms

[393] ibid 115-116.
[394] Michael L Perlin, 'The German and British Roots of American Workers ' Compensation Systems : When Is an Intentional Act Intentional' (1985) 15 Seton Hall Law Review 849, 854; Julia Moses, *The First Modern Risk* (Cambridge University Press 2018) 37.
[395] Price (n 378) 118-119.
[396] ibid; Ernest Hennock, *The Rrigin of the Welfare State in England and Germany, 1850 - 1914 Social Policies Compared* (Cambridge Univ Press 2007) 98.
[397] Price (n 378) 118-119.
[398] J Clapham, *The Economic Development of France and Germany, 1815-1914* (4th ed., University Press 1936) 335-338.
[399] Val R Lorwin, *The French Labor Movement* (Harvard University Press 1966) 3; Jeff Horn, *The Path Not Taken : French Industrialization in the Age of Revolution, 1750-1830* (The MIT Press 2006) 46-48.

proposed by Turgot to reform the economy and taxation, at the expense of the privileged class, were rejected by Louis XVI, which eventually led to a revolution.[400] The French Revolution of 1789 would usher in reforms that impacted labor through suppressing the corporations/guilds and eliminating intermediary institutions, and imposing a liberal market doctrine that in actuality, make the state more powerful.[401] The *Le Chapelier* Law, passed in 1791, prohibited workers from organizing and bargaining collectively as doing so was deemed to be incompatible with the concept of individual liberty and with the Declaration on the Rights of Man.[402] Collective bargaining was outlawed with severe penalties for workers who colluded to for a combination for the purposes of collective bargaining, yet it was difficult for the governments to enforce the prohibitions due to the militancy of the French working class.[403]

Early 19th century French laws regulating working conditions focused on limitations of working times for specific occupations, mandating Sunday and holiday rest, and, prohibiting children under ten years of age from working in mines.[404] Throughout the early 19th century, France, just as in England, children were used as laborers in industry, frequently working in deplorable and dangerous environmental conditions. However, despite public awareness of the conditions children faced in the workplace, there was wide reaching opposition to governmental regulation of child labor, from factory owners, to government officials, to intellectuals, to workers themselves.[405] The first public outcry for legislation directed at child labor came from small industrialists, intellectuals, and religious writers, which cumulated in petitions to the government demanding that legislative action be taken to regulate child labor and to improve the health and sanitary conditions in factories for workers, resulting in

[400] Turgot had partly suppressed the guilds (corporations) in 1776, but failed to extend this to the whole of France. And his further proposals met with hostility among the nobility leading to his dismissal from office. See for more: Price (n 378) 174; David McNally, *Political Economy and the Rise of Capitalism: A Reinterpretation* (University of California Press 1988) 133.
[401] Horn (n 399) 170-171.
[402] The law banned guilds and trade unions until it was repealed in 1884. For more see: Mankiewicz (n 315) 86; Lorwin (n 399) 4.
[403] The sanctions and prohibitions for workers to organize were present in law before the 1789 Revolution and women were not prohibited from organizing. However, it was difficult to prevent workers from organizing. For more see: Horn (n 399) 250, 252-255.
[404] Price (n 378) 174.
[405] Lee S Weissbach, 'Child Labor Legislation in Nineteenth-Century France' (1977) 37 The Journal of Economic History 268, 268.

legislation being passed in 1841.[406] The 1841 child labor law was applicable to factories relying on machine-driven power or a continuous fire, which employed 20 or more workers, and like the English laws, it focused on a establishing minimum age for workers, focused on child workers, limiting the working hours of children, and mandating education.[407] Problematic however was the observance of the law on two dimensions; first, both workers and industrialists resisted the law, and second, like the early laws in Germany, enforcement of the 1841 French law was left up to voluntary commissions.[408] The plight of the French worker was dismal as most members of the working class were disenfranchised from voting and reforms designed to benefit the worker were stifled by an indifferent conservative government and monarchy.[409]

The French Revolution of 1848 ushered in the French Second Republic. One of the first acts of the revolutionary government was the Right of Labor Law, which limited the work hours for all workers to ten hours in Paris and 11 hours in the provinces.[410] The government established "national workshops" to provide work for workers, yet this amounted to "make work" and it was not possible to sustain; consequently the "national workshops" were closed, resulting in riots and clashes between workers and the military.[411] In 1862, Napoleon III allowed a delegation of French workers to attend an international exposition for workers in London and a year later, typographical workers in Paris went on strike, demanding higher wages.[412] As a result of the change in the law enabling workers to strike, unions spread throughout the country, leading to the establishment of a federation of unions, the French International, which was affiliated with the First International.[413] While unions did

[406] Price (n 378) 175-176; Weissbach (n 405) 268-269.
[407] The minimum age for child workers was set at 8, with no more than 8 hours work per day for children aged 8-12. Children 12-16 could work no more than 12 hours a day. For more see: Price (n 378) 176; Weissbach (n 405) 269.
[408] Price (n 351) 176; Weissbach (n 378) 269.
[409] Jonathan Richard Hill, "The Revolutions of 1848 in Germany, Italy, and France" (Senior Honors Theses and Projects 45 Eastern Michigan University 2005) 37-38 < https://Commons.Emich.Edu/Honors/45/> accessed 16 March 2019.'
[410] Price (n 378) 177.
[411] The French delegation upon return asked for the right to strike and to associate freely. For more see: Lorwin (n 399) 9.
[412] As a result of the strike, leaders were arrested but pardoned and the law was changed in 1864 to allow workers to strike. However, workers were not granted the right to associate together or collectively bargain. For more see: ibid.
[413] ibid 12.

exist, they lacked legal standing, yet given the tense political climate coupled with the Franko-Prussian war, the government tolerated unions. The aftermath of the Franko-Prussian war resulted in the establishment of the Third Republic. The government responded to demands of workers for recognition of unions by passing the Waldeck-Rousseau Law in 1884, which recognized trade unions and freedom of association.[414]

With the Third Republic, progress was also made at improving working conditions, when in 1874 a law was passed that extended existing legal protections of workers to all industrial sectors, established a minimum age of 12 for child labor, limited children between 12 and 17 years of age to working no more than 12 hours a day.[415] The 1874 law also introduced the first protections for women laborers, addressed sanitary conditions of factories, and most importantly, provided for special inspectors to enforce the law.[416] Enforcement however, proved to be problematic, as the 1874 law authorized too few inspectors to be effective. Yet, through subsequent legislative action, the numbers of factory inspectors were increased, increased tightening of conditions for child labor was implemented, and laws were passed to address workers' health and safety.[417] In 1910, a labor code was created that consolidated all earlier acts into a single code.[418]

1.6. Early Labor Law in the United States of America

In this section, I will overview the development of labor law in the United States of America. A chronological overview of the development of labor law in the U.S. is more difficult to trace due to the differing levels of industrial development among the states. Early labor law was enacted only at the state level and U.S. federal labor law would not emerge until the early 20th century and would initially be limited in scope to freedom of assembly and organizing for the purposes of collective bargaining and laws regulating child labor. My overview first will cover the evolving nature of the

[414] The law required trade unions to register as associations. The Minister of Interior, Waldeck-Rousseau in hopes to de-radicalize the unions and allow them to develop along non-socialist lines, sponsored the legislation. For more see: ibid 18-19.
[415] Nardinelli (n 382) 127.
[416] Price (n 378) 176; Weissbach (n 405) 270.
[417] Price (n 378) 180.
[418] ibid 180-181.

master-servant relationship and legislative acts and executive actions of the U.S. federal regulations designed to circumvent state legislation in this domain. I will then proceed to overview select state laws regulating the workplace and working conditions following the path of industrialization amongst the states. And lastly, I will overview early U.S. federal labor law, from the early laws regulating the workplace, working terms and conditions, to laws regulating unionizing and collective bargaining.

As discussed earlier in this chapter, prior to the revolutionary war and thereafter, the relationship between a worker and an employee in the U.S. was that of the master-servant relationship, emulating from English common law. Yet in the early 19th century, the relationship between employer and employee was evolving from that of a master-servant relationship to the free agent relationship. If workers were constrained and compelled to labor against their will, it amounted to involuntary labor; the laborer thus was a master of his own destiny and could not be compelled to labor against his will.[419] While the evolving nature of the master-servant relationship recognized the freedom of laborers to control their own destiny, economically, the employer held an advantage. If a laborer chose to end the relationship before the term of the contract and sought wages for his labor through the courts, the employer was likely to prevail and the worker would not be compensated for whatever work had been completed.[420] This shift in the dynamics of the relationship could be characterized as one of judicial equals in terms of their contractual relationship, the employer could not compel the worker to labor against his will, nor could the employer physically discipline the worker for failing to perform the tasks in a satisfactory manner, yet the reality was one in which the employer was still the more powerful party as it was he who set the terms and conditions for employment, and it was up to the worker to take or leave it.[421]

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[419] Steinfeld (n 319) 147-148.

[420] While in England a worker who failed to complete the work for which he had contracted could be compelled to complete the work, and imprisoned and fined if he refused. In the U.S., the relationship had changed to an agency relationship, and workers could end the relationship at will, and need not worry about being compelled to labor nor imprisoned and fined for failure to do so. However, the employer exerted economic influence over the worker, as courts would not allow workers that ended the relationship before the term to recover wages that were due for work completed before the ending of the term. For more see: ibid 151-152.

[421] ibid 157-158.

While indentured servitude had lost legitimacy in the 1820s in most states, and with the American Civil War ending slavery a practice of peonage persisted, particularly in the western states and territories.[422] Also, many southern states in the aftermath of the American Civil War enacted statutory provisions whereby contractual breaches of labor contracts were criminalized. In response to these actions and to settle the issue of indentured servitude, the U.S. federal government passed the Federal Anti-Peonage Age of 1867, which outlawed voluntary and involuntary servitude in any U.S. state or territory, effectively ending all forms of forced labor in the U.S. resulting in the solidification of the contractual free agency relationship between employer and worker.[423]

Industrialization in the U.S. in the early 19th century was primarily limited to the northern states, particularly in the New England region. Child labor was frequently utilized in textile mills, and the environmental conditions were like that of England and elsewhere in the world at that time, unsafe and unsanitary. The first law passed regulating child labor was in Massachusetts in 1836.[424] However, it was not very effective since a *laissez-faire* spirit engrossed the people and the industrialists, and state governments, were reluctant to take regulatory action seriously.[425] Still, efforts at labor legislation persisted, spurred forward by labor organizations, which called for legislation aimed at limiting working hours, protections for unsafe working environments, and further, most of these early efforts were targeted to child labor.[426] [427] By 1848, most of the New England states had laws regulating children's working hours and ages.[428] Subsequent factory acts focused on the regulation of child laborer,

[422] ibid 180.
[423] ibid 184.
[424] Sarah S Whittelsey, *Massachusetts Labor Legislation: An Historical and Critical Study* (American Academy of Political and Social Science 1900) 9.
[425] John R Commons, *History Of Labour In The United States Volume I* (2nd edn, AM Kelley 1966) 321.
[426] As with early labor laws in Europe, early U.S. laws focused on the regulation of child labor in four areas, a minimum age to work; education; limiting hours worked and; protections from environmental hazards. For more see: Elizabeth Sands Johnson, 'History of Labour in The United States Volume III' in John R Commons (ed), *Child Labour Legislation* (2nd edn, A M Kelley 1966) 403.
[427] Donald W Rogers, 'From Common Law to Factory Laws: The Transformation of Workplace Safety Law in Wisconsin before Progressivism' (1995) 2 The American Journal of Legal History 177, 195.
[428] Nardinelli (n 382) 127.

but were characterized as deficient due to lacking an effective mechanism to provide for a means of enforcement.[429]

While early laws were lacking in many aspects of genuine protections for the welfare of workers, the mere attempts to legislate labor regulations was seen as an interference with freedom to contract, resulting in litigation being undertaken by politically interested groups which then resulted in state labor laws deemed to be invalid in court decisions.[430] However, as workplace injuries and accidents became more frequent and labor organizations pressed for legislation. Massachusetts was the first U.S. state to enact legislation targeted at factory safety and health in 1877.[431] Near the end of the 19th century, most of the industrialized states had passed some form of factory legislation with the southern states lagging behind and not passing labor laws before 1900, due to the South's being primarily an agricultural region and its late industrialization.[432]

U.S. federal labor legislation regulating working times, conditions and collective bargaining was slow to develop, with laws regulating private enterprises not emerging until the early 20th century. In 1840, U.S. President Martin Van Buren issued an executive order that limited work hours to 10 for all manual laborers in federal public works.[433] Aside the aforementioned executive order, legislation regulating labor was promogulated at the state level and state laws were frequently challenged in the late 19th century as interfering with private bargaining. *Lochner v NY* is the leading case.[434] Anne Marie Lofaso characterizes U.S. labor law jurisprudence the 19th century and early 20th century grounded on free enterprise, which viewed laws

[429] The Massachusetts Law of 1867 set the minimum age of employment at 10, required three month schooling prior to employment for children aged 10-15, and limited the weekly working hours to 60 for children under 15. However, there was no enforcement mechanism. For more see: Whittelsey (n 424) 11.
[430] Johnson (n 426) 399.
[431] The law required dangerous machinery to be guarded so as to protect the workers from injury, required engines to be cleaned only when in operation, and detailed safety measures for the factory in terms of access to stairways, fire-escapes, and door openings, focused on protections in instances of fire. The 1877 act was amended numerous times to encompass a wide range of safety protocols, licensing mechanisms, and factory inspections. For more see: Whittelsey (n 424) 21-23.
[432] ibid 405-406; Nardinelli (n 382) 129-130.
[433] David R Roediger and Philip Sheldon Foner, *Our Own Time : A History of American Labor and the Working Day* (Greenwood Press 1989) 40.
[434] *Lochner v New York,* 198 US 45 (1905).

regulating worker rights as interfering in workers and employers' rights to contract freely.[435]

In the early 20th century, responding to public pressure over child labor, oppressive working conditions and workers striking for better working conditions and pay, the administration of President Woodrow Wilson introduced federal legislation regulating labor. In 1916, the Adamson Act became law[436]; it was the first law at the federal level regulating working hours and pay for private enterprises. The constitutionally of the Adamson Act was soon challenged, leading to the U.S. Supreme Court holding the act as constitutional, noting that it is within the powers of the U.S. Congress under the commerce clause to enact such an act.[437] In 1916, the Keating-Owen Act became law[438]; it was the first law at the federal level targeting child labor through regulating interstate transport of products manufactured using child labor. The constitutionality of the Keating-Owen Act was also challenged, and the U.S. Supreme Court held the act to be unconstitutional;[439] the decision was heavily criticized at the time[440] and the decision would later be overturned.[441] In 1924, a proposed U.S. constitutional

[435] Lofaso (n 10) 577–579.

[436] The act established eight hours as a work day and applied to workers on trains transporting persons or goods interstate, with the exception that the act did not apply to railroads under 100 miles in length and electric railroads used at the time in municipal transportation of persons. The act provided for monetary fines for violations. The act also established a baseline rate of pay for workers, with work exceeding over eight hours to be paid on a pro-rata basis. For more see: Adamson Act, Sept. 3, 5, 1916, ch. 436, 39 Stat. 72 (U.S.).

[437] *Wilson v New,* 243 US 332 (1917).

[438] The act prohibited sale through interstate commerce goods produced by factories employing children under 14 years of age, goods extracted from mines employing children under the age of 16, and goods produced in any facility where children under the age of 14 worked after 19:00 or before 0600, or in facilities where children under the age of 14, whose working time exceeded eight hours a day. The act provided for inspectors to ensure compliance and provided for monetary fines for violations of the act. For more see: Keating-Owen Act, Sept. 1, 1916, ch. 432, 39 Stat. 675 (U.S.).

[439] *Hammer v Dagenhart*, 247 US 251 (1918).

[440] The power to regulate internal affairs is within the competence of the states, yet when they send products into other states, via interstate commerce, and products are deemed contrary to the public polity of the whole of the U.S., Congress has the power to regulate, as the effect of child labor is then exported to other states. It is the rights of the U.S. Congress to regulate commerce between the states. For more see: Thomas Reed Powell, 'Child Labor , Congress , and the Constitution North Carolina Law Review' (1922) 1 North Carolina Law Review 61, 65-67.

[441] *United States v Darby*, 312 US 100 (1941).

amendment to regulate child labor was sent to states to adopt, but it was not adopted.[442]

Under the administration of President Franklin D. Roosevelt, the Fair Standards Labor Act became law in 1938;[443] which*, inter alia*, provided for an eight-hour workday, a 40-hour workweek, a minimum wage, and limitations for child workers. Like earlier acts under the Wilson administration, the constitutionality of the Fair Standards Labor Act was challenged, yet the U.S. Supreme Court upheld the act.[444] Though amended several times, the aforementioned Act remains largely substantially unchanged and prohibits goods manufactured using "oppressive child labor" from being shipped interstate.

I will discuss briefly the development of U.S. federal legislation specific to organized labor. Before the first federal legislation on collective bargaining, organized labor movements in early America were an outgrowth of the colonial era guilds, the first being the shoemakers of Boston in 1648, which was an association formed to ensure quality of shoes manufactured, essentially protecting the profession while viewing competition 'as a menace primarily to prices and wages'.[445] In the latter half of the 18th century, organizations of labors related to professions resorted to strikes for pay and working hours.[446] The labor movement crossing trades to encompass workers in general (as opposed to specific trades) can be traced to the Mechanics' Union of

[442] The proposed amendment on regulating child labor would have authorized the U.S. Congress to regulate and limit the 'labor' of persons less than eighteen years of age. Arguments against the amendment were that it would 'constitute a menace to the family, to the home, and to our local self-government. For more see: William D Guthrie, 'The Child Labor Amendment' (1934) 20 American Bar Association Journal 404, 404-405.

[443] Fair Standards Labor Act of 1938 (U.S.).

[444] The U.S. Supreme Court held that it is within the power of the U.S. Congress to regulate goods transported through interstate commerce if such goods are detrimental to the public policy of the U.S., especially if such goods are 'injurious to the public health, morals, or welfare. The decision overturned *Hammer v Dagenhart*. For more see: *United States v. Darby,* 312 US 100 (1941) (n 441).

[445] John R Commons, 'American Shoemakers, 1648–1895 a Sketch of Industrial Evolution' (1909) 24 Quarterly Journal of Economics 39, 40-44.

[446] The first strike in the U.S. was in 1786 by printers in Philadelphia, striking for a minimum wage, followed by the second strike in the U.S. by carpenters in 1791, also in Philadelphia, striking for a 10 hour workday. With the turn of the century, the association of shoemakers, printers expanded to New York Baltimore, Boston and eventually, New Orleans. Journeymen in the trade associations were subject to criminal conspiracy charges and tried, with prosecutions financed by the Maters. For more see: Selig Perlman, *A History of Trade Unionism in the United States* (Macmillan and Co 1922).

Trade Associations, which was a union of various trades, morphing into a political movement driven to attain the "equality of citizenship" which was predicated on actualizing the equality of workers 'against conditions which made them feel degraded in their own eyes as full fledged citizens.'[447] The movement focused, *inter alia,* on issues related to working hours, working conditions, public education for children, and prohibitions against child labor, and it was influenced by Robert Dale Owen, a son of the English industrialist Robert Owen, and the movement was active primarily in the New England states.[448]

Throughout the 19th century, despite combinations acts, workers organized, went on strike for better working conditions and the courts responded with injunctions against strikes and criminal convictions for striking workers and organizers. In the later 19th century, workers federations grew, with the creation in 1876 of the American Federation of Labor, composed of unions representing various trades, in the U.S., Canada, and Mexico, which acknowledged the independence and autonomy of each union within the federation, with an aim of carving out benefits and better working conditions for workers in the respective unions.[449]

The Clayton Act of 1914 expanded upon the provisions of the Sherman Anti-Trust Act of 1890, which, *inter alia*, guaranteed the right of workers to organize and affirmed that human labor is not a commodity.[450] The Sherman Anti-Trust Act was relied on by enterprises subject to the act to obtain injunctions against organizing and striking workers and the Clayton Act was enacted, to strengthen the Sherman Anti-Trust Act's reach on competition law, but also in response to injunctions against

[447] ibid.

[448] Throughout the 1800s, striking workers were subject to criminal prosecutions for conspiracy. Striking works sought to achieve a ten-hour work day, (similar to the ten hours movement in England) and later for an eight-hour work day. For more see: ibid.

[449] Thus the U.S. labor movement differed from labor movements in Europe, as class mobility was not as difficult in the U.S. and the unions sought to carve out protections for their workers and to bind employers to institute "closed shops" where non-union members were not allowed to be employed. For more see: ibid.

[450] Section 6 stated that workers organizing and bargaining cannot be held to be 'illegal combinations or conspiracies in restraint of trade', Section 20 of the act forbid the issuance of injunctions or restraining orders by any court 'in any case between an employer and employees…involving, or growing out of, a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to property, or to a property right'. For more see: Clayton Act, 1914, ch. 323, 38 Stat. 730 (U.S.), sections 6 and 20.

striking workers, as a means to end the practice.[451] The Wilson administration also established the National War Labor Board in 1918, the first federal initiative aimed at mediating disputes with workers and employers.[452] U.S. federal labor legislation would not develop further until 1932, with the enactment of the Norris-La Guardia Act in 1932, which banned so called "yellow dog contracts", prohibited courts from granting injunctions against nonviolent striking workers, and forbid employers from taking retaliatory action against workers seeking to unionize.[453]

The Roosevelt administration ushered in numerous sweeping economic reforms in response to the worldwide depression. The National Industrial Recovery Act of 1933 directly related to worker rights[454] but the act was judged as exceeding the executive authority and was declared partly unconstitutional by the U.S. Supreme Court soon after it was enacted.[455] In response, the National Labor Relations Act of 1935 was enacted, which proclaimed U.S. policy was to encourage collective bargaining as a means of eliminating obstructions in commerce and to protect workers 'freedom of association, self organization, and designation of representatives of their own

[451] Moshe Zvi Marvit, 'On the Greatest Property Transfer That Wasn't: How the National Labor Relations Act Chose Employee Rights and the Superme Court Chose Property Rights' (2010) 38 Southern University Law Review 79, 82-83.

[452] The National War Labor Board established via executive action to settle labor disputes due to the need for goods in a time of war. Membership was composed of five representatives of employers, five representatives of organized labor, and two representatives of the public. Principles and policies of the board included inter alia, provisions on the right to organize, women workers, hours of labor, and interestingly, the concept of a "living wage". The board was intended to function as a mediation and reconciliation facility in labor disputes and was seen as the 'court of last resort in all labor disputes'. For more see: Richard B Gregg, 'The National War Labor Board' (1919) 33 Harvard Law Review 39, 40-45.

[453] The act noted that unorganized workers are at a disadvantage in bargaining with employers, and that contracts made with employees which forbid an employee to join a union was deemed to be an unenforceable contract, as this was against the public policy of the U.S. Courts were forbidden to issue injunctions regarding a labor dispute whereby inter alia, an employee sought to join a union, to assemble in a combination to promote their interests in a labor dispute. For more see: Norris – La Guardia Act 1932, ch 90, 47 Stat. 70. (U.S.).

[454] The act was wide reaching, section 3 established national codes of fair competition and industries subject to them and section 7 provided that employees in industries subject to national codes in section 3 have the right to organize and collectively bargain and that employers subject to the codes adhere to standards and requirements set by the U.S. President with regards to minimum rates of pay, limitation of working hours, and regulations on working conditions. For more see: National Industrial Recovery Act of 1933, ch 90, 48 Stat. 195 (U.S.).

[455] The executive exceeded its authority to promulgate codes, a power which rests with the legislative, not the executive branch of government. For more see: *ALA Schechter Poultry Corp v United States,* 295 US 495 (1935).

choosing, for the purposes of negotiating terms and conditions of their employment.'[456] The act established the National Labor Relations Board,[457] defined rights of employees,[458] defined unfair labor practices,[459] and applied to all employees of enterprises engaged in interstate commerce, with the exception of certain industries.[460] The National Labor Relations Act was held to be constitutional law by the U.S. Supreme Court,[461] is current U.S. law, as amended,[462] and has been long been discussed from a variety of viewpoints and aspects.[463] [464]

[456] National Labor Relations Act of 1935, ch 372, 49 Stat. 449 (U.S.), Section 1 [5].
[457] ibid Section 3, 4.
[458] Worker rights are defined as 'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.' For more see ibid section 7.
[459] A laundry list of specifics with respect to workers organizing, becoming members in a union, bargaining, striking, and imparting information are deemed to be unfair labor practices and were applicable to employers and later with an amendment to the act, to worker's organizations (unions) as well. For more see: ibid section 8.
[460] ibid.
[461] *National Labor Relations Board v Jones & Laughlin Steel Corporation,* 301 US 1 (1937).
[462] Arguably, the most significant amendment was in 1947, which imposed unfair labor practices on workers associations (unions) making it more difficult to strike, providing national security provisions whereby the executive branch could enjoin workers from striking, and importantly, it allowed states to disallow union security provisions, (14B) which led to many states enacting right to work laws. For more see: 'Labor Management Relations Act, 1947, 61 Stat. 136 (1947)'.
[463] For example, the concept of "employer free speech" in section 8 to the amended act and its impacts, coupled with the amendment permitting workers the freedom to or not to join a union served to shift policy from one that championed efforts at unionization to one that constrained efforts at unionization, and where employers would exercise their freedom to speech in a manner that would interfere with efforts at unionization. For more see: James A Gross, 'Worker Rights as Human Rights: Wagner Act Values and Moral Choices' (2002) 4 University of Pennsylvania Journal of Labor and Employment Law 479, 480-485.
[464] Kate Andrias opines the original implications of the National Labor Relations Act combined with labor actively engaged in production in the run up and period of WWII, saw labor, in terms of organizing and collective bargaining moving from between employer and union on a local level, to of unionization on a sectorial level, with some sectors being nationally represented, and the federal government involved in labor negotiations, a tripartite arrangement similar of that in many European countries. However changes in the political landscape leading to the 1947 amendment, which 'cemented labor law's commitment to private, firm-based bargaining' with the government becoming less involved can be attributed to the U.S. not developing a tripartite relationship between labor, business, and the state. For more see: Kate Andrias, 'The New Labor Law' (2016) 126 Yale Law Journal 2, 16-19.

1.7. Findings

In the preceding sections, through my historical analysis of black letter law and social-legal analysis of the development and evolution of worker rights starting from the pre-industrial era to the early 20th century. As industrialization spread throughout the world, so did labor law. For example, was one of the first to rapidly industrialize in the latter part of the 19th century through the efforts of the Meiji government's desire to modernize Japan.[465] The first factory legislation was proposed in 1887 however due to political and business fears that government regulation would stifle economic development, the law was not implemented for some time.[466] And soon after the turn of the century, in 1911 the government passed the first factory legislation, however it would not be implemented until 1916.[467] Indeed labor law would spread elsewhere with the pattern of industrial development.

I have in this chapter shown that worker rights developed in reaction to innovations in manufacturing technology from the early 19th century, an era known as the first industrial revolution. The process began in England and spread throughout the world. The development of early labor law was in response to societal pressures from the political, economic, and humanitarian viewpoints about the plight and conditions in which the working class lived and labored. While my analysis focused primarily on England as the first labor laws emerged in England and spread to other states with the spread of industrialization, from my analysis I submit that labor laws followed a consistent pattern of development driven by societal forces as a response to the plight of workers.

[465] Koji Taira, 'Factory Legislation and Management Modernization during Japan's Industrialization, 1886-1916' (1970) 44 The Business History Review 84, 87.
[466] Nardinelli (n 382) 182.
[467] ibid.

CHAPTER 2.

THE INTERNATIONALIZATION OF WORKER RIGHTS

One of my foremost aims in this work is to connect worker rights to basic human rights and to make my case, I proceed to discuss the forces leading to the internationalization of worker rights. I will then discuss the emergence of an international organization charged with ensuring protections for workers and advancing workers interests. I will then overview the concept of fundamental labor rights as advanced by different organizations and argue conceptions of fundamental labor rights as currently developed are not adequate to protect workers human rights. Further, to connect worker rights to basic human rights necessitates a philosophical inquiry into the conditions necessary for human rights, a textual analysis of contemporary human rights norms, and a theoretical discussion of the concept of basic rights, which was discussed earlier in this work. However, I shall revisit the findings in the conclusion of this work where I aim to tie in worker rights to basic human rights.

As the first industrial revolution swept the world, members of the public became aware of the horrendous environment of the mines and factory workplaces in which men, women and children labored. Realistic accounts of workers injuries and working life, complete with unsafe and unsanitary conditions at work, women and children exploited, men crushed by dangerous machinery and all workers subject to oppressive, draconian conditions was published in the press. Governments of the world's industrialized societies responded, often belatedly, with measurers directed at limiting working conditions for women and children, mandating protections for workers from the dangers of machinery, and inspections of workplaces and mines. Laws were also changed to give workers the right to organize and more equally bargain, collectively, with employers. Trade unions, governments and industrialists alike became increasingly concerned that by international trade, industrialists exploitation of workers in countries with lackadaisical labor and factory regulations was a threat to profitability of industrialists located in countries with more developed labor and factory regulations, and further, that differing national standards of

regulation significantly impaired progress in advancing workers' rights.[468] This chapter will map the internationalization of worker rights.

2.1. Moving Towards International Labor Standards

By the middle of the 19th century, awareness by industrialists, trade unionists, governments, as well as philosophers, and workers themselves led to the beginnings of an international movement for workers' rights sustained by three pillars; a political pillar; a trade unionist pillar; and an economic and scientific pillar.[469] Indeed the movement even in its infancy understood that international trade and competition was a threat to worker rights, as human rights:

> International competition, however, becoming daily sharper, forces each nation to grind the working class down under a load of exhausting toil and excessive hours; to exploit men, women, and children as instruments of cheap and abundant production without regard to their rights as human beings.[470]

The political pillar traces its origins to the International Workingmen's Association (hereinafter First International) founded in London in September 1864.[471] The organization was dedicated to the emancipation of the worker through class solidary, based upon the ideals of Karl Marx, who was a member of the organizing committee.[472] The First International was organized as a federation, with internationals organized in numerous countries, with meetings of the highest body, the Congress held annually in different cities. However, due to internal political divisions,

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[468] Lee Swepston, *The Development in International Law of Articles 23 and 24 of the Universal Declaration of Human Rights: The Labor Rights Articles* (Brill Nijhoff 2014) 8.

[469] I use the term "pillar" to describe the three distinct interest groups constituting the international labor movement for workers' rights, as in my view when tracing the beginnings of the ILO, it is these three interest groups which contributed ideas which would become the ILO, thus they are the foundational 'pillars' upon which the ILO rests. See for more: Boutelle Ellsworth Lowe and Leifur Magnusson, *Historical Survey of International Action Affecting Labor* (U S Government Printing Office 1920) 11.

[470] ibid 8.

[471] Marcello Musto, 'On the History and Legacy of the First International' in George Comninel, Marcello Musto and Victor Wallis (eds), *The International after 150 Years Labor vs Capital, Then and Now* (Routledge 2015) 5-6.

[472] George C Comninel, 'Marx and the Politics of the First International' (2014) 28 Socialism and Democracy 59, 62.

the First International disbanded in 1876. The Second International was established in 1889 and continued to champion industrial and political reforms centered upon workers' rights.[473]

The trade unionist pillar was consisted of national federations of trade unions organized as the International Federation of Trade-Unions, and independent craft associations and unions that were not affiliated through an international federation.[474] Both trade unionist groups worked together for the purposes of unifying the labor movement and early on, were not characterized by political unity or political activism. In the aftermath of WWI, the trade unionist pillar, particularly the International Federation of Trade-Unions, were influential forces in pushing for the inclusion of a social policy program geared at workers' rights in the Versailles Treaty.[475]

The economic and scientific pillar was largely made up of groups representing economic or scientific interests advocating for labor reform. Groups in this pillar included the Permanent International Commission for the Study of Occupational Diseases, the International Association on Unemployment, and the International Association for Labor Legislation (hereinafter IALL), which was organized in 1900 in Paris.[476] In 1901 an International Labor Office was established to expedite the work of the IALL.[477] The objective of the IALL was to promulgate labor legislation from association members with the intention of formulating international labor standards, and further, to establish an international congress on labor legislation.[478] The IALL's

[473] For example, resolutions of the 1910 Congress of the Second International called for a maximum work day of 8 hours; minimum age of children to be 14; prohibition of night work; 36 hours of uninterrupted hours of rest for all workers weekly; unrestricted right to association; and inspection of working conditions by authorized agencies with the presence of labor. See for more: Lowe and Magnusson (n 469) 11.
[474] ibid 8.
[475] Reiner Tosstorff, 'The International Trade-Union Movement and the Founding of the International Labour Organization' (2005) 50 International Review of Social History 399, 400.
[476] Lowe and Magnusson (n 469) 13.
[477] The idea of an international labor office to disseminate national labor standards, conduct and publicize studies on labor standards aimed at initiating international labor conventions had first been suggested in a proposal to the Swiss Federal Council in 1889, and reiterated numerous international labor congresses in the latter part of the 19th century. See for more: ibid 89; Antony Evelyn Alcock, *History of the International Labour Organisation* (1st edn, Macmillan 1971) 10-11.
[478] Thomas Richard Davies, 'Project on the Evolution of International Non-Governmental Organizations (9 June 2010) <http://Www.Staff.City.Ac.Uk/Tom.Davies/IALL.Html> Accessed 6 March 2019.'

international labor office originated two international agreements concerning workers' rights, and further efforts were underway prior to the outbreak of WWI, which interrupted the work, splitting the leadership of the IALL, largely along the belligerent parties and differing visions.[479] Despite the split in leadership of the IALL, throughout WWII, labor organizations from all sides agreed that upon succession of hostilities, an organization charged with enforcement of international labor legislation should be an integral part of the peace agreement.[480]

Through WWI, divisions emerged around the design of the organizational structure, the direction and leadership of the organization, and most importantly, about the nature of the inclusion of international labor standards and social protections for workers in an agreement negotiated to end hostilities. Leadership from both sides agreed that there should be international labor standards, that the industrialists should not push the costs of the war onto the workers, and both aspired for further advances in social justice. But the division reflected differing views of the role of organized labor, and further, to what extent regulatory oversight should be structured. The resulting division was along the lines of the belligerents, with each side competing for leadership of the International Federation of Trade-Unionists, and neutral states balancing their positions accordingly.

The position of the International Federation of Trade-Unionists from the Entente countries embraced developing international labor standards through recommendations by trade unions to national governments, which would then be proposed to an international commission and if adopted, carried out by the international labor office. This international commission would continue to meet annually for the purpose of considering future recommendations, with final decision making authority for adoption vested in the governments, and resolutions passed at said conferences to be carried out by the international labor office.[481] The position of

[479] Tosstorff (n 475) 402.

[480] Swepston (n 468) 8.

[481] Entente countries convened an international trade-union conference in Leeds on 15 July 1916 to establish an organizational alternative to the International Federation of Trade-Unions to that of the Central power countries. Among the agenda items for consideration was a document originated by the French *Confédération Génerale du Trava*, which called for the formation of an international social program for workers. The document was passed unanimously was known as the Leeds Program and was disseminated to all national trade union headquarters. The Leeds Program provided for equal rights

the International Federation of Trade Unionists from countries comprising the Central Powers advocated for an internationalist approach of through binding international labor standards and social protections, and an enforcement mechanism.[482] The situation was further complicated by the entrance of the U.S. into WWII, as the American Federation of Labor was hostile to any sort of governmental interference whatsoever with labor conditions, and especially to the imposition, by whatever means of international labor standards.[483]

As governments began to prepare for the inevitable peace that would ensue with the end of hostilities, on June 11, 1918, the IALL submitted a memorandum to the Swiss Federal Council requesting support in urging the inclusion of international labor legislation in the Versailles treaty, and further proposed that the International Labor Office be charged with enforcing international labor standards in the proposed Society of Nations (which would inevitably become the League of Nations).[484] Experts from

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for all workers; freedom to form unions; tripartite control over worker migration (trade unions, employers, governments); equal rights and working conditions for immigrant workers; a social insurance system; a 10 hour workday, with additional limitations for women and children; 1.5 days of rest each week; and for the establishment of an international commission to make proposals at further governmental conferences and such proposals to be implemented by the international labor office. See for more: Tosstorff (n 475) 403-405.

[482] The International Trade-Union Federation leadership from the Central Power countries contended that the Leeds Program did not go far enough in protecting the workers. The leadership drafted a proposal entitled 'Peace Demands of the International Trade-Union Federation' which was a counter-proposal to the Leeds Program that encompassed essentially the same provisions, but more defined. However, there were significant differences, particularly with regards to immigrant workers, and the counter-proposal included a detailed section on the 'realization' of international labor legislation, with a provision for factory inspections in every country, to include participation by trade unions. Further, the counter-proposal called for binding international labor standards, going much further than the Leeds Program. An attempt to hold a joint conference with International Trade-Union Federation delegations from all countries was not successful, due to the U.S., England, Belgium and Canada refusing to send delegations, and the French and Italian delegations unable to attend the conference. Nevertheless, the conference convened in Bern from 1-4 October 1917 and was attended by delegations from the Central Powers and neutral states. The counter-proposal was amended to include additional international labor standards, which would be internationally binding and enforced through an international labor office and it was unanimously adopted. See for more: ibid 407-412.

[483] ibid 410.

[484] Among the proposed international labor standards where a minimum age of employment of 14; a 10 hour workday for women; 8 weeks maternity leave for women; eight hour work shifts for industries of continuous operations; Sunday rest; prohibition on the use of poisonous substances; protections for workers at sea and railroads; social insurance laws; international regulation of labor contracts to include the right of workers to associate, to unionize, to collectively bargain, and a minimum wage; protections and limited restrictions for immigrant labor; and official reporting on the enforcement of

the IALL national sections began consultations with governments of France, Germany and the U.S., pressing for the inclusion of labor legislation in the peace treaty, yet each country was at a differing stance and stage of preparedness for the peace negotiations.[485]

2.2. The International Labor Organization

As discussed in Part I of this dissertation, a key part of the Versailles treaty which ended WWI was to actualize Wilson's fourteenth point, that being the creation of an association of nations that would guarantee political independence and territorial integrity of states. This was accomplished through the creation of the League of Nations. Further, a commitment of Allied governments was to reward labor for its support in the war efforts, through a charter of fundamental rights for workers and the creation of an organization that would advance the social welfare of the working class on an international level was realized through the creation of the Commission on International Labour Legislation at the Peace Conference of 1919.[486] The commission was largely composed of experts and advisors from national sections of the IALL and was tasked with working together to formulate the organizational structure of an agency charged with labor legislation to be included in the League.[487] Two important outcomes resulted from the meetings (as discussed in chapter 2, section 5), namely, the "Labor Charter" which outlined minimum levels of worker rights which all

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labor laws. See for more: 'Reconstruction in Industry' (1918) 7 Monthly Labor Review 1198, 1206-1208; Lowe and Magnusson (n 469) 13-14.

[485] The German delegation IALL adopted the Berne Programme, and attempted to persuade the government to include social policy demands in the peace treaty, but the government resisted. The IALL enlisted the General Commission of German Trade Unions to advance the efforts but was again rebuffed. But with a change of government in October 1918, social policy demands were included from the German government. The French government had established a committee in 1917 to address social policy in the peace treaty and the French IALL section worked with the committee in formulating the position of the French government, which was working alongside the English government. The U.S. IALL section was busy compiling information on social policy, which was forwarded to the U.S. peace delegation in Paris. The English were more advanced in formulating a special committee to address social policy in the peace negotiations, which included a labor section. See for more: Tosstorff (n 475) 415-417.

[486] *Report of the Commission on International Labor Legislation of the Peace Conference. The British National Industrial Conference: Report of the Provisional Joint Committee.* (n 166) 5-6; Ernest B Hass, *Beyond the Nation State: Functionalism and International Organizations* (Standford University Press 1964) 114; Lauren (n 88) 96.

[487] Tosstorff (n 475) 442.

members of the League would be obligated to subscribe to, and the commitment to create an institution dedicated to focused on worker rights, linked to the League.

While many proposals for the structure and operational detailed for the aforementioned institution were discussed and submitted, the English government's plan for an international labor organization was the most developed plan.[488] The English plan envisioned a tripartite structure whereby representatives of governments, employers, and workers would each have representation in the organization and decision-making authority. The plan proposed two governing organs; a secretariat, which would serve as the permanent office and be charged with collecting and disseminating information, and annual conferences where international labor legislation would be negotiated and adopted. An important feature of the English plan was that implementation of legislation adopted by the organization would be the responsibility of national governments. Thus, the English plan was predicated from the onset against the establishment of a supranatural organization with the authority to bind members to its decisions.[489] The ILO largely is based on a combination of the English plan and the IALL's plan, and the IALL is generally characterized as the forerunner to the ILO.[490]

The 1919 constitution of the ILO was inserted into the Treaty of Versailles, in Part XIII, which stated explicitly that 'peace can be established only if it is based upon social justice.'[491] The 1919 constitution provided for a permanent organization consisting of an International Labor Office subordinate to a Governing Body, and a

[488] For some countries, the English plan was not radical enough while for other countries it was too radical, as some countries embraced a statist conception of economic governance whereas others embraced a laissez-fair conception of economic governance. The key issues of disagreement reflected the differing conceptions of how tightly international labor standards were to be set, how the institution itself would function, how penalties for infractions would be administered, how representation in the institution would be actualized, the differing levels of economic development among members and how international standards would then impact in terms of competition, and differing measurers whereby conventions adopted by the institution would be implemented by national governments, as many countries were Federal and thus labor legislation was not necessarily within the competence of the federal government, but rested with the local units of government. Finally, there was the question of membership in the institution, as the League had not yet been established. For more see: Alcock (n 477) 21-37.

[489] ibid 21-25.

[490] Davies (n 478).

[491] Treaty of Versailles (n 154) part XIII section 1.

General Conference of ILO members' representatives, based upon a tripartite structure.[492] Meetings of the General Conference were to be held annually and while the representation and decision making was based on the tripartite concept, voting was tilted in favor of the government, with each ILO member sending four representatives - two from government and one each from workers and employers - and each representative having one vote.[493] The 1919 ILO constitution provided for two types of measurers to be adopted by a two-thirds majority vote of all delegates; a recommendation or a draft international convention.[494]

Both recommendations and draft conventions were to be brought before the ILO members' national authority responsible for action on the matter within one year, or in exceptional circumstances, 18 months.[495] No obligation was to be imposed on an ILO member that did not take the steps to implement a recommendation within one year, nor if a draft convention was not adopted by the ILO members' competent authority within one year.[496] In the instances of federal states, where implementation often defers to the process in federal districts or federal states, draft conventions could be designated-at the discretion of the government of the federal state, as a recommendation.[497] In no instances should the adoption of a recommendation or draft convention would an ILO member be asked or required to reduce existing worker protections enshrined in municipal law.[498] The 1919 ILO Constitution also had provisions for an annual labor report, a means for ILO members to file complaints against other members for noncompliance with ILO obligations, a mechanism and procedure of investigation by special commissions, and referral to the Permanent

[492] Representatives of ILO members constituted a tripartite representation consisting of delegates to the General Conference from government, employers, and workers. The Governing Body consisted of 12 members representing governments (8 of which were to be from member states deemed to be 'chief industrial members', which was to be decided by the Council for the League of Nations and the remaining 4 members being elected by the governmental members of the delegates to the Conference), 6 members representing workers, and 6 members representing employees. See for more: ibid art 388-393.

[493] Advisors could accompany representatives, and if issues to be considered by the General Conference concerned women, then at least one of the advisors was to be a woman. See for more: ibid 389-390.

[494] ibid art 405-406.

[495] ibid art 405.

[496] ibid.

[497] ibid.

[498] ibid.

Court of International Justice for adjudication.[499] And further, it was possible for ILO members upon authorization to take economic actions against an ILO member that was held to be in default of its obligations by the recommendations of the Commission of Inquiry or the decision of the Permanent Court of International Justice.[500]

Article 424 of the treaty of Versailles required that the first meeting of the ILO General Conference convene in October 1919 to consider the agenda specified in an Annex.[501] Accordingly, the first ILO General Conference was held in Washington D.C. from 29 October 1919 to 29 November 1919 during which six draft conventions were adopted; limiting working hours[502]; unemployment[503]; women's employment before and after childbirth;[504] employment of women working during the night;[505] minimum age of children to be employed in industry;[506] and limitations of child workers at night in industry.[507] The first ILO General Conference also adopted six recommendations; unemployment recommendation;[508] reciprocity in treatment of foreign workers;[509] prevention on anthrax;[510] lead poisoning of women and children;[511] labour inspection and health services;[512] and the prohibition of the use of

[499] ibid art 411-417.
[500] ibid art 418-419.
[501] ibid art 424.
[502] ILO Convention, C0001 – 'Hours of Work (Industry), 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[503] ILO Convention, C0002 – 'Unemployment Convention, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[504] ILO Convention, C0003 – 'Maternity Protection Convention, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[505] ILO Convention, C0004 – 'Night Work (Women) Convention, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[506] ILO Convention, C0005 – 'Minimum Age (industry) Convention, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[507] ILO Convention, C0006 – 'Night Work of Young Persons (Industry) Convention, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[508] ILO Recommendation, 'R0001 – Unemployment Recommendation, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[509] ILO Recommendation, 'R0002 – Reciprocity of Treatment Recommendation, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[510] ILO Recommendation, 'R0003 – Anthrax Prevention Recommendation, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[511] ILO Recommendation, 'R0004 – Lead Poisoning (Women and Children) Recommendation, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).
[512] ILO Recommendation, 'R0005 – Labour Inspection (Health Services) Recommendation, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).

white phosphorus in manufacturing.[513] The aforementioned ILO instruments constitutes the first internationalization of worker rights, with many hailed as the first achievements international instruments to protect human rights, some 29 years before the acceptance of the UDHR by the members of the UN.

The changing political landscape of the interwar period ushered in governments with differing conceptions governance, which entailed the relationship between the state and the individual, the economic model utilized, (capitalist, fascist, or socialist, and to what extent and extreme), and the role of the ILO and worker rights. For example, in the months preceding the rise of Benito Mussolini in Italy, individual members, leadership, and organizational meetings of the leading Italian Trade Union (*Generale del Lavordo*) were assaulted and disrupted by fascists, as the Italian socialist party was aligned with the trade unionists – with the workers – and the Italian fascist were disconcerted by this relationship.[514] While in Spain, the dilemma faced by the ILO can be best illustrated by the ILO's inability in 1920 to conduct an official inquiry into allegations by the Spanish ILO worker representative that the Spanish government was working to undermine workers organizations.[515]

Antony Alcock described fascist ideology of the relationships between the individual, the state, and privately-owned enterprises as being premised upon the absolute theory of the nation as a collective, the state constituting the nation, the subordination of private enterprise to the state, which manifested upon the relationship between employer and employee being one of a collaborator basis, with state intervention limited to instances concerning its national interest.[516] Like some states in the contemporary era, in fascist Italy, organization of and membership in a trade union was free – as long as the union was one recognized by the state.[517]

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[513] ILO Recommendation, 'R0006 – White Phosphorus Recommendation, 1919' International Labour Conference (1st Session Washington DC, 28 November 1919).

[514] The socialist party (PSU) had connections to the International Federation of Trade Unions (IFTU) that alarmed the fascist. When the IFTU learned of the attacks of the Trade Unionist by the fascists, the IFTU acted through the organs of the ILO against the Mussolini fascist regime. For more see: Antony Evelyn Alcock, *History of the International Labour Organisation* (1st edn, Macmillan 1971) 68.

[515] The ILO could not investigate the dispute, as the Spanish government had not invited them to do so. This led to allegations by the IFTU that the organization was in actuality dominated by governments and business. For more see: ibid 60-61.

[516] ibid 67.

[517] ibid.

Throughout the 1920s, the ILO, fascist Italy and internal forces within Italy and without clashed frequently, perhaps best illustrated by the inability to rescind the credentials of an Italian fascist government's ILO delegate, which led to fascist conceptions of worker rights in terms of freedom of association, organization and combination.[518] Also, consider the late entry into the ILO by the U.S; spurred on by president Franklin D. Roosevelt's administration, which would see the U.S. becoming a more active participant as a member of the ILO, yet in the proceeding decade, the U.S. was not a member of the ILO.[519] Lastly, consider the ideological battle between capitalism and socialism and the position of the ILO, marked by international trade federations, which were frequently ideologically opposed on issues such as the definition of a worker and the relationship between the worker, the employer and the state.[520] Arguably, the aforementioned ideological differences manifesting in numerous ways during the interwar years illustrate the importance of and difficulties of the ILO and the question of global governance.[521]

With an understanding of the ideological nature of the inner-war years (defined as the years 1919-1939) perhaps the most important consideration in understanding how the ILO functions in its current incarnation, is through understanding the external pressures the institution itself faced given the uncertainty of the outcomes of a second world war.[522] This can be understood best from the prospective of the functioning the

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[518] ibid 69-70, 75-79.

[519] The U.S. as discussed in chapter 2 did not join the League and only joined the ILO after the election of president Roosevelt, though the U.S. was an active participant in ILO activities in the early 1930s. For more see: ibid 123-125.

[520] This ideological divide was premised upon the underlying ideology of the respective governments from where the trade federation hailed. For example, the capitalist conception of the function of the trade union was to secure for the worker the maximum enjoyment of his "contribution" in labor, expressed as higher wages, better working conditions, and shorter hours, whereas, the socialist conception is the worker should receive the totality of his contribution in labor, minus what is deemed necessary for social or public needs and thus the function of a trade union is to increase production. For example, the Russian Council of Trade Unions proclaimed its purpose to be restoring and organizing production forces. And further, as E H Carr noted, with the admission of the Soviet Union into the League, and hence membership in the ILO, 'An institution based on the notion of class collaboration and not of class-struggle, and giving to capitalist governments and capitalist employers a two-to-one voting majority over proletarian workers, was difficult to reconcile with Marxist doctrine.' For more see: E H Carr, 'Two Currents in World Labor' (1946) 25 Foreign Affairs 72, 75, 78.

[521] Alcock (n 477) 126-133.

[522] Prior to WWII, with the world-wide depression, and changes in political leadership and worldviews in ILO member states, the ILO was confronted with numerous forces seeking a change premised on history and ideology and was faced, for the first time with states representing 'capitalism and socialism

ILO as an institution of the League when facing the realities of WWII. Indeed, the ILO's mere existence and its and continuation as an institution, in whatever global governance regime was to emerge in the aftermath of the war was at stake.[523]

The aforementioned pressures on the ILO can be characterized as "combination of differing world views" expressed by the belligerent parties to the war, one of which would be victorious in the aftermath of WWII. I characterize this as a "combination of differing world views" to illustrate the constituted views held by a multitude of stakeholders in each state, which often were intertwined in opposition internally. This "combination of differing world views" is further defined through actions and as reactions of the multitude of stakeholders, irrespective of differing ideologically premised world views of the soon to be belligerent parties. Broadly speaking, in each state, this multitude of stakeholders can be characterized politically embracing a left vs. right ideological world view and internal governance; the timeless class struggle of workers vs. capitalists and; activists left, right and center, acting internally and externally, sometimes to the determent of a states' dominant policy or ideologically premised worldview. Indeed, this aforementioned multitude of combined forces, this "combination of differing world views", would, as discussed earlier, come to shape the post WWII era, which would itself usher in another world war, based upon this "combination of differing world views", yet it would be a cold rather than a hot war.

Indeed, while the creation of the ILO is a monumental achievement for the protection of workers through advancing global worker rights and labor standards, it was in its early years in many ways flawed (and perhaps still is to this day) and like the League, largely ineffectual at achieving all it purported in a legalistic standpoint for two

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in their starkest forms'; the U.S. and the USSR. These forces and been at odds through the world-wide depression and the ILO acted while facing the pressures of competing interest groups, political pressure, and the pressure of internal economic status and international economic forces and interests. For more see: ibid 118, 62-66.

[523]Prior to the outbreak of WWII, divisions in trade union federations were emerging along ideological lines and with the outbreak if WWII, the functioning of the ILO itself was at stake, with the institution impeded from normal functioning due to invasions of states and withdrawal from and pressure for states to withdraw from the ILO (Germany withdrew in 1933, Italy withdrew in 1938, Vichy France for example was pressured by Nazi Germany to withdraw from the ILO, and the Soviet Union membership in the ILO ceased after the Soviet invasion of Finland in 1938). The ILO searched for a new base of operations through the wartime, with representatives in and shifting between Geneva, Montreal and London before setting up operations at McGill University in Canada. For more see: ibid 154-161.

reasons; firstly, due to the differing standards in application of ILO resolutions and conventions between so called industrialized ILO members and colonies, and secondly, due to the non-binding nature of the of the aforementioned instruments.[524] Notwithstanding the economic and ideological premised challenges of the inner-war years, the ILO actively advanced worker rights and protections, adopting 67 Conventions and 66 Recommendations. One of the most significant of the 67 Conventions adopted in the inner-war period is the prohibition of forced labor, ILO Convention No29, which was adopted in 1930 to protect indigenous workers from exploitation, which has been ratified by more than 160 states.[525]

Throughout WWII, the ILO worked to maintain itself and force an alliance with the allied post-war planners, while having to strike a balance between the differing ideological worldviews embraced by the allied states. For example, the Soviet Union was critical of the ILO due to the imbalance between workers and governments and business in the tripartite representation.[526] The United Nations Relief and Rehabilitation Administration (hereinafter UNRRA) was an organization established in 1943 tasked with reconstruction in the aftermath of WWII.[527] The ILO sought inclusion in the UNRRA and was supported by the British and the U.S. and at the first meeting of the UNRRA Council the ILO was given observer status.[528] Thereafter the ILO participated in UNRRA Council and committee meetings, discussing the workings of international-cooperation in the aftermath of WWIII. As shown and

[524] Defined in the ILO 1919 constitution as "non-metropolitan territories" differing standards could be applied than what was mandated in Conventions and Recommendations. It was up to the state that controlled such areas to decide if and how the standards and conditions would differ. For more see: Gerry Rodgers and others, *The International Labour Organization and the Quest for Social Justice, 1919–2009* (International Labour Office 2009) 41-43.

[525] National Research Council, *Monitoring International Labor Standards: Techniques and Sources of Information* (The National Academies Press 2004) 136-137.

[526] ibid 182.

[527] The agreement for the UNRRA was between the "United Nations" which was the characterization used by the allied powers and their supporters referring to themselves; forty-four states signed the agreement. For more see: *United Nations in the Making: Basic Documents* (World Peace Foundation 1945) 99-101.

[528] Prior to the first meeting of the UNRRA Council the British and U.S. issued communications supporting the involvement of the ILO, with the British stating the ILO should participate in the work of the UNRRA. The U.S. issued a document outlining areas warranting international cooperation, which should be administered by the UNRRA and specifically referred to work accomplished by ILO and the need to continue progress in labour areas, specifically regarding improvement of labour standards, which the Soviet Union supported as well. For more see: Alcock (n 477) 173-175.

notwithstanding the difficulties of survival the institution faced, leadership of the ILO was actively strategizing to secure the role of the ILO in global governance after WWII.[529]

2.3. The International Labor Organization Revisited

The efforts of the ILO throughout the years of WWII culminated in the 26th annual conference of the ILO in Philadelphia in 1944, where the "Declaration of Philadelphia"[530] was adopted and subsequently incorporated in 1946 into the amended ILO constitution.[531] In drawing on the fifth point of the Atlantic Charter, the Declaration of Philadelphia expanded the mandate of the ILO beyond labor legislation, to include a quest for economic and social justice.[532] Alcock noted the "heart of the document" was expressed in the second part of the Declaration, and its significance relates to the equality of all people, while acknowledging missteps in the League, which Alcock summed it up as an affirmation of the:

> principle of equality of all human beings, irrespective of race, creed or sex, deliberately excluded by the framers of the League, passed for the first time into a statement of the aims and purposes of a world organization, to the Declaration anticipated and set a pattern for the United Nations Charter and the Universal Declaration of Human Rights.[533]

Alcock derived two concepts from the heart of the document, one being that national and international policy should be developed to ensuring that individuals are treated equal, and that economic policy, national and international, should be measured by it advancing, rather than impeding the principle of equality.[534] Following the

[529] The ILO Governing body, meeting in London decided the international labour conference would take place in Philadelphia and the agenda would be to secure a role for the ILO in whatever new global governance regime would emerge after WWII. ibid 176.
[530] ILO Declaration, 'Declaration Concerning the Aims and Purposes of the International Labour Organisation, 1944' International Labour Conference (26th Session Philadelphia, 10 May 1944).
[531] Rodgers and others (n 524) 44.
[532] Eddy Lee, 'The Declaration of Philadelphia: Retrospect and Prospect' (1994) 133 International Labour Review 467, 468-469.
[533] Antony Evelyn Alcock, *History of the International Labour Organisation* (1st edn, Macmillan 1971) 183.
[534] The Declaration positioned the ILO to play a key role in the United Nations, building upon its accomplishments, while strengthening the ILO as an institution, defining its mission and defined ten objectives related to economic, social, and worker rights, to be policy objectives and the role of the

Philadelphia conference, the ILO worked intensely to position itself as a specialized agency of the UN, all the while facing opposition of the Soviet Union and challenges internally over the governance structure of the institution.[535] Notwithstanding the aforesaid pressures faced by the ILO, the institution became a specialized agency of the UN in 1946 pursuant to Article 57 of the UN Charter.

The ILO of 2021 has a tripartite representation structure like that of the 1919 ILO constitution, whereby governments are represented by two delegates, and workers and employers are represented by one delegate each. The governance of the ILO is also tripartite in nature, and is composed of three bodies, those being a Secretariat, directed by a Director General, and the Governing Body, which meets three times a year to set and to steer the agenda of the ILO.[536] An International Labor Conference is the third body, which meets annually to adopt conventions and recommendations. It also monitors and supervises international labor standards, and sets the agenda for a dialogue on the direction of the ILO.[537]

Instruments to actualize international labor standards consist of ILO Conventions and Recommendations. Conventions obligate ILO member states to proceed with the

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ILO in achieving them. The ILO incorporated the Declaration into its constitution as the aims and purposes of the institution. For more see: ibid 183-185.

[535] As discussed earlier, the Soviet Union viewed the ILO as favoring the employer to the worker and established the World Federation of Trade Unions (WFTU), which, like the ILO, was also vying for participation in conferences organizing the UN and participation in the institution thereafter. In 1945, the ILO facing a re-ordered world, characterized by an ideological divide between stances of global stakeholders regarding a myriad of issues related to labor and ownership of the means of production and the ILO itself, which led to initiatives in changing the tripartite governance of the ILO. The Latin American Worker's group proposed a 2-1-2 representation and governance structure, with 2 delegates for both workers and governments, and 1 for employers. The impetus was to address nationalized industry whereby one of the two government delegates would represent nationalized industries and the other the state, while of the two worker delegates, one was to represent national trade unions and the other to represent workers in nationalized industries. The employer was to have a sole delegate. A proposal by Belgium envisioned a 2-2-2 structure whereby of the two employer delegates, one would represent nationalized companies and the other to represent privately owned companies. The two worker delegates would give countries where labor was represented by more than one national trade union the opportunity to have representatives of the two dominant trade unions. Neither proposal was accepted. For more see: ibid 189-199.

[536] The Secretary General, elected for a renewable 5 year, term directs the work of the secretariat, which is accountable to the Governing Body. The Governing Body is composed of 56 members, of which 28 are government members and 14 members from both labor and employer. For more see: Erika de Wet, 'Governance through Promotion and Persuasion : The 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2008) 9 German Law Journal 1429, 1432-1433.

[537] ibid.

process to ratify Conventions within 18 months of communication, and if a Convention is not ratified, no further obligation remains aside from periodic reporting to the Governing Body or Director General on the progress or lack thereof in ratification of the Convention.[538] Recommendations likewise obligate ILO member states to proceed within 18 months through the legislative process to enact legislation in accordance with the regulation, and impose no further obligations aside from periodic reporting on the status of legislation concerning provisions of the Recommendation.[539] Conventions are thus international treaties, which are legally binding, while Recommendations are not legally binding instruments.[540] The ILO has an enforcement procedure whereby an ILO member may lodge a complaint against another ILO member for non-observance of the Convention, if both members have ratified the Convention.[541] The Governing Body has the authority to appoint a Commission of Inquiry, which proceeds to investigate the complaint and submits a report on its findings, which may include recommendations (in instance where it is determined that a member is not compliant with the Convention at hand) on what should be done to comply with the Convention and a timeline to follow in actualizing the recommendations.[542] Decisions of the Commission of Inquiry are subject to review by the International Court of Justice (hereinafter ICJ).[543] In the instance of a ILO member not complying with the recommendations of the Commission of Inquiry, or a decision rendered by the ICJ, the Governing Body may resort to an Article 33 action, whereby the Governing Body submits recommendations of action to International Labor Conference for consideration.[544] In the history of the ILO, Article 33 action has been used only once,[545] while Commissions of Inquiry arising from

[538] Constitution of the International Labour Organisation (Part XIII Treaty of Peach between the Allied and Associated Powers and Germany) (signed 28 June 1919, entered into force 10 January 1920, as amended 20 April 1948) 15 UNTS 40 art. 19.
[539] ibid.
[540] de Wet (n 536) 1433.
[541] Constitution of the International Labour Organisation, as amended 15 UNTS 40 art. 26.
[542] ibid art. 27-30.
[543] After communication of the decision by the Commission of Inquiry, states have three months to decide if they accept the decision. If a state does not accept the decision, it must inform the Director General if it intends to ask the ICJ consider the decision, which may affirm, reverse or modify the findings of the commission and the decision of the ICJ is final. For more see: ibid art. 29, 31, 32.
[544] ibid art 33.
[545] Article 33 was used once, in 2000, against Myanmar over its use of forced labor. A complaint by worker delegates led to a Commission of Inquiry, which Myanmar did not cooperate with. This led to the invoking of Article 33, a list of sanctions presented at the conference, which only adopted a

complaints have been established 13 times arising from 34 complaints lodged by members since the inception of the ILO.[546]

Central to this work is the ILO Declaration on Fundamental Principles and Rights at Work[547], adopted in 1998 at the International Labor Conference is soft law, which like the UDHR is a declaration, not a treaty creating obligations, but a set of principles that states are to strive to attain.[548] Arguably declarations are the softest approach, certainly lacking the commitment that a Convention would entail. Nonetheless it is especially relevant, as are other initiatives at protecting human rights advanced by other international institutions. In consideration of my thesis, that there are certain worker rights, which are human rights, and further it is my contention that, such rights must not only be universally recognized, but also protected, and the most efficient method is through a reformed WTO, perhaps with linkage to the earlier efforts undertaken by the ILO, indeed perhaps by linkage the ILO as an institution itself. In order to build my case, I proceed in the next chapter to overview FLRs and human rights, from an institutional approach, encompassing the main actors in global governance, specifically the protection of human rights.

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strongly worded resolution, far from sanctions, which merely requested ILO members review their relations with Myanmar. While some states took unilateral actions in the form of sanctions against Myanmar, it demonstrated the 'impotence' of Article 33, as noted by Alan Hyde correctly in my opinion. Further, the wording in Article 33 was changed in 1946 from the 1919 ILO constitution, that encompassed the language 'measurers of an economic character' as measurers states could take in an Article 33 proceeding, which would have arguably made the use of Article 33 proceedings much stronger. For more see: Alan Hyde, 'The ILO in the Stag Hunt for Global Labor Rights' (2009) 3 Law & Ethics of Human Rights 154, 160-161.

[546] ILO, 'Complaints/Commissions of Inquiry (Art 26)' (*ILO*) <https://www.ilo.org/dyn/normlex/en/f?p=1000:50011:5132631941942::::P50011_DISPLAY_BY:1> accessed 13 October 2020.

[547] ILO Declaration, 'Declaration on Fundamental Principles and Rights at Work and its Follow Up, 1998' International Labour Conference (86th Session Geneva, 18 June 1998).

[548] Kari Tapiola, *The Teeth of the ILO - The Impact of the 1998 ILO Declaration on Fundamentals Principles and Rights at Work* (International Labour Office 2018) 32-34.

CHAPTER 3.

FUNDAMENTAL LABOR RIGHTS

In this chapter, I will describe the concept of Fundamental Labor Rights (hereinafter FLRs). This can be said to be a universalist conception of "worker rights" as derived from instruments originated by the ILO, to codes of conduct for TNCs as developed by the OECD, and from instruments and initiatives concerning human rights applicable to TNCs, as developed by the UN. While each of the aforementioned organizations originates FLRs in its own manner, I submit the notions of FLRs common to all, are grounded in concepts expressed in the International Bill of Rights. Further, each of the following FLRs schemes differ in terms of a means of actualization, and each differ in defining worker rights that are deemed to be fundamental. It is my assertion that the differing mechanisms offered as a means to actualize FLRs are inefficient and meaningless without binding obligations for both transnational corporations and states mandating adherence to FLRs. Furthermore, without binding obligations linked to an enforcement and adjudication mechanism, coupled with sanctions for non-compliance and surveillance to ensure compliance, FLRs have not and will not be actualized internationally. And further it is my submission that the following conceptions of FLRs do not go far enough in securing basic rights, as there is no inclusion of minimal standard OSH protections, which I submit *must* be included among FLRs. It will be argued later in this dissertation that minimal standards for OSH protections are fundamental human rights, and that together with the ILO Declaration's worker rights, are linked to Shue's conception of basic rights.

3.1. International Labor Organization Initiatives

The UN World Summit for Social Development in 1995 resulted in the identification of workers' fundamental rights largely through the efforts of the ILO in preparation for the summit after deliberations on workers' fundamental rights during the 81st

session of the ILO in 1994.[549] ILO Fundamental Worker Rights are based on eight ILO Conventions[550], which are deemed to be fundamental ILO Conventions,[551] while the entirety of the ILO instruments are said to encompass the International Labor Code, with labor standards reflected therein.[552] As will be shown, the ILO has been at the forefront of advancing the notion of FLRs since its creation and first international labor standard directly related to protection of the safety of the worker, to its most recent move to include the safety and health of a worker as a fundamental labor right.

3.1.1. ILO Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy

As discussed in the previous chapter, ILO Conventions and Recommendations, when ratified would apply where so adopted. With free trade and foreign direct investment expanding however, awareness grew on both the positive and negative impacts of doing business globally. The ILO sought to assert itself as an institution, issuing guidance for global business enterprises. In 1977, the ILO Governing Body adopted

[549] ILO Report, 'Report VII: Consideration of a Possible Declaration of Principles of the International Labour Organization Concerning Fundamental Rights and Its Appropriate Follow-up Mechanism' International Labour Conference (Geneva June 1998).

[550] The Conventions are: ILO Convention, 'C0029 - Forced Labour Convention, 1930' International Labour Conference (14th Session Geneva 28 June 1930)'; ILO Convention, 'C0087 - Freedom of Association and Protection of the Right to Organise Convention, 1948' International Labour Conference (31st Session San Francisco 09 July 1948).; ILO Convention, 'C0098 - Right to Organise and Collective Bargaining Convention, 1949' International Labour Conference (32nd Session Geneva 01 July 1949); 'ILO Convention, 'C0100 - Equal Remuneration Convention, 1951' International Labour Conference (34th Session Geneva 29 June 1951); ILO Convention, 'C0105 - Abolition of Forced Labour Convention, 1957' International Labour Conference (40th Session Geneva 25 June 1957). ; 'ILO Convention, 'C0111 - Discrimination (Employment and Occupation) Convention, 1958' International Labour Conference (42nd Session Geneva 25 June 1958); 'ILO Convention, 'C0138 - Minimum Age Convention, 1973' International Labour Conference (58th Session Geneva 26 June 1973).; ILO Convention, 'C0182 - Worst Forms of Child Labour Convention, 1999' C182, International Labour Conference (87th Session Geneva 17 June 1999).

[551] The outcome of designating the eight conventions as fundamental was to enhance the ILO's supervisory mechanism in the areas of eliminating discrimination, forced, and child labor in accordance with art. 10.1 of the ILO Constitution; however, this enhanced supervisory mechanism was not extended to freedom of assembly. Further, the ILO committed itself to promoting ratification of the eight fundamental conventions among the members with the aim of "universal ratification" of said conventions, which admittedly would be difficult to attain. For more see: ILO Report VII: Consideration of a Possible Declaration of Principles of the International Labour Organization Concerning Fundamental Rights and Its Appropriate Follow-up Mechanism, (n 549).

[552] Philip Alston and James Heenan, 'Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2004) 36 New York University Journal of International Law and Politics 221, 222-223.

the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (hereinafter MNE Declaration).[553] The MNE Declaration provides guidelines to multinational corporations in social policy and is the first ILO instrument to address activities of multinational corporations, specifically in regards to employment, conditions of work, relationships between employers', workers' and governments.'[554] The MNE Declaration was the ILO's response to the impacts of multinational companies' operations in host states, which were both positive and negative – resulting in lack of agreement in drafting an international labour convention to address impacts of multinational corporations, resulting in the MNE Declaration, a non-binding instrument.[555] It references numerous ILO Conventions and Recommendations in its four main headings, employment, training, conditions of work and life, and industrial relations.[556] In 1986, a procedure for examining disputes concerning the application of the MNE Declaration was adopted, which essentially provides guidance in the interpretation of the MNE Declaration.[557]

3.1.2. ILO Declaration on Fundamental Principles and Rights at Work

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work[558] (1998 Declaration), in the context of the Final Declaration of the WTO's Ministerial Conference at Singapore, in which the WTO affirmed its commitment to observe international labor standards and acknowledged the ILO as the competent body to establish and enforce said standards.[559] The Declaration declared that 'the ILO is the constitutionally mandated international organization and the competent

[553] ILO Declaration, 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977' Governing Body of the ILO (204th Session, Geneva, November 1977, as amended).
[554] ibid section 7.
[555] Jean-Michel Servais, 'A New Declaration at the ILO: What For' (2010) 1 European Labour Law Journal 286, 293.
[556] ILO Declaration, 'Declaration on Social Justice for a Fair Globalization, 2008' International Labour Conference (97th Session, Geneva, June 2008).
[557] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, (n 553) 17-18.
[558] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up Mechanism, (n 547).
[559] Hilary Kellerson, 'The ILO Declaration of 1998 on Fundamental Principles and Rights : A Challenge for the Future' (1998) 137 International Labour Review 223, 224.

body to set and deal with international labour standards'.[560] The 1998 Declaration defined four labor rights as fundamental; the prohibition of child labor; the prohibition of forced labor; discrimination; and freedom of association/collective bargaining. These labor rights were deemed as fundamental due to their being necessary to actualize other labor standards.[561] However it has been noted that the aforementioned labor rights are inherently civil and political in nature, essentially negative rights, which 'is the antithesis of the ILO approach.'[562]

While the eight underlying conventions upon which the Declaration's fundamental labor rights rests have attained ratification by a high percentage of ILO members, three ILO members with high populations and large economies have only ratified a few of the underlying conventions. The 1998 Declaration did not impose new obligations on ILO members,[563] Erika de Wet argues the effect is that states cannot 'distance themselves from the content contained therein'.[564] While I agree in principle with de Wet, it should be noted if a state has not ratified an ILO Convention, then the state is not subject to the supervisory mechanism of the ILO regarding legal obligations of said unratified Convention. This is especially important for the purposes of this thesis, as conventions concerning workers' rights to organize for the purposes of collective bargaining,[565] have not been ratified by the U.S., China, or India, yet it is my submission that these are fundamental workers' rights. The obligation to promote and endorse the Declaration by virtue of ILO membership

[560] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up Mechanism, (n 547), preamble.

[561] Erika de Wet, 'Governance through Promotion and Persuasion : The 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2008) 9 German Law Journal 1429, 1438.

[562] It is argued that the inclusion of rights that are "negative" in nature are not neutral, that it reflects a costless approach, hence not imposing a cost on a state, insofar as a "positive right" may entail. Further, Alston and Heenan contend that many scholars are disingenuous in hailing the Declaration as a remarkable achievement, premised upon human rights, as focusing on core negative rights risks limiting the actualization of international labor rights premised upon economic and social rights, such as arguably, the right to a health and safe working environment. For more see: Alston and Heenan (n 552) 253-255.

[563] As members of the ILO, states are obliged to endorse principles and rights of the ILO and the Philadelphia Declaration, both of which recognize the fundamental labor rights outlined in the 1998 Declaration; thus states irrespective of having ratified the underlying Conventions are nevertheless obligated to promote and actualize the principles contained therein as expressed in the 1998 Declaration. For more see: Kellerson (n 559) 224-225.

[564] de Wet (n 561) 1437.

[565] ILO Freedom of Association and Protection of the Right to Organise Convention, 1948, C87, (n 550); ILO Right to Organise and Collective Bargaining Convention, 1949, C98, (n 550).

amounts arguably to soft law[566] and does not go far enough to actualizing workers' right to collective bargain and free association for the purposes of said action. Further, the Declaration does not address health and safety of workers[567] and has been criticized for weakening, rather than strengthening worker rights, firstly, by focusing on a core of worker rights, and secondly, that the Declaration 'de-emphasizes legal enforcement in favor of promotional techniques, dialogue, and technical assistance'.[568] While the core conventions have been widely adopted, as demonstrated by the number of conventions adopted by the top 20 states as measured by GDP (See Annex A), notably both China and the U.S. have yet to adopt a majority of the core conventions.

Indeed, the inherent weakness in the Declaration concerns its monitoring mechanism, characterized at the 'Follow-up to the Declaration'[569], which amounts to merely preparing and disseminating two reports annually for review by the ILO Governing Board. One report is prepared by a group of experts on the status of the implementation of the Declaration's fundamental worker rights by states that have not ratified one or more of the eight conventions linked to said fundamental worker rights, with states.[570] The second, a Global Report, is prepared by the ILO Director General, focusing on one of the four fundamental worker rights, aimed to give an overall overview of the actualization of the selected fundamental right from a global perspective over the past four years.[571] Philip Alston and James Heenan opine that to

[566] Notwithstanding that the Declaration defined four fundamental labor rights, the ILO could have used a stronger instrument than an declaration, which arguably does not have constitutional status. For more see: Adelle Blackett, 'Mapping the Equilibrium Line : Fundamental Principles and Rights at Work and the Interpretive Universe of the World Trade Organization' (2002) 65 Saskatchewan Law Review 369, 379-380.

[567] Adelle Blackett argues that health and safety constitute a fundamental human right in relationship to art. 3 of the UDHR which provides for "the right to life, liberty and security of a person" (quoting from the UDHR), noting that no derogation is permitted per art. 4 of the ICCPR, and that linkage exist with the workplace and the right to life and security therein through a healthy and safe working environment, which I argue for in this work. Further, Erika de Wet notes that references to rights defined as fundamental in the Declaration based on wording in the preamble to the constitution of the ILO are no stronger than references to health and safety principles, and questions why they were not included in the Declaration. For more see: ibid 386; de Wet (n 561) 1437-1438.

[568] Alston and Heenan (n 552) 233.

[569] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up Mechanism (n 547) annex.

[570] ibid annex II.

[571] ibid annex III.

obtain consensus to enact the Declaration, it was structured so as not to create a 'serious monitoring mechanism nor be infected by ongoing activities under those other mechanisms.'[572]

3.1.3. ILO Declaration on Social Justice for a Fair Globalization

In 2008, the ILO adopted the ILO Declaration on Social Justice for a Fair Globalization (hereinafter SJFG Declaration).[573] The SJFG Declaration reaffirms and builds upon the principles of the Philadelphia Declaration, the 1998 Fundamental Rights and Principles at Work, and the MNE Declaration, emphasizing the vision of the ILO in the globalized world of the 21st century.[574] Jean-Michel Servais opines that the SJFG Declaration envisions legal norms 'as instruments for the elaboration and actual implementation of desirable social policies rather than values themselves.'[575] The SJFG Declaration focuses primiarly on core labour standards, as defined in the 1998 Fundamental Rights and Principles at Work, with other ILO norms envisioned as a means to achieve them, while not considering the importance of saftey of workers while working.[576] The signifiance as Servais noted is that:

> The Declaration takes however a further step to move development and employment issues towards the centre of the ILO concern and to give international labour standards a lower priority, with the exception of the fundamental principles and rights at work…[T]he new Declaration clearly brings the risk to be interpreted in a way that reduces the strength and the impact of the ILO *corpus iuris*.[577]

Janice Bellace notes the concept of "Decent Work Agenda" was developed by ILO Director General Juan Somavia as a means to address negative impacts of globalization on workers in the 21st century, especially with respect to growing inequalities, and was the outcome of the 2007 ILO Forum on Decent Work for a Fair

[572] Alston and Heenan (n 552) 257.
[573] ILO Declaration on Social Justice for a Fair Globalization (n 556).
[574] ibid 6-8; Servais (n 555) 286 .
[575] Servais (n 555) 297.
[576] ibid.
[577] ibid 299-300.

Globalization.[578] The "Decent Work Agenda" defines four strategic objectives for the ILO, related to the ILO's Constitutional mandate as:

> (i) promoting employment by creating a sustainable institutional and economic environment…(ii) developing and enhancing measurers of social protection – social security and labour protection – which are sustainable and adapted to national circumstances…(iii) promoting social dialogue and tripartism…(iv) respecting, promoting and realizing the fundamental principles and rights at work.[579]

Bellace sees the SJFG Declaration directly linked to the concept of social justice for workers, as stated in the in the inception of the ILO in the preamble to its Constitution and further refined by the Philadelphia Declaration, and that opines that 'Decent Work can be seen as the label describing the conditions which must exist for workers to be able to enjoy the human rights guaranteed to them in various international instruments and ILO conventions.'[580]

With the SJFG Declaration, the ILO sought to reassert itself as an institution in the globalized world of the 21st century and significantly, as noted by Francis Maupin, the impetus for the SJFG Declaration grew out of the failure of the U.S. and the EU to place social issues related to trade on the agenda of the 1999 WTO Ministerial Conference.[581] While fundamental rights follow employment, social protection, and social dialog, they are at the heart of the SJFG Declaration, as fundamental rights are the means to achieve the objective of social protection envisioned in the SJFC Declaration, which 'brings together 'decency' elements related to labour conditions (working time and wages), social security, and safety at work.'[582] While the SJFG Declaration arguably connects the ILO of the 21st century with the visions of social justice and labour as defined in the 1919 ILO constitution, it falls short as it is a soft law instrument, and as Jean-Michel Servais notes:

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[578] Janice R Bellace, 'Achieving Social Justice: The Nexus between the ILO's Fundamental Rights and Decent Work' (2011) 15 Employee Rights and Employment Policy Journal 5, 22-23.
[579] ILO Declaration on Social Justice for a Fair Globalization (n 556) 9-11.
[580] Bellace (n 578).
[581] Francis Maupain, 'New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization' (2009) 20 European Journal of International Law 823, 828-829.
[582] ibid 834.

> International labour standards are considered to work as a firewall against those who seek to profit, in a context of stiff international competition, from mediocre or exploitive working conditions…non-binding mechanisms can usefully supplement legal procedures, but they cannot be substituted for those procedures…[T]he new Declaration clearly brings the risk to be interpreted in a way that reduces the strength and the impact of the ILO *corpus iuris*.[583]

Reasserting itself almost a decade after its founding with the SJFC Declaration, the ILO, while seizing on the failure of the WTO to address social issues related to trade nevertheless misses the mark with soft law instruments, such as the aforementioned declaration, I agree with Jean-Michel Servais' observations. While I shall return to the ILO in the final chapter of this work, when discussing linking trade with worker rights and the role of the ILO in this linkage, it is important before moving forward to discuss the centennial ILO International Labour Conference, held in Geneva in June of 2019. A promising outcome was that of a resolution was adopted at the conference requesting the Governing body to include workers' safety and health rights as a core fundamental labour right.[584]

3.1.4. ILO Centenary Declaration for the Future of Work

As argued by scholars in previous sections of this work that workers' safety and health rights should be included as core fundamental labour rights, the adoption of the resolution was promising. Reflecting on core labor rights, Ulla Liukkunen notes that notwithstanding that occupational safety and health is not a core labor right, that through strong collective bargaining and dialog with the employer, occupational health and safety protections can be achieved for workers, as collective labor rights through worker participation in regulatory development aimed at securing better working conditions. Others have stated this argumentation, that through collective bargaining, better working conditions can be attained. Yet as Liukkunen further notes, it is problematic that ILO Convention 87 (freedom of association) and ILO Convention 98 (collective bargaining) have not been widely ratified and problems

[583] Servais (n 555) 288, 300.
[584] ILO Resolution, 'Resolution on the ILO Centenary Declaration for the Future of Work, 2019' International Labour Confrence (108th Session Geneva, 21 June 2019).

exist in states, which have ratified the aforementioned conventions.[585] She goes onto state that:

> The question of effective incorporation of core labour standards into transnational sets of labour standards created by various non-state actors has become increasingly central in terms of labour protection and the social dimension of globalization. …[t]he voice and authority of the ILO is needed in regulatory contexts where international actors independently organize and create new sets of rules of labour governance to ensure that the labour rights- based perspective is not sidelined.[586]

Liukkunen identifies non-state actors in reference to the above to include Multi National Enterprises and international or national trade union federations.[587] Indeed, core labor standards are frequently incorporated into agreements between the aforementioned non-state-actors, specifically in International Framework Agreements.[588] Problematic however is in monitoring of the aforementioned agreements, which 'raises a concern about the extent to which such agreements can be regarded as advancing transnational accountability without further developing their implementation and enforcement.'[589]

The outcome of the ILO centennial labour conference was the ILO Centenary Declaration for the Future of Work of 2019, which reaffirmed that is labor a commodity, the commitment to achieving social justice and peace, and most importantly in support of my position, declaring that 'Safe and healthy working conditions are fundamental to decent work.'[590] Further, in the aforementioned, the ILO called for The Governing Body to follow up and review the implementation of the ILO Centenary Declaration for the Future of Work and 'Requests the Governing Body to consider, as soon as possible, proposals for including safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work.'[591] While the path towards the inclusion of safe and healthy working conditions

[585] Ulla Liukkunen, 'The ILO and Transformation of Labour Law' in Tarja Halonen and Ulla Liukkunen (eds), *International Labour Organization and Global Social Governance* (Springer 2021), 29.
[586] ibid 30.
[587] ibid 39.
[588] ibid.
[589] ibid 41.
[590] ILO Declaration, 'Centenary Declaration for the Future of Work, 2019' International Labour Conference (108th Session Geneva, 21 June 2019) Part II, D 2019.
[591] ILO Resolution on the ILO Centenary Declaration for the Future of Work (n 584).

as a core fundamental labor right is promising, the problem of enforcing fundamental labor rights nevertheless remains.

As discussed in the preceding section, ILO Conventions ratified by states create obligations and an enforcement mechanism, though rarely used, by the ILO, whereas, a Declaration, like ILO Recommendations, does not. As noted by Erika de Wet, 'The basic premise of the ILO is to rely on cooperation and dialogue rather than sanctions in its efforts to realize its goals.'[592] I agree with the aforementioned statement wholeheartedly, and I shall elaborate further on the institutional weakness of ILO, and propose a way to overcome it in through institutional linkage the final part of this work.

3.2. The Organization for Economic Corporation and Development: Guidelines for Multinational Enterprises

The Organization for Economic Co-operation and Development (hereinafter OECD) is included because it originated the first codes of conduct for corporations acting internationally. Adopted by the OECD in 1976 as an annex to the OECD Declaration on International Investment and Multinational Enterprises,[593] the OECD noted the importance of multinational enterprises and the interplay between international investment and economic development, and the need to resolve difficulties, which may arise from international investment and the operations of multinational enterprises, and recommended that multinational enterprises operating in OECD member states adhere to the guidelines in the annex to the declaration.[594] The annex encompassed a list of recommendations to multinational enterprises, which serves as the foundational basis of the OECD Guidelines for Multinational Enterprises (hereinafter OECD Guidelines). The OECD Guidelines were voluntary, nonbinding, on corporations yet required OECD states to implement and promote the OECD Guidelines to transnational corporations with operations in its jurisdiction.[595] Initially,

[592] de Wet (n 561) 1429.
[593] Organisation for Economic Co-operation and Development (OECD) Declaration on International Investment and Multinational Enterprises (21 June 1976) OECD/LEGAL/0144.
[594] ibid.
[595] Roel Nieuwenkamp, 'The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct' (2013) 1 Dovenschmidt Quarterly 171, 172; John Ruggie and Tamaryn Nelson, 'Human

the references to human rights in the OECD Guidelines nonexistent, but the employment and industrial relations section touched upon freedom of association and collective bargaining.[596] An interesting feature of the Guidelines is the requirement that OECD states establish National Contact Points, which promote the Guidelines and further, provide for a mediation mechanism whereby alleged breaches of the Guidelines by transnational corporations may be addressed.[597]

As of March 2019, the OECD Guidelines have been revised five times, with the 2011 revision being the most recent and significant.[598] The significance of the 2011 revision is the inclusion of a chapter on human rights, which in chapter 4 covers human rights and implements aspects of the UN General Principles, which as discussed earlier, operationalizes the instrument.[599] Chapter 5 covers employment and industrial relations and reiterates the ILO 1998 Declaration.[600] With the addition of a human rights chapter implementing the General Principles, the implication is that human rights infringements by transnational corporations operating in OECD states, or with home offices in an OECD member state, may be mediated through the aforementioned National Contact Points. While a TNCs adherence to the OECD Guidelines is voluntary, the publication of a transnational corporation's failure to mediate human rights violations does amount to a "naming and shaming" strategy, which is however, arguably an ineffective strategy.

Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) 2.

[596] Ruggie and Nelson (n 595) 2-3.

[597] While the OECD Guidelines are not binding for transnational corporations, the NCP mediation mechanism has been described as 'soft law with hard consequences,' as a company unwilling to engage in mediation faces being 'named and shamed' for failure to engage in mediation over human rights issues linked to the OECD Guidelines. See for more the outcome of the Vedanta case in: Nieuwenkamp (n 595) 171.

[598] ibid 172.

[599] Ruggie and Nelson (n 595) 5-6.

[600] Section V. Employment and Industrial Relations in the: Organisation for Economic Co-operation and Development (OECD) Declaration on International Investment and Multinational Enterprises (21 June 1976) OECD/LEGAL/0144, as amended on 25 May 2011.

3.3. United Nations Initiatives

Efforts at the UN to hold transnational corporations accountable for the failure to respect international human rights can be traced to the 1990s, an era linked to expanding economic globalization with the collapse of the USSR and the emergence of a new world economic order.[601] The approach of the UN can be traced from three spheres; that of the UN Human Rights Commission, efforts advanced by the Secretary General and the outcome of a working group established by the UN Human Rights Council. Each approach is different, varying in the methodology, substance, operation, and binding nature of the measures.[602] I will overview each approach in the following sub-sections.

3.3.1. Draft Norms

In 1998 the UN Human Rights Commission's Sub-Commission through its resolution 1997/11 appointed Mr. El-Hadji Guissé to research and prepare a document outlining the relationship between human rights and the work methods and activities of transnational corporations for presentation at the 50th session.[603] The following year, Mr. El-Hadji Guissé presented his findings and through resolution 1998/8, the Sub-Commission authorized a working group to further examine working methods and activities of transnational corporations, with particular focus on human rights impacts, including recommendations for adequate measurers to be undertaken to ensure the protection of human rights.[604]

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[601] While UN efforts at drafting a 'Code of Conduct for Transnational Corporations' was initiated in 1977, the scope of the code was foreign direct investment activities by transnational corporations, the relationship between the home and host state and other assorted issues – not corporate social responsibility, worker rights nor human rights. See for more: PD Maynard, 'Towards a Code of Conduct for Transnational Corporations' (1983) 9 Commonwealth Law Bulletin 259, 259-261.

[602] David Weissbrodt, 'Human Rights Standards Concerning Transnational Corporations and Other Business Entities' (2014) 23 Minnesota Journal of International Law 135, 139.

[603] UNCHR 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-Ninth Session' Res. 1997/11 (5 November 1997) UN Doc. E/CN.4/1998/2, E/CN.4/Sub.2/1997/50.

[604] David Weissbrodt, Mayra Gomez and Bret Thiele, 'Highlights of the Fiftieth Session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1999) 17 Law & Inequality: A Journal of Theory and Practice 445, 467-468.

At its first meeting, the working group set about to develop a code of conduct, based on human rights, applicable to transnational corporations.[605] David Weissbrodt submitted a paper to the working group 'Principles relating to human rights conduct of companies'[606] that would in time become the foundation for a draft code. The working group held three public meetings in 2000 deliberating over many issues related to the code, ranging from the name of the document, the scope of applicability and application, to a mechanism for implementation and enforcement.[607] The ILO participated in the working group and reiterated the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, stressing the importance of the International Bill of Rights, and most importantly for my purpose, OSH conditions, and collective bargaining and free association by workers.[608] The working group tasked the experts with consulting with relevant actors in refining their working papers, with an aim to find a method to actualize and implement a human rights code of conduct for TNCs.[609]

In 2001, through resolution 2001/3, the Sub-Commission drawing upon the progress made in the preceding years authorized the working group to finalize draft human rights norms applicable to transnational corporations addressing their impact and interaction with human rights.[610] The following year, the working group refined the scope of enterprises subject to the norms so as to exclude small businesses[611] and

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[605] UNCHR (Sub-Commission) 'Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on Its First Session' (12 August 1999) UN Doc. E/CN.4/Sub.2/1999/9.

[606] UNCHR (Sub-Commission Working Group) 'Principles relating to human rights conduct of companies' Working paper prepared by Mr. David Weissbrodt (25 May 2000) UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1.

[607] Eight NGOs and the ILO participated in the meetings of the working group. Transnational corporations were noted as impacting 'the physical and mental health of people, on employment and on working conditions, as well as on the right of association, the right to strike and the right to collective bargaining.' See for more: UNCHR (Sub-Commission Working Group) 'Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Second Session' (28 August 2000) UN Doc. E/CN.4/Sub.2/2000/12, 4 [11].

[608] ibid, 9 [47].

[609] ibid, 12 [61].

[610] UNCHR 'Report of the Sub-Commission on the Promotion and Protection of Human Rights on its 53rd session' (22 November 2001) UN Doc. E/CN.4/2002/2-E/CN.4/Sub.2/2001/40, 16-17.

[611] A '*de minimis'* exception was created for small businesses, which may not have the resources of larger enterprises, and the challenge was to create an exception in a manner in which large enterprises could not exploit. The exception was premised upon three elements whereby a small business could invoke so not to be subject to the envisioned code, (a) if its impact was localized, (b) if it has not

redefined the name of the proposed code to emphasize the 'non-voluntary nature of the instrument'.[612] In 2002, through resolution 2002/8, the Sub-Commission requested that the Draft Norms be disseminated to governments, NGOs, IGOs, transnational corporations, and unions for comments, and in 2003 at the 55th session of the Sub-Commission, the working group presented their draft, titled 'Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (Hereinafter Draft Norms).[613] Of particular importance for my purposes is section D of the Draft Norms, which addresses the rights of workers, and which encompasses the ILO fundamental Labor Rights, yet the Draft Norms went further to include positive rights mandating a safe and healthy working environment and a positive obligation to ensure remuneration adequate to achieve a sufficient standard of living,[614] which in my view was the correct position. Because further, the Draft Norms would not have been voluntary guidelines, or codes of conduct, but would have served as a means to legally bind transnational corporations to adhere to human rights norms as defined in the Draft Norms; in the same manner as international human rights law binds states.[615]

The Sub-Commission approved the Draft Norms in 2003 through resolution 2003/16 and invited interested parties to submit comments and that the working group finalize the Draft Norms with the intention to proceed towards enactment.[616] The finalized Draft Norms were submitted to the UNCHR pursuant to resolution 2004/116 for

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connections with a transnational corporation and, (c) if the activity complained was not connected to activities identified in the security section of the draft code, such as genocide or torture. For more see: David Weissbrodt and others, 'A Review of the 54th Session of the United Nations Sub-Commission on the Promotion and Protection of Human Rights' (2003) 21 Netherlands Quarterly of Human Rights 291, 320-321.

[612] ibid, 321.

[613] UNCHR (Sub-Commission on the Promotion and Protection of Human Rights) 'Draft norms submitted by the Working Group on the Working Methods and Activities of Transnational Corporations pursuant to resolution 2002/8 (30 May 2003) UN Doc. E/CN.4/Sub.2/2003/12.

[614] The Draft Norms provided for 14 specific employer obligations, five of which were concerning worker rights, with more precise language enunciated than in the ILO Fundamental Labor Rights. The requirement to provide a safe and healthy working environment is explicitly stated in part 7 of section D. See for more: ibid, 5-6 .

[615] The duties imposed on transnational corporations to "promote, secure the fulfillment of, respect, ensure respect of, and protect human rights" would be secondary within their "spheres of influence" while states would continue to have primary duties. For more see: ibid 4, Section A [1], 6, Section E [10] [11] [12].

[616] UNCHR 'Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-Fifth session' (20 October 2003) UN Doc. E/CN.4/2004/2 E/CN.4/Sub.2/2003/43, 52-53.

acceptance. However in 2004, the UNCHR subsequently declined to adopt it, noting that while it is important to consider the relationship of transnational corporations and human rights, and that authorization had indeed been given to research said relationship, nonetheless, the document submitted pursuant to resolution 2004/116 was merely a draft proposal, having no legal standing.[617] The Draft Norms would have created binding obligations on transnational corporations,[618] yet with the aforementioned decision, the Draft Norms withered away, and were abandoned altogether in 2005.[619] This however would not end efforts of the UN to address human rights abuses by TNCs, yet the mechanism would shift from the binding hard law approach to a voluntary approach at the initiative of the UN Secretary General.

3.3.2. Global Compact

In 1999, the Secretary General of the UN, Kofi Annan addressed global business executives at the Davos World Economic Forum in Davos Switzerland.[620] In his address, Secretary General Annan proposed that the UN and business leaders 'initiate a global compact'[621] stressing the need for business leaders to address the critics of economic globalization by embracing a concept of corporate social responsibility, premised upon shared values and principles, grounded on voluntary actions by corporations.[622] Thereafter, Secretary General Anan worked with a group of business executives to formulate what would become the UN Global Compact, initially

[617] UNCHR 'Report to the Economic and Social Council on the Sixteenth Session of the Commission' (2004) UN Doc. E/2004/23 E/CN.4/2004/127 2004, Decision 2004/279, 332-332 (c).
[618] Surya Deva, 'UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?' (2004) 10 ILSA Journal of International and Comparative Law 493, 499.
[619] Larry Catá Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsiblity in International Law' (2006) 37 Columbia Human Rights Law Review 287, 331.
[620] UN Secretary-General Kofi Annan, 'Secretary-General global compact on human rights, labour, environment, in address to World Economic Forum in Davos' (1 February 1999), UN Doc. SG/SM/6881/Rev.1.
[621] ibid [4].
[622] Addressing worker rights, Secretary General Annan urged the need not to 'wait for every country to introduce laws protecting freedom of association and the right to collective bargaining…. at least make sure your own employees, and those of your subcontractors enjoy those rights…make sure that you yourselves are not employing under-age children or forced labor, either directly or indirectly. And you can make sure that in your own hiring and firing policies, you do not discriminate on grounds of race, creed, gender or ethnic origin.' ibid [14].

founded upon nine points, with a tenth point added in 2004. The UN Global Compact addresses issues relating to human rights, labor rights, environment, and corruption. Principles 1 and 2 directly address human rights, and principles 3-6 directly address labor rights and are linked to the ILO Declaration on Fundamental Principles and Rights at Work.[623] Corporate Social Responsibility is thus linked to fundamental labor rights. Corporations that voluntary subscribe to the UN Global Compact are obligated to publish annual progress reports of the corporations' advancement in implementing the principles, with the idea that through voluntary actions corporations can set ethical standards to which competitors will strive to attain, and through public awareness more corporations will subscribe to the UN Global Compact. As of 2020, over 5,000 companies have subscribed to the UN Global Compact.[624]

3.3.3. General Principles

In 2005, General Secretary Annan appointed Professor John Ruggie as a Special Representative of the Secretary General (hereinafter SRSG), pursuant to UNCHR resolution 2005/69, reporting to the UNCHR for the purposes of defining the relationship between transnational corporations and human rights. SRSG Ruggie's task was essentially to further investigate the relationship between business and human rights after failure of the Draft Norms, and to define the relationship between transnational corporations, states and human rights in an era of economic globalization. In 2008, SRSG Ruggie proposed a solution to the dilemma of defining

[623] The principles that address human rights and labor rights are 'Principle 1: Business should support and respect the protection of internationally proclaimed human rights within their sphere of influence and; Principle 2: make sure they are not complicit in human rights abuses; Principle 3: Business should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; and; Principle 6: the elimination of discrimination in respect of employment and occupation.' For more see: United Nations Global Compact, 'UN Global Compact The Ten Principles' (*UN Global Compact*, 2013) 1 <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 24 September 2020.

[624] UN, 'Our Participants | UN Global Compact' <https://www.unglobalcompact.org/what-is-gc/participants/search?utf8=✓&search%5Bkeywords%5D=&search%5Borganization_types%5D%5B%5D=5&search%5Bper_page%5D=10&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc> accessed 24 September 2020.

the relationship and areas of responsibility; the Protect, Respect and Remedy Framework (hereinafter PRRF), which Ruggie described as a three-pillar structure.[625]

The first pillar asserts that responsibility for protection against human rights abuses by third parties, including transnational corporations rests with the State, through legislative means and an enforcement and adjudication mechanism; the second pillar asserts that corporations' have an obligation to respect human rights through a due diligence process designed to ensure human rights are not violated by the corporation, and further, that breaches are adequately remedied; and the third pillar supports the first two through ensuring that mechanisms are in place to remedy human rights infringements by the state or third parties. The PRRF does not however impose binding human rights obligations on transnational corporations. The United Nations Human Rights Council (hereinafter UNHRCo) endorsed the PRRF and extended SRSG Ruggie's mandate, charging him with devising an operational mechanism to implement the PRRF.[626] In March of 2011, SRSG Ruggie presented his project to operationalize the PRRF, entitled 'Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework'[627] (hereinafter General Principles) to the UNHRCo, which subsequently endorsed it on June 16 2011.[628]

The General Principles embody 31 foundational and operational principles categorized into three sections consistent with the division of responsibilities enunciated in the PRRF. The first section encompasses the first ten principles, which affirm that responsibility rests with the state to prevent, investigate and punish instances of human rights abuses by corporations. While the General Principles provides recommendations and suggestions, it leaves it up to states to determine what

[625] John Gerard Ruggie, 'Protect, Respect And Remedy: A United Nations Policy Framework For Business And Human Rights', *Proceedings of the Annual Meeting (American Society of International Law)* (2009) 282.
[626] UNHRC 'Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (18 JUNE 2008) U.N. Doc. A/HRC/RES/8/7.
[627] UNHRC 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc. A/HRC/17/31.
[628] UNHRC Res 17/4 (6 July 2011) UN Doc. A/HRC/RES/17/4.

means and mechanisms to employ in discharging its duty to prevent and redress human rights abuses in its territory or areas of jurisdiction.[629]

The second section encompasses principles 11 to 15, which are foundational principles of corporate responsibility to respect human rights, and principles 16 to 24 are the operational principles to achieving this end. The foundational principles of this section affirm the responsibility of business enterprises to respect and avoid infringing upon internationally recognized human rights; that this responsibility requires business enterprises to refrain from actions that may infringe upon human rights either through action or inaction and further that this responsibility extends via linkage to other business enterprises and relationships; that this responsibility is not diminished by the size of the enterprise, ownership nor control and; that to achieve this responsibility, business enterprises should develop and have in place sufficient policies and procedures to show they respect human rights.[630]

The operational principles, 16-24 are designed to offer more specific guidelines to business enterprises in effectively formulating human rights policy and to the means to implement it. The operational principles address and provide guidance on how to communicate the business enterprise's commitment to human rights throughout the enterprise to all stakeholders; how to conduct effective due diligence and human rights impact assessments; how to integrate due diligence and impact assessment findings into the enterprises human rights policy and measurers to effectively communicate the findings and reforms to all relevant stakeholders; and should a business enterprise discover, despite the best practices, instances of infringement of human rights by the actions of the business enterprise, the business enterprise should engage in efforts to remediate the situation if a direct linkage is present and in instances where there is no direct linkage, business enterprises, while not required, are

[629] In Part I, Section B, Principle 3 charges states with enforcing and enacting legislation requiring business enterprises to respect human rights, to provide guidance to business on how to respect human rights, to ensure that corporate municipal law does not constrain business respect for human rights, and to encourage business enterprises to communicate how human rights are impacted by their operations. For more see: UNHRC 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (n 491) 8.

[630] In Part II, Section A, Principle 12 states that internationally recognized human rights include, at a minimum, rights expressed in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. See for more: ibid 13.

nonetheless encouraged to participate in remediation efforts. Lastly, in instances of multiple human rights infringements directly linked to the business enterprise, and where not possible to concurrently address them all, the business enterprise should focus on the most severe human rights violations first.[631]

The third section encompasses principles relating to accessing effective remedies and is directed at all relevant stakeholders. Principle 25 affirms that states are responsible for providing effective mechanisms for individuals aggrieved to adjudicate human rights abuses suffered from actions from a business enterprise located in their jurisdiction. Principles 27 and 28 call upon states to provide alternative dispute mechanisms for the adjudication of human rights infringements, and to facilitate access to said facilities by individuals impacted by human rights abuse. Principle 29 calls upon business enterprises to provide 'operational-level grievance mechanisms' whereby individuals and communities alike can *ex ante* address and identify situations likely to result in infringements upon human right directly to the business enterprise so corrective measures may be taken early on to prevent the occurrence of said infringement, and similarly, principle 30 addresses *ex ante* identification and compliance with standards likely to minimize human rights infringements through grievance mechanisms and are collective in nature, for example unions, trade associations *et al*. And lastly, Principle 31 sets out the criteria by which state and non-state judicial grievance mechanisms should be evaluated, namely, that said grievance mechanisms should be legitimate; accessible; predictable; equitable; transparent; rights-compatible; and a source of continuous learning, while considering the need for engagement and dialog with all relevant stakeholders.[632]

3.3.4. Proposed Business and Human Rights Treaty

In 2014, the UNHRCo established the Open-Ended Intergovernmental Working Group on Transnational Corporations (hereinafter OIWG).[633] The mandate of the

[631] ibid 15-21.
[632] ibid 22-26.
[633] UNHRC Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights (14 July 2014) UN Doc. A/HRC/RES/26/9.

OIWG is 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[634] As noted by several scholars, seemingly, the UN, while having adopted the earlier discussed Guiding Principles three years earlier, was revisiting the abandoned Draft Norms, in the sense of creating "legally binding instrument" which would regulate TNCs with respect to international human rights.[635]

The initiative for the resolution was led by Ecuador and South Africa, with strong support from an array of developing states, yet the initiative faced resistance by a contingent of developed states including the U.S. and EU members.[636] Lee McConnel attributes the initiative by Ecuador as a response to obstructions experienced by the state of Ecuador and by its citizens in pursuit of litigation against Chevron for pollution of the environment in its operations in Ecuador.[637] Notwithstanding resistance by several states, the resolution narrowly passed, and it called for the first two meetings of the OIWG to lay the groundwork for the eventual development and presentation of a draft instrument.[638] The first meeting in 2015 was marked by a division between states supporting the resolution and those against it, and as noted by the expert advisor to the Delegation of Mexico, Humberto Cantu Rivera, the division and discussion centered upon:

> the possibility of establishing direct international obligations upon corporations, the hierarchy within competing international legal regimes, and an insistence on creating obligations only applicable to 'transnational

[634] ibid 2 [1].
[635] *See generally*: Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 Business and Human Rights Journal, 41, 43; Humberto Cantu Rivera, 'Negotiating a Treaty on Business and Human Rights: The Early Stages' (2017) 40 University of New South Wales Law Journal 1200, 1202; Connie de la Vega, 'International Standards on Business and Human Rights: Is Drafting a New Treaty Worth It' (2017) 51 University of San Francisco Law Review 431, 446; Lee McConnell, 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66 International and Comparative Law Quarterly 143, 144; Giorgia Papalia, 'Doing Business Right: The Case for a Business and Human Rights Treaty' (2018) 3 Perth International Law Journal 96, 96–97.
[636] De Schutter (n 635) 42–43; McConnell (n 635) 144–145.
[637] Ecuadorian citizens sued Chevron in domestic courts and obtained a judgement of 9.5 billion USD, which Chevron then relied on the doctrine of *forum non conveniens*, arguing the case should be decided in the U.S., where litigation continues. For more see: McConnell (n 635).
[638] UNHRC 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights' (14 July 2014) UN Doc. A/HRC/RES/26/9, [3].

> corporations' and not to businesses with commercial activities of a purely domestic character.[639]

The second meeting of the OIWG in 2016 Rivera noted was more productive, with the working group divided into six panels charged with working out the details on an assortment issues centered upon the nexus of state and corporate obligations including the extraterritorial application of domestic law, codification of piercing the corporate veil, procedural rights and the involvement of NGOs, jurisdictional concepts (municipal, international, or some hybrid formulation), corporate civil and criminal liability, the type of instrument to be developed and its implementation and its relationship with the UNGPs.[640] The third meeting of the OIWG took place in 2017, focused on developing a binding treaty, building upon the prior work of the OIWG, with elements of what could be included in such a treaty outlined in a paper published prior to the third meeting by the chair of the OIWG.[641] After much deliberation, it was decided that the working group should endeavor to present a draft agreement for an binding treaty to address transnational corporations and other business enterprises and human rights, before the fourth meeting of the OIWG in 2018.[642]

The so-called "Zero Draft" was released in August of 2018,[643] and serves as a basis for negotiations for what will constitute the envisioned Treaty on Business and Human Rights. The Zero Draft states its purpose in Article 2:

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[639] The division centered upon the position of developing states focusing on transnational corporations while developed states insisted the inclusion of an assessment in implementing UNGPs and that the work be focused on other business enterprises, not just TNCs. Other issues raised where clash of international law, specifically bi-lateral investment treaties and human rights, the scope of the instrument (all human rights or only specific human rights), and the workings of the supply-chain and how to ensure that the instrument would capture all parts of the supply-chain. For more see: Rivera (n 635) 1203-1206.

[640] ibid 1207-1212.

[641] Markus Krajewski, 'The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities' (2018) 23 Deakin Law Review 13, 31.

[642] Panel discussions were more focused in the fourth meeting and divided into the following topics: Framework of the agreement; Scope of application; General obligations; Preventive measures; Legal liability; Access to justice, remedies; Jurisdiction; International cooperation and; Measurers of implementation. The United States did not participate and neither did the ILO, though several NGOs and national human rights institutions did participate in the session. For more see: UNHRC 'Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (24 January 2018) UN Doc. A/HRC/37/67.

[643] UNHRC Open-Ended Intergovernmental Working Group on Transnational Corporations 'Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities of Transnational Corporations And Other Business Enterprises' (16 July 2018) Zero Draft.

> To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities of transnational character…to ensure an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character, and to prevent the occurrence of such violations.[644]

The scope of human rights included in the Zero Draft encompassed all international human rights, as recognized in municipal law, and the scope was limited as to applying to human rights violations by transnational business activities.[645] Jurisdiction for actions resides in the state in which the business enterprise is domiciled or where 'such acts or omissions occurred.'[646] A business enterprise or its agents may be held liable for violations of human rights, with sanctions of a criminal and monetary nature imposed in instances where liability is established.[647] The law to be applied is the law in the forum state, however, victims may request the court to apply of the law of the state in which the business enterprise is domiciled if so desired.[648] The section on victims' rights is extensive, covering access to courts and information, due process, legal assistance, enforcement of judgments, assistance from foreign consular offices, and affirms that states are to 'guarantee the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement of victims, their representatives, families'.[649] Further, the UNGPs on corporate due diligence are enshrined in the Zero Draft in the section on protection.[650] The Zero Draft provides for an institutional framework consisting of a Committee of experts, elected from parties to the treaty charged with receiving and disseminating information concerning the implementation of the treaty, make recommendations to

[644] ibid art 2.1 (a) (b).
[645] ibid.art. 3.1, 3.2.
[646] ibid. art. 5.1 (a) (b).
[647] States are to enact provisions in municipal law to address civil and criminal liability. Liability extends to direct action (or inaction) by the business enterprise, its subsidiaries, intermediaries, or other entity in its supply chain. Criminal offenses are defined as crimes as defined under international law, international human rights instruments, and as defined in municipal law. For more see: ibid. art. 10.
[648] ibid art 7 (1) (2).
[649] ibid art 8.1, 8.2, 8.4, 8.5, 8.6, 8.7, 8.8, 8.9, 8.12.
[650] At a minimum, business enterprises are obliged to monitor human rights impact of its operations, identify any human rights violations, prevent human rights violations, conduct and disclose human rights and environmental impact assessments of its activities and interact with various stakeholders who may be impacted by the business enterprises' human rights violations. A state may exempt small and medium sized enterprises of due diligence provisions to lessen administrative requirements if needed. For more see: ibid art. 9.1, 9.2 (a) (b) (c) (d) (e) (f) (g) (h).

parties to the treaty, and prepare a report annually for the UN General Assembly on the implementation of the treaty.[651]

Since its publication, the Zero Draft has been discussed widely among NGOs, scholars, and other interested stakeholders, with the legal discussion centered an assortment of legal and practical issues presented, ranging from the status of a TNC as a legal person subject to international law,[652] to the vagueness and lack of precision in the Zero Draft's terminology,[653] to the problem of not specifically defining what constitutes a violation of human rights,[654] to the likelihood of the treaty not being ratified widely or at all,[655] thus amounting to little more than previous attempts by the UN in holding transnational corporations responsible for human rights violations.

The fourth OIWG meeting invited interested stakeholders to submit comments on the Zero Draft, with the aim to revise the Zero Draft by addressing many of the issue discussed in the meeting, with the goal to formulate an acceptable instrument. The revised draft was released in July of 2019[656] and subsequently discussed at the fifth OIWG meeting in October of 2019. The revised draft further connected the zero draft to UNGPs,[657] refined ambiguous terminology,[658] enhanced the scope of the instrument

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[651] ibid art 14.1 (a) (b); art 14.4 (a) (b) (c) (d) (e).

[652] McConnel discusses the problem of how non-state actors are viewed in international law insofar is being recognized as subjects of international law, which entails a discussion of legal personality, of the law as authority and who is then subject to international law. Indeed, the concept of the state itself, its historical role in shaping international law, the political and economic relationships between non-state actors and states, and if subject to international law, the role of non-state actors in formalizing and consenting to be bound by international law. For more see: McConnell (n 635) 146-149.

[653] David Birchall, 'Between Apology and Utopia: The Indeterminacies of the Zero Draft Treaty on Business and Human Rights' (2019) 42 Suffolk Transnational Law Review 289, 324; Julia Bialek, 'Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does It Regulate and How Likely Is Its Adoption by States?' (2019) 9 Goettingen Journal of International Law 501, 513.

[654] Noting a lack of a precise definition of what constitutes a "violation" For more see: Birchall (n 653) 299.

[655] de la Vega (n 635) 433.

[656] UNHRC OEIGWG Chairmanship Revised Draft 'Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities of Transnational Corporations And Other Business Enterprises' (16 July 2019).

[657] The Zero Draft was noted as taking a harder approach to due diligence than the approach of the UNGPs, which rely on business to cooperate while the Zero Draft would obligate transnational corporations to prevent human rights violations through due diligence, which would impose an extremely formidable task on them (See Birchall (n 653) 320-322). Further, the revised instrument has a greatly expanded Preamble, which specifically notes the role of the UNGPs. For more see: ibid preamble [17].

in terms of law[659] and expanded the scope beyond TNCs.[660] Legal liability is expanded greatly with language obligating treaty parties to ensure legal liability exists in domestic law for certain crimes, such as war crimes,[661] torture,[662] forced labour[663], slavery[664], human trafficking[665] and enforced disappearance.[666] The preamble was greatly expanded with reference to worker rights demonstrated by reference to the eight fundamental conventions of the ILO, ILO Convention 190, and noted that business enterprises should endeavor to protect labour rights and environmental and health standards.[667] The revised draft was discussed by OIWG delegations and widely acknowledged to be an improvement of the Zero Draft and noting problems which must be further refined.[668] Recognizing the need to improve and further refine the instrument, as with the Zero Draft, the OIWG invited interested stakeholders to

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[658] For example, several scholars noted the Zero Draft did not include a precise definition, for example what constitutes a human rights violation (See Birchall (n 653) 298-302 for an analysis of interpretations of "violation"). The Zero Draft in article 4 contained two definitions 'Victims' and 'Business activities of a transnational character'. Article 1 of the revised instrument contains five definitions, 'Victims'; 'Human rights violation or abuse'; 'Business Activities'; 'Contractual relationship' and; 'Regional integration organization'. For more see: ibid art 1.

[659] For example, the instrument states it is to be a 'Legally Binding Instrument' and that it should cover 'all human rights', whereas the Zero Draft did not state that it was legally binding and further the Zero Draft stated in article 3.2 that it was to cover 'all international human rights and those recognized under domestic law' which arguably would be limited in its scope of application to violations of international human rights by transnational corporations, but only those international human rights which had been transposed into domestic law. For more see: ibid art 2.1; art 3.1; art 3.3.

[660] For example, the instrument's statement of purpose was expanded to encompass all business activities with the elimination of the language 'business activities of a transnational character' expanding purpose of the instrument to address 'business activities' which thus includes business enterprises lacking a transnational dimension. Furthermore, in the scope of the instrument, it is specifically stated that it shall apply to 'all business activities, including particularly, but not limited to those of a transnational character'. The Zero Draft was limited in the purpose and scope to 'business activities of a transnational character'. For more see: ibid art 2.1 (a) (b) (c); art 3.1.

[661] War crimes are those as defined in the Rome Statute for the International Criminal Court, for more see: ibid art 6.7 (a).

[662] ibid art 6.7 (b).

[663] Forced labor as defined by the ILO Forced Labour Convention and the Abolition of Forced Labour Convention 1957. ibid 6.7(e).

[664] ibid art 6.7 (h).

[665] ibid art 6.7 (j).

[666] ibid art 6.7 (c).

[667] ibid preamble [2] [17] [11].

[668] Widely acknowledged as an improvement of the Zero Draft, the revised instrument was however noted by some delegations as diverging from the UNGPs. Problematic for some delegations was the language in at 3.3 of 'all human rights', noting that it was 'overly broad' and recommendations were put forth to focus on a more specific definition of 'human rights', noting the problem with the principle of legality and interpretation, by States. For more see: UNHRC 'Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (9 January 2020) UN Doc. A/HRC/43/55 [11] [12] [43].

submit recommendations and that the second revised instrument be produced, with due consideration given to recommendations submitted by stakeholders, with the aim to finalize the instrument at the sixth meeting of the OIWG in October of 2020.[669]

The second revised draft was released in August 2020.[670] The second revised draft further expanded the scope of business activities and elaborates on what constitutes 'business activities of a transnational character'[671] The language of 'business relationship'[672] is used to define relationships between various entities in conducting business activities, whereas the first revised draft use the language of 'contractual relationship'[673] to define such relationships. The legal scope of the instrument is more precise and includes any 'fundamental ILO convention to which a state is a party.'[674] Due Diligence of business enterprises is expanded to not only identify human rights abuses related to their activities, but to proactively undertake measurers to 'prevent and mitigate effectively the identified actual or potential human rights abuses'[675] and provides for 'commensurate sanctions'[676] in instances of failure to comply with due diligence requirements in Articles 6.2 and 6.3. Legal liability is expanded, mandating that state parties ensure in criminal liability in domestic law for entities engaged in 'human rights abuses that amount to criminal offences under international human rights law binding on the State Party'[677] which amounts to extending criminal liability to legal persons, when business activities amount to human rights abuses. Perhaps the most significant changes in the second revised draft is that which precludes courts

[669] ibid VII A (a) (b) (c) (f) (h).
[670] UNHRC OEIGWG Chairmanship Second Revised Draft 'Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities of Transnational Corporations And Other Business Enterprises' (06 August 2020).
[671] State Enterprises and joint ventures were added to define enterprises subject to the treaty and transnational business activities are defined as business activities involving more than one state whose activities have an 'substantial impact' on another state. For more see ibid art 1.3, 1.4.
[672] ibid art 1.5.
[673] UNHRC OEIGWG Chairmanship Revised Draft 'Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities of Transnational Corporations And Other Business Enterprises' (16 July 2019) art. 1.4.
[674] Language defining the scope of the instrument is changed to 'all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights' and references customary international law. For more see: UNHRC OEIGWG Chairmanship Second Revised Draft 'Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities of Transnational Corporations And Other Business Enterprises' (06 August 2020) art 3.3.
[675] ibid art 6.2 (b).
[676] ibid art 6.6.
[677] ibid art 8.9.

from invoking *forum non conveniens* in instances where victims bring an action in a court for human rights abuses[678] and shifting the burden of proof to defendants in certain instances.[679] Like the Zero Draft, and the revised draft, the second revised draft will be discussed in the sixth meeting of the OIWG, with the aim to refine the instrument into an acceptable treaty for relevant stakeholders.

Widely ambitious, as other proposals for international courts or tribunals for the international protection of human rights[680] and notwithstanding the necessity to protect human rights, I am of the opinion that the proposed treaty of business and human rights will most certainly not be adopted as in its revised incarnation. Further, important for my purposes and as noted by David Birchall, the inclusion of all international human rights is 'seemingly extensive but does not include some of the labour rights most frequently violated, such as working hours'.[681] Understandably, the initiative for the referendum establishing the OIWG was justified, but as seen through the painful negotiations thus far, noting how states have differing reasons for opposing such a treaty which, are largely driven by economic interests of their individual stakeholders, and how participation in the OIWG has been limited, it is difficult to imagine a treaty being negotiated that would amount to hard law. Other scholars agree, noting that hard law approaches in the nexus of business and human rights are difficult to attain.[682]

Indeed if the proposed treaty were ever to become palatable through many revisions to become adopted, most probably few states would choose to ratify it, and were it widely ratified, it would most probably be an ineffective instrument, much like the

[678] ibid art 7.5, art 9.3.
[679] ibid art 7.6.
[680] Manfred Nowak and Julia Kozma, 'Research Project on a World Human Rights Court' (2009); Claes Cronstedt and others, 'The Hague Rules On Business and Human Rights Arbitration' (2019).
[681] Birchall (n 653) 297.
[682] In a recent empirical assessment of the proposed treaty, scholars compared 98 corporate social responsibility instruments and found the more specific and stronger the language the less of a commitment to the instrument. Instruments with strong language with no accountability nor enforcement mechanisms attain greater participation, while instruments with an accountability and enforcement mechanism gain less support. For more see: Tori Loven Kirkebo and Malcolm Langford, '"Ground-Breaking? An Empirical Assessment of the Draft Business and Human Rights Treaty' (2020) 114 AJIL Unbound 179, 180-184.

voluntary UN initiatives discussed previously in this section.[683] At the time of concluding this section, the OIWG started its sixth meeting with the second revised draft being at the heart of debate.

[683] Giorgia Papalia, in making the case for pursuing a business and human rights treaty, identifies five arguments developed by leading scholars against creating such an instrument, those arguments being 1. Lack of consensus, in that few states would ratify the treaty; 2. The treaty will diminish the achievements of the UN Guiding Principles; 3. That states are already under a duty to protect human rights; 4. That the scope would be too wide and; 5. That international law should not apply to corporations. While she makes a compelling case against each of the arguments, I am of the opinion that lack of consensus and that the scope is too wide are the stronger arguments for why the treaty would not be successful in achieving its objectives. For more see: Papalia (n 635)104-112.

PART II. SUMMARY

This Part sought to trace the development of worker rights from the first industrial revolution. The analysis began in the 14th century focusing on England and its colonies in North America, and focused on the relationship between an employer and a worker, characterized as that of a Master-Servant relationship. The analysis revealed that pressure from employers led to the first labour laws passed which, *inter alia*, regulated wages, criminalized workers "combining together" to organize, to collectively bargain, and further, in some instances permitted physically beating a worker, so long as it was not a "severe" beating. This endured throughout the 18th century. Reforming the Master-Servant relationship, including the laws criminalizing freedom of association and collective bargaining first started in the early 19th century in England and in the middle 19th the U.S., but resistance endured. As England industrialized, workers, especially children, labored in horrendous conditions while working in textile mills and mines. Further, working conditions were oppressive, unsafe, unsanitary, and injurious, frequently causing harm to the worker, including death. As societal awareness grew about the deplorable and inhumane working conditions, the deaths and accidents suffered by all workers, but especially women and children necessitated the first laws regulating working conditions in factories and mines were enacted. Child labor was regulated through limiting hours worked, restrictions on occupations, mandating free time to attend school, and a system of enforcement and monetary sanctions for violations. Later legislation established a system of factory inspections, which was combined with requirements to install safety devices on machinery and monetary sanctions for violations.

As the industrial revolution spread to other counties, so too did labor law. This chapter analyzed the growth and development of early labor law in Germany, France, Japan and the U.S., and shown that notwithstanding differences in levels of development, economics, conceptions of governance, and social differences, that as a nation industrialized, development of early labor law progressed similarly elsewhere as that of England, though at different speeds. As the world began to industrialize in the mid to late 19th century, workers' rights did too, ushering in an international movement for workers' rights. Driven by political and economic interests, influenced by philosophers and workers' movements in different countries, with an

understanding that with international trade, thus increasing competition, is threat to worker rights. In England, Germany and the U.S., workers movements morphed into political parties with differing heights of success.

Notwithstanding the differing pace of labor law development in countries analyzed, the impetus for labor law was twofold; to protect workers from having to labor in deplorable, harmful, oppressive, even life ending working conditions and; to provide for a means for collective bargaining so as to equalize the bargaining power between employer and worker, necessary for subsistence means even, which, as with the former impetus, acquaints to a basic and fundamental human right; the right to life. This part in chapter 2 mapped the internationalization of worker rights, through the emergence of an international association in the early 20th century focused dissemination of labor law, with a view to harmonize labor law amongst members. This association was the forerunner of the ILO, which was established by inclusion in the Versailles treaty of 1919. The ILO sets labor standards through conventions, recommendations, and declarations. The ILO was founded with a mission of social justice, dedicated to narrowing the division between worker and employer, focusing on the improvement of working conditions for workers and collective bargaining. The sole surviving institution of the League of Nations, ILO reasserted itself and its mission with the Declaration of Philadelphia in 1944, becoming a specialized agency of the United Nations in 1946. As multinational enterprises expanded their reach in the latter half of the 20th century, the ILO issued a declaration on the activities and social impacts of multinational enterprises in 1977. In 1998 the ILO identified four fundamental labor rights, and the ILO is committed to actualizing them among its members; however, labor rights related to OSH were not included among the four fundamental labor rights. In 2008 the ILO Declaration on Social Justice for a Fair Globalization, reasserting itself as an institution in an increasingly globalized world. Of special importance to this work, in 2019, the ILO Centenary Declaration for the Future of Work was adopted, with an aim towards incorporating safe and healthy working conditions as a fundamental labor right.

This Part in chapter 3 also discussed initiatives by the UN and the OECD directed at business and human rights. Worker rights as defined in the ILO fundamental labor rights have been referenced or otherwise referred to in many of the initiatives at the

UN centered on the nexus of business and human rights. Efforts at the UN have been both voluntary and obligatory. However, thus far, only voluntary efforts have met with any success. Voluntary initiatives include the UN Global Compact and the UN Guiding Principles. In 2003, the UNHRC was presented with "Draft Norms" on business and human rights, which was envisioned to be legally binding international instrument, yet the UNCHR bowed to pressure from transnational corporations, and did not adopt the Draft Norms, a product of five years of work. The latest initiative is a draft treaty on business and human rights. The OECD issued guidelines to multinational corporations in 1976 focused on the impact of multinational corporations on countries in which they operate. The OECD guidelines are voluntary and have been revised five times. The latest revision includes a section on human rights, has specific references to the ILO fundamental labor rights, and implements, inter alia, the National Contact Points of UN Guiding Principles.

Thus, it is submitted that the path to worker rights started with the industrial revolution. Worker rights were societal response to the conditions in which workers labored, in conditions detrimental to human rights. As the world became increasingly connected through economic relations, worker rights became politicized and internationalized, with the creation of the ILO. Fundamental rights at work are referenced in initiatives to hold business accountable for human rights violations undertaken by the ILO, UN and the OECD. Only voluntary initiates have been successful, which are only soft law instruments at most. The UN is currently in the process of drafting a convention on business and human rights, which references ILO fundamental rights at work among "all human rights"; wildly ambitious, it remains to be seen if this latest attempt will be successful, if like earlier UN efforts at creating binding obligations for business and human rights, it will be doomed to failure.

PART III.

THE PATH TO INTERNATIONAL ECONOMIC LAW

In this Part, I will discuss the historical development of world trade and international economic law. I begin with an overview of international trade starting from ancient times and progress in a chronologically, discussing early trade agreements and regimes and the prevailing visions of the times, from different parts of the ancient world. I then shift my focus to the development of world trade from a Eurocentric standpoint, as the foundation for contemporary international law can be traced to the Treaty of Westphalia of 1608. I proceed to discuss the theoretical basis for world trade as an argument against the prevailing mercantilism view. Casting aside mercantilism, I discuss the early development of international economic law, which for this research, I define as starting from the latter half of the nineteenth century at the apex of the industrial revolution. I then discuss the development and break down of international economic law that ultimately collapsed with the emergence of WWI. I briefly discuss the chaotic inter-war period, and overview the development of international economic law and institutions in the aftermath of WWII. I discuss institutional development of trade law in the contemporary era, which for this research, I define as starting with the reordering of the world, economically, after the collapse of the Soviet Union, and the emergence of the WTO in the early to mid 1990s. Then I overview the WTO, its operations, dispute settlement, and past jurisprudence. I then turn my analysis to the relationship between human rights and the WTO, and then I reflect on the accomplishments and difficulties the WTO faces as it enters its 26th year.

CHAPTER 1.

THE HISTORY AND DEVELOPMENT OF INTERNATIONAL ECONOMIC LAW

While it has been noted that there is no agreed conscious as to what constitutes international economic law, from differing descriptions of international economic law,[684] it can be said that it entails the nexus of private and public law that embrace economic transactions, which are regulated through agreements and institutions at the international and regional level and areas subject to such regulation including trade law, financial law, investment law, competition law and intellectual property law.[685] While my focus is on trade law, I shall briefly discuss the relationship between trade law and other spheres of international economic law, to give a better understanding of the nexus between trade, finance, and the monetary system, as all are inner-related and function together. While my focus is concentrated on the contemporary era, I believe it necessary to overview the evolution of economic law from early times to illustrate the historical influences on the current normative structure, interests, and division of economic law, and to support my contention that in the contemporary era, economic law, especially trade law, developed without consideration for human rights.

1.1. Trade, The Nation-State and Globalization

Globalization, in the sense of an interconnection between people and states is nothing new[686], as in ancient times, communities were connected through trade and military alliances, yet with the past century's advancements in communications, logistics and

[684] International economic law may be classified broadly or narrowly. In a broad sense it is the law that concerns relations with subjects having an economic and international aspect. In the narrow sense, it is international legal rules regulating the conduct of subjects of international law and their economic relationship. However, categorized, international economic law is fundamentally interdisciplinary in nature. See for more: Yusuf Aksar, 'International Economic Law' in Yusuf Aksar (ed), *Implementing International Economic Law: Through Dispute Settlement Mechanisms* (Martinus Nijhoff Publishers 2011) 7.

[685] Joel P Trachtman, 'The International Economic Law Revolution' (1996) 17 University of Pennsylvania Journal of International Economic Law 33, 48-50.

[686] Alison Brysk, *Globalization and Human Rights* (University of California Press 2002) 6-7.

technology, the world is interconnected today – globalized – like never before. In the ancient times, nations did engage in trade with one another frequently with a system of rules and regulations, which expanded as empires expanded and alliances developed.[687] In ancient Greece, international trade was viewed as mutually beneficial, necessary, and efficient in terms of realizing a higher output through the division of labor, as Plato observed in the *Republic*.[688] However, this view was far from being wholly accepted, as Aristotle maintained that city-states should strive for self-sufficiency and have limited commercial relations with foreigners, and when necessary, to limit trade to what is absolutely essential, while ensuring a fair bargain in the exchange of goods.[689] The Aristotelian position arguably can be conceived as protectionist and isolationist in nature. Aristotle and his philosophical concepts greatly influenced intellectual development in Europe from the 13th to the 15th century, laying the foundation for economic science.[690] The isolationist and protectionist view persisted but in time diminished. Thomas Aquinas acknowledged the importance of international trade in *Summa Theologica*, yet Aquinas also noted the adverse influence that foreigners bring to the local community.[691] Thus, while acknowledging the importance and necessity of international trade, distrust of foreigners persisted.

The emergence of natural law theorists in the 17th century emphasized liberalization of individuals, and of commerce. Hugo Grotius argued that free trade was a right that no state could dispute while Francisco Suarez went further, proclaiming free trade to be an inalienable right of everyone and of all nations, arguing that society would not be damaged, economically nor culturally, but would be enriched through international trade.[692] The treaty of Westphalia[693] ended the Thirty Years War, which radically shifted the balance of power in Europe, greatly diminished the influence and power of religion, paving the path for religious freedom and tolerance in Europe, and most

[687] CM Reed, *Maritime Traders in the Ancient Greek World* (Cambridge University Press 2003) 16-17.
[688] Carmen Elena Dorbåt, 'A Brief History of International Trade Thought: From Pre-Doctrinal Contributions to the 21st Century Heterodox International Economics' (2015) VIII Journal of Philosophical Economics 106, 107.
[689] ibid 108.
[690] ibid.
[691] ibid.
[692] ibid.
[693] *A General Collection of Treatys. Volume I* (2nd edn, 1713) 1.

importantly, ushered in the concept of national sovereignty that spread beyond Europe, laying the foundations of contemporary international law.[694] The emergence of nation states as the dominant actor internationally was premised on the principles of autonomy and equality in relations between nation states, and non-intervention in internal affairs.[695]

Notwithstanding the aforementioned principles of sovereignty, a balance of power among nations developed, and when one nation threatened the balance, nations would intervene, resulting in alliances being formed between nations and armed conflicts ensuing to restore the balance of power.[696] The economic order of the time, Mercantilism, was focused on increasing the wealth of the states through the accumulation of gold and other precious metals through protectionist policies which limited imports and protected domestic producers.[697] Through mercantilist economic policy, nations sought to expand their wealth and influence through territorial conquest and colonization, with international trade premised on maximizing exports of goods and minimizing imports, thus generating a trade surplus rather than a deficit.[698] The mercantilist view would endure for well over two centuries, as European nations were engaged in trade wars and armed conflicts with one another throughout the 17th and 18th centuries, often employing mercenary forces, thus necessitating the need for capital and embracing mercantilism and protectionist ideology; indeed, international trade was viewed as a "zero sum game" where one only wins at the expense of another.[699] Regulation of trade, finance, and capital was seen then as a means for stability and thus regional trading blocks were organized with special rules for trade between each other.

[694] Gerald A Bunting, 'GATT and the Evolution of the Global Trade System : A Historical Perspective' (1996) 11 Journal of Civil Rights and Economic Development 505, 509; Adom Getachew, 'The Limits of Sovereignty as Responsibility' (2019) 26 Constellations 225, 239-240.
[695] Bunting (n 694) 509; Getachew (n 694) 240.
[696] Bunting (n 694) 509.
[697] Dorbåt (n 688) 109.
[698] Bunting (n 694) 507-508.
[699] ibid 508-509; Dorbåt (n 688) 109.

1.2. Trade Liberalization and the Emergence of International Economic Law

With the changes ushered in through technical innovations of the Industrial Revolution, the classical economist Adam Smith developed the theory of absolute advantage in his monumental work, *An Inquiry into the Nature and Causes of the Wealth of Nations*, in which he rejected the prevailing mercantilist view, arguing that through a division of labor in the manufacturing process, whereby each worker specializes in the task they are best adopted at doing, would make for a more efficient means of production. Smith contended that by concentrating production on what commodity a State's labor force is best suited at producing, a surplus of that commodity would be generated that could be traded with other States for goods which could be imported at a lower cost than producing them at home.[700] As Smith put it, 'It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy'.[701] So it is prudent for the master of a family, so it should be prudent for a nation. Smith was a proponent of free trade as a means not only to increase the wealth of states, but also to increase living standards, disseminate technology, spur innovation, limit monopolies, and further, through free trade, Smith believed that the division of labor would be internationalized, as trading partners would opt to embrace the concept to become more competitive, resulting in benefits for all nations involved in free trade.[702]

Smith's theory of Absolute Advantage is one of the cornerstones of the theoretical framework supporting free trade. Richard Ricardo, a British economist, provides another cornerstone in the theoretical framework for free trade through his theory of comparative cost advantage, or more simply stated, the theory of comparative advantage. Ricardo, in his monumental work, *On the Principles of Political Economy and Taxation*, expanded upon Smith's absolute advantage by suggesting that even

[700] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Printed for W Strahan; and T Cadell, 1776).
[701] ibid 414.
[702] While Smith maintained that free trade was mutually beneficial, he admitted that nations would benefit equally, with some gaining more than others. And Smith added that when trading among unequal nations (wealthy nations and poor nations) that the wealthy nation would benefit more and thus highlight the difference between them. For more see: Reinhard Schumacher, 'Adam Smith's Theory of Absolute Advantage and the Use of Doxography in the History of Economics' (2012) 5 Erasmus Journal for Philosophy and Economics 54, 58-62.

where a country has an absolute advantage in all tradeable goods, it would be more beneficial to concentrate production of goods in which, it has a relative advantage.[703]

Ricardo and Smith both used labor units as a measure defining production cost and efficiency when cost for other factors was level. Ricardo argued that by shifting labor into producing goods in which a nation is relatively most efficient, that a greater surplus of said goods can be produced, in which it could then trade with other countries.[704] The result would be a mutually beneficial situation for all and even where one state did enjoy an absolute advantage in production of all tradeable goods, by embracing the comparative advantage, it would maximize the welfare of all states. Ricardo argued further that through free trade premised upon comparative advantage, the international community would benefit through more efficiency in labor and industry, and that inventiveness and innovation would be stimulated, which in turn, would benefit the whole of the civilized world, by fostering global intergradation and exchange.[705] While some scholars are critical of Ricardo's analysis as being overly simplistic through the failure to take into account the balance of power existing at the time of his writing, which had been developed earlier in the 16th and 17th centuries, resulting in unequal trading relationships at the time,[706] Ricardo's theory of comparative advantage is nevertheless one of the cornerstones of international trade theory.

While efforts at trade liberalization were present in continental regimes dating from the early 19th century, such efforts were focused primarily on agricultural

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[703] David Ricardo, *Principles of Political Economy and Taxation* (Dover Publications, republished, 2012 first published in 1817).

[704] Ricardo used the example of Portugal having an absolute advantage in the production of wine and cloth when compared to England. In his example, Portugal could produce wine with 80 men laboring for an hour and produce cloth with 90 men laboring for an hour. To produce the same goods in England would require the labor of 90 men for an hour to produce wine and the labor of 100 men for an hour to produce cloth. Portugal, by shifting production into wine, which it is relatively more efficient at producing that cloth, would free up labor from the production of cloth, which could then be deployed to produce more wine, thus producing more wine as a whole, which could then be traded to England, and Portugal could then import more cloth from England than had Portugal continued to produce itself. For more see: ibid 153-154.

[705] ibid 152.

[706] Matthew Watson, 'Historicising Ricardo's Comparative Advantage Theory, Challenging the Normative Foundations of Liberal International Political Economy' (2017) 22 New Political Economy 257, 258-259.

commodities, with the motivation to protect the status and interests of the landed aristocratic class, and free trade was not accepted by all segments of society due to competing economic interests.[707] The rise of political liberalism and acceptance of Ricardo's theory of comparative advantage which ushered in the liberalism of free trade, is marked by England's unilateral repeals of tariffs and other barriers to imported goods, starting with the repeal of the Corn Laws in 1846 [708] and repeal of the Navigation Acts in 1849.[709] The repeal of the English mercantilist and protectionist legislation, coupled with a trade agreement between England and France, ushered in a wave of bilateral trade agreements concluded between European states, which would in turn lead to an early world trading system.

The Cobden-Chevalier treaty concluded between England and France in 1860 lowered tariffs and included an unconditional most favored nation clause. The most favored nation clause (hereinafter MFN) is in reality an equal treatment clause, as if new

[707] In Prussia, the landed aristocratic Junkers supported free trade as early as 1818 as they were dependent upon agricultural commodities to England while the hereditary ruling class sought to regulate agriculture and commerce, frequently engaging in export restrictions and market intervention to regulate commodity prices. With the establishment of a customs union (Zollverein) among German States in 1834, and resistance to impose high tariffs to protect developing industrialization, German States members of the Zollverein exported commodities to England. For more see: Hannes Lacher and Julian Germann, 'Before Hegemony: Britain, Free Trade, and Nineteenth-Century World Order Revisited' (2012) 14 International Studies Review 99, 116.

[708] The Corn Laws were protectionist legislation limiting the imports of grains unless domestic prices increased to high levels. Essentially, in repealing the Corn Laws, England embraced free trade by casting aside legislation protecting domestic production. The social order was changing in Britain with the emergence of the industrial revolution, creating competing economic interests (industrialists, financers, workers, and the old aristocratically privileged order) resulting in social unrest and disorder. The Anti-Corn League offered vision of how to address the growing inequalities in British society, and the government, partly to diminish their support and partly to address the need to import grains due to the Irish potato famine, repealed the Corn Laws in 1846. For more see: Phyllis Deane, *The First Industrial Revolution* (2nd edn, Cambridge University Press 1979) 227; Lacher and Germann (n 707) 107-108.

[709] The Navigation Acts, dating from the seventeenth century actualized mercantilism within the British Empire by restricting trade of commodities, limiting shipping routes between England and the North American and Indian colonies and restricting the use of foreign vessels to protect the British Empire and the dominant aristocratic social class from competition. With the advent of the industrial revolution and the emergence of a middle class of industrialists (the new bourgeoisie), for which mercantilist policy was seen as a hindrance in seizing opportunities to export goods, encourage liberal trade, and export industrialized capitalism. Under the leadership of British Prime Minister Sir Robert Peel, reforms were ushered in to appease the working class, advance the interests of the 'new bourgeoisie' while securing the old aristocracy. These reforms realigned the focus of British regulation in the economic sphere from that of mercantilism to that of laissez-faire capitalism, centered on free markets, sound money and finalization. For more see: Lacher and Germann (n 707) 106-108.

states become members to an existing trade agreement and are given preferential treatment, that same preferential treatment would then be extended without condition to the existing members of the trade agreement; thus the MFN ensures that all members are treated equally even if new concessions are granted to new members.[710] Jean-Jacques Hallaert, notes that in the latter half of the 19th century, the MFN clause led to a 'proliferation of bilateral agreements and *de facto* turned the European network of agreements into a quasi-multilateral system'.[711]

While the Cobden-Chevalier treaty was not the first trade agreement between two States, its significance is due to it being much broader in scope, that it was concluded between the two major powers at the time, and most importantly, due to the unconditional MNF clause, other States feared being placed at a competitive disadvantage were thus driven to sign trade agreements to remain competitive.[712] Indeed, 15 years after Cobden-Chevalier, 56 similar agreements had been singed, with most incorporating an MFN clause.[713] The result was a network of bilateral trade agreements linked through MFN clauses, yet without an institutional support system or means of dispute resolution.

As Hallaert and others discern, within a decade after Cobden-Chevalier, trade liberalism reversed course and while bilateral trade agreements continued to be negotiated, they took into account protectionist measures designed to offset costs associated with wars in continental Europe, the American Civil War, and further in the aftermath of such conflicts, the power structure realigned, resulting in a new political elite that were inherently nationalistic and embraced protectionism.[714]

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[710] Jean-Jacques Hallaert, 'Insights from the 19th Century Wave of Bilateral Trade Agreements for the WTO Era' (2015) 7 Trade, Law and Development 356, 362.
[711] ibid.
[712] ibid 363-364; Antonio Tena-junguito, Markus Lampe and Felipe Tâmega Fernandes, 'How Much Trade Liberalization Was There in the World Before and After Cobden-Chevalier?' (2012) 72 The Journal of Economic History 708, 717-722.
[713] Markus Lampe, 'Explaining Nineteenth-Century Bilateralism: Economic and Political Determinants of the Cobden-Chevalier Network' (2011) 64 The Economic History Review 644, 644-645.
[714] With a network of bilateral trade agreements but no institutional framework or rules, the tendency was to form alliances with like-minded trading partner, which in turn supported protectionist policies with each other. Tariffs were increased by some states to pay for reconstruction and reparations after wars and to protect and support developing industry. And some states in a need to address macroeconomic imbalances and drastic price swings in commodities, necessitating the need to increase tariffs to respond to domestic economic crisis. For more see: Hallaert (n 710) 368-375.

Moreover, the "Great Depression" between 1873 and 1896 was caused by increased competition in agricultural commodities from the U.S. and Russia, and impacted European states particularly hard, as the sudden surge in imports collapsed grain prices, resulting in internal turmoil, collapsed equity markets, and suffering by the aristocratical and peasant class alike.[715] This in turn caused alliances to develop between states fed on by a feeling that bilateral trade agreements were unfair and as Hallaert astutely maintains, 'Without an international organization like the WTO able to accommodate and limit the protectionist measures, protectionism swept across Europe and bilateral trade agreements were negotiated to allow its effective implementation.'[716]

Notwithstanding rising tensions emerging between states in the latter half of the 19th century and the absence of an international organization to mediate trade disputes, peace was maintained and trade in goods expanded through the development of an international monetary system, a system independent of nation states, yet acting with national central banks, a system which facilitated the expansion of the industrial revolution and empires, a system of *haute finance* as recounted by Karl Polanyi.[717] The role of international banking established a monetary system of self-interested international bankers, which enabled the industrial revolution to expand, which enabled trade to expand. Further, *haute finance* sought to forestall conflicts by exercising leverage on dependent states, and as Polanyi proclaimed,

> Trade had become linked with peace. In the past the organization of trade had been military and warlike…Trade was now dependent upon

[715] ibid.

[716] ibid 375-376.

[717] Characterized as one of the most complex institutions produced, haute finance emerged as an ever-present force, not subject to any one state, acting internationally in its own interest by financing trade, industry, national central banks, and present throughout Europe, frequently working together, the international bankers were anything but benevolent, having made fortunes financing conflicts, their motive being financial gains. While the institution was international, it was dependent on national institutions-governments, industry and national banking systems. Yet by having stakes in multiple states, large and small, in facilitating the expansion of industry and trade, haute finance sought to maintain the balance of power between states and avert a war between the largest and most powerful states, as if one were to manifest, it would threaten the very system of international banking, of *haute finance* itself. For more see: Karl Polanyi, *The Great Transformation : The Political and Economic Origins of Our Time* (2nd edn, Beacon Press 2001) 10-15.

> an international monetary system which could not function in a general war. It demanded peace…'[718]

International finance then served as a system to maintain peace throughout the 19th century, yet with the aforementioned "Great Depression" between 1873 and 1896, states became increasingly competitive with one another, resorting to alliances with like-minded states.[719] Notwithstanding that at the end of the 19th century, *haute finance* was at its zenith, the openness and expansion of free trade slowed and divisions began to emerge between states through increased competition.[720]

While there was not an organization like the WTO to administer trade agreements and settle disputes, an organization was established that marked the beginnings of inter-governmental cooperation through an institutional arrangement with an 1890 treaty creating an International Union for the Publication of Customs Tariffs (hereinafter IUPCT), which was signed by over 40 states.[721] The IUPCT was created to publish tariffs and customs laws between its members in a publication entitled "International Customs Bulletin".[722] The IUPCT has several features of an international organization, including an annual budget[723], financial contributions from members according to their economic strength[724], and the creation of an International Bureau in Brussels Belgium, complete with a Superintendent and staff to administer the IUPCT.[725] Despite the limited trade liberalization due to protectionists policies, the bilateral network of trade agreements was maintained until the outbreak of WWI, as states valued the "trade architecture of the time" which the network and the IUPCT

[718] ibid 15-16.
[719] Hallaert (n 710) 368-375.
[720] Polanyi (n 717) 19-20.
[721] International Union for the Publication of Customs Tariffs (Done at Brussels 5 July 1890, entered into force 1 April 1891) 1 Bevans 172.
[722] The publication was published in English, French, German, Italian and Spanish and was to contain not only tariffs, but also particulars on the members' customs laws, tariff classifications, and any international treaties and national laws that would have an impact on tariffs. For more see: ibid at art 4, art 12, and art 1 of the Regulations for the Execution of Creating an International Bureau for Publication of Customs Tariffs (as provided for in art 13 of the Convention).
[723] ibid art 8.
[724] ibid art 9-11.
[725] ibid art 13.

represented, which however protectionist in nature, served as a means to limit retaliatory actions by states, which would in turn lead to trade wars.[726]

The idea for an international organization to regulate world trade can be traced to early 20th century proposals for the creation of an organization after the conclusion of WWI that would regulate international trade.[727] Indeed, with the creation of the League of Nations in the aftermath of WWI, steps were taken in multilateral trade regulations towards this vision, beginning with the Convention for the Simplification of Customs Formalities and Protocol of Signature in 1923.[728] The 1923 convention *inter alia,* committed signature states to equal treatment in the application of customs regulations, transparency in publishing regulations related to customs and licensing requirements, to prevent arbitrary application of laws in customs and related matters, and further, to provide a mechanism to settle disputes for those who had been subject to discrimination in the application of said laws and regulations, with the right to refer the dispute to the Permanent Court of Internal Justice (hereinafter PCIJ).[729]

In 1927, the International Convention for the Abolition of Import and Export Prohibitions and Restrictions declared in its preamble that 'a return to the effective liberty of international commerce is one of the primary conditions of world prosperity.'[730] This convention obligated states to commit to abolish all import and export prohibitions and restrictions, subject to a list of exceptions if such measurers 'are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or disguised restriction on

[726] Hallaert (n 710), 378.
[727] U.S. Congressman Cordell Hull, who would later go on to be Secretary of State in the Roosevelt administration, proposed setting up a 'permanent trade congress' to promote fair trade through formulating trade policy designed to avoid economic warfare. Hull envisioned the work of the trade congress to consider national practices 'which in their effects are calculated to create destructive commercial controversies or bitter economic wars, and to formulate agreements with respect thereto, designed to eliminate and avoid the injurious results and dangerous possibilities of economic warfare, and to promote fair and friendly trade relations among all nations of the world.' For more see: Cordell Hull, *The Memoirs of Cordell Hull, Volume 1* (Macmillan and Co 1948) 82; Steve Charnovitz, *The Path of World Trade Law in the 21st Century* (World Scientific Pub Co Pte Ltd 2014) 38.
[728] International Convention Relating To The Simplification Of Customs Formalities And Protocol Of Signature (adopted 3 November 1923, entered into force 27 November 1924) 30 LNTS 372.
[729] ibid art 2, art 3, art 4, art 7, art 22.
[730] International Convention for the Abolition of Import and Export Prohibitions and Restrictions (Signed 8 November 1927, did not enter into force) 97 LNTS 391.

international trade.'[731] It further provided that in the instance of imposing any restrictions or prohibitions on products from another state, the measure should be structured so as to cause the least possible injury to the trade of the other Contracting Parties'[732] and in settling maters of dispute between states in measures related to said measurers undertaken, the dispute could ultimately be referred to the PCIJ for settlement.[733] While the 1927 convention never entered into force, it and the 1923 convention encompassed norms, which would in later years form key components of contemporary international trade law.[734]

As the inter-war period entered its second decade, the world-wide Great Depression engulfed the world. The U.S. enacted the Smoot-Hawley Act in 1930, which imposed high tariffs on imports.[735] Other states responding in turn by enacting protectionist trade measures, which worsened the economic crisis, thus leading to a loss of collective trust and security in the international community, and the rise of authoritarian regimes in Europe and Asia, cumulating in the eruption of WWII.[736]

[731] Exceptions included prohibitions imposed on moral or humanitarian grounds, prohibitions to protect animals and plants from degeneration or extinction, and a prohibition on goods made by prison labor. For more see: ibid art 4 and Protocol 6.

[732] ibid art 7.

[733] The convention provided for arbitration by a technical body, such as the Council of the League of Nations to render advisory opinions based on disputes regarding the legal interpretation of the application of articles 4, 5 and 6, and the Protocol, and in disputes arising based on the legal application of other aspects of the convention, the matter was to be referred to the Permanent Court of International Justice. Further deciding if the dispute is of a legal nature or not was to be determined by the Permanent Court of International Justice. For more see: ibid art 8.

[734] As Steve Charnovitz observed, the only missing norms of contemporary trade law was that of the most-favored nation principle and the establishment of an organization to administer an international trading system. For more see: Steve Charnovitz, 'A WTO If You Can Keep It' (2019) 6 Questions of International Law Journal 5, 9-10.

[735] Noting to what extent the Smoot-Hawley tariff was responsible for triggering the worldwide great depression is contested (as there were other factors which contributed to its cause) it did nevertheless lead to retaliatory actions undertaken by other states against U.S. exports, which then triggered a response, which then accelerated the downward spiral. For more see: Douglas A Irwin, 'U.S. Trade Policy in Historical Perspective' (2019) 33-34.

[736] Robert Howse, 'From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System' (2002) 96 American Journal of International Law 94, 94-95.

CHAPTER 2.

INTERNATIONAL ECONOMIC LAW AFTER THE SECOND WORLD WAR

As the allied powers were planning new global governing organization to replace the League, they were also planning for a new international economic world order. Discussions on trade began as early as 1943 with a vision to create an international financial order based on common rules and institutions to regulate finance, trade and investment.[737] In furtherance of the development of institutions to regulate finance and reconstruction, at the Bretton Woods Conference 1944, an institution charged with providing for the administration of funds to rebuild Europe and Japan in the aftermath of WWII, the International Bank for Reconstruction and Development was instituted, and to address the balance of payments and financing of governments worldwide, the International Monetary Fund was created.[738] To deal with disputes concerning foreign investment, the Washington Convention was signed. To deal with world trade, the International Trade Organization was envisioned, which would be a permanent institution charged with administering an agreement, which was to regulate international trade, and further, would settle trade disputes.[739] These three institutions were to constitute the post-war trade and financial order.

2.1. The International Trade Organization

The Charter for the ITO was singed in Havana Cuba on 24 March 1948 and is known as the Havana Charter.[740] The Havana Charter was the result of draft proposals for the ITO submitted by the U.S. and the UK, which eventually led to the inclusion of over 50 states, and observers from labor and industry, in formulating the final charter. The idea behind including differing states, like the work undertaken by UNHRC in drafting the UDHR, was to take into consideration the differing philosophies of

[737] Lowenfeld (n 18) 24-25.
[738] Peter-Tobias Stoll and Frank Schorkopf, *WTO: World Economic Order, World Trade Law* (Brill Nijhoff 2006) 12.
[739] Lowenfeld (n 18) 25-26.
[740] Final Act and Related Documents, United Nations Conference on Trade and Employment (Havana Cuba, 21 November 1947–24 March 1948) UN Doc. ICITO/1/4(1948).

economic organization and differing levels of economic development of states and differing philosophies of governing to draft a Charter that would have universal application owing to input from different states. In February 1946, the United Nations Economic and Social Council (hereinafter UNESC) appointed a committee of 19 states to work together in drafting the Charter.[741] These different nations did indeed encompass very differing views on the relationship between international trade and society. The views of the U.S. were that liberalism in trade is to be encouraged to maintain a peaceful world, as protectionist measures such as high tariffs, unfair comparative advantages, and preferential trade agreements with other states were one of the major sources of international conflict that sparked WWII.[742] Further, recognizing the linkage between stable employment and peace, the ITO Charter recognized the need for states to maintain employment and, further, for the necessity of governments to intervene in order to do so.[743] Through the inclusion of more than just the UK and U.S. in formulating the Charter, provisions were made to satisfy the concerns of lesser developed states for the need for state intervention to stimulate the economy and develop industry, to protect domestic industry, and to stabilize the balance of payments, which were incorporated in Parts III and IV of the ITO Charter.[744]

The ITO was to become a specialized agency of the UN, as provided for in Article 86 of the ITO Charter[745] and in Article 57 of the UN Charter.[746] The ITO Interim Commission Secretariat published draft agreements between the ITO and other international organs, which detailed the relationship and the means to implement the ITO Charter with respect to actualizing the expected relationships.[747] Among the particulars of the agreement between the UN and the ITO, the ITO was to consult

[741] Lowenfeld (n 18) 26.
[742] Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford University Press 2011) 24-25.
[743] ibid 26.
[744] ibid.
[745] 'Final Act and Related Documents, United Nations Conference on Trade and Employment' (Havana Cuba, 21 November 1947–24 March 1948) UN Doc. ICITO/1/4(1948) art 86 [1].
[746] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI art 57.
[747] Interim Commission of the International Trade Organization, 'Drafts of Agreements Between the International Trade Organization and Other International Organs' ICITO/EC.2/21 (4 October 1948).

with the UNESC to facilitate work between the two organizations;[748] reciprocal representation in which the UN would send representatives to observe meetings at all levels of the ITO and where the ITO would send representatives to observe and participate in deliberations in meetings of the UNESC and to send representatives to meetings of the UN General Assembly and its main committees on matters related to the scope of the ITO;[749] and to coordinate with the UN and the UNESC in implementing recommendations to achieve the objectives stipulated in Article 55[750] of the UN Charter.[751] In certain instances, the ITO was to interact with the International Court of Justice. For example, the ITO could ask for an advisory opinion from the ICJ on questions of law regarding the scope of its activities.[752] Further, in dispute resolution, decisions could be, upon request by an ITO member, referred to the ICJ and the ITO and its membership would be bound by the ICJ's decision.[753]

Most important for the purposes of my research, the ITO Charter addressed issues that went beyond strict economic concerns, specifically issues related to consultations and cooperation with NGOs in the formulating work of the ITO, and issues related to labor. Concerning the former, Article 87 of the ITO Charter defined the ITO's relations with other organizations and section two provided that 'The Organization may make suitable arrangements for consultation and co-operation with non-governmental organizations concerned with matters within the scope of this Charter'.[754] The ITO Interim Commission Secretariat drafted a proposal for the mechanism to incorporate NGOs into the ITO by (1) listing applicable NGOs as consultative organizations; (2) inviting those NGOs to ITO Conference Sessions; (3)

[748] ibid at 'Draft Agreement Between the International Trade Organization and the United Nations', art I [2].
[749] ibid art II.
[750] Article 55 of the UN Charter stipulates the objective of creating stability and well-being within the international community, conditions necessary for peaceful coexistence, and commits the UN to promoting inter alia 'higher standards of living, full employment, and conditions of economic and social progress and development…solutions of international economic, social, health, and related problems…and universal respect for, and observance of, human rights and fundamental freedoms'. For more see: United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI art 55.
[751] Interim Commission of the International Trade Organization, 'Drafts of Agreements Between the International Trade Organization and Other International Organs' ICITO/EC.2/21 (4 October 1948) Draft Agreement Between the ITO and the UN art. IV.
[752] ibid art XI.
[753] 'Final Act and Related Documents, United Nations Conference on Trade and Employment' (Havana Cuba, 21 November 1947–24 March 1948) UN Doc. ICITO/1/4(1948) art 96.
[754] ibid art 87 [2].

giving an opportunity to representatives of NGOs that had submitted reports to comment on said reports; (4) NGOs receiving ITO documents.[755] Steve Charnovitz, noted that it is clear by the actions undertaken to implement Article 87 that the architects of the ITO envisioned active NGO participation in the multilateral trading organization and further opined that 'The notion that the international trade regime should be a buffer between the makers of policy and the public is an elitist view that should not find refuge in liberal governance.'[756] NGO participation as envisioned in the ITO would thus serve as a means for views of the public to be taken into consideration in formulating trade policy at the institutional level.

As discussed in Part II of this dissertation, at the close of the 19th century, the labor movement had made significant advances for workers, including advances in national legislation defining working conditions, advances in national legislation concerning remuneration for hours worked, and securing the right for workers to organize and collectively bargain.[757] Among arguments made by labor against liberalizing trade was that the many advances made by the labor movement would be nullified due to production being shifted to countries that had not realized the advances made on the aforementioned labor issues, and further, that the advances made in developed states may be undermined if international trade was liberalized without the inclusion of provisions defining minimum labor standards in the aforementioned areas. The resulting ILO Charter sought to take into consideration the position of labor in Chapter II, which addressed the importance of employment and economic activity. Chapter II consisted of seven articles that highlighted the importance of employment, balance of payments, information exchange, inflation and deflation, and most importantly, fair labor standards.[758] Article 7 on Fair Labor standards in section one states that:

> The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations,

[755] Steve Charnovitz, 'Participation of Nongovernmental Organizations in the World Trade Organization' (1996) 17 University of Pennsylvania Journal of International Economic Law 331, 338-339.
[756] ibid 345.
[757] Lang (n 742) 27.
[758] 'Final Act and Related Documents, United Nations Conference on Trade and Employment' (Havana Cuba, 21 November 1947–24 March 1948) UN Doc. ICITO/1/4(1948) Chapter II, Articles 1-7.

> conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.[759]

The second and third section of Article 7 provided for the ILO to facilitate the understanding of fair labor standings and also, for the ILO to be consulted in any matters concerning disputes presented to the ITO concerning fair labor standards.[760] In the agreement between the ILO and the ITO to implement Article 7, the organizations were to have observer reciprocal representation in meetings in which either organization has an interest, and to establish joint committees to discuss shared interests.[761]

The ITO Charter that resulted from rounds of negotiations in London, Geneva and Havana took into consideration the views and positions of a diverse mixture of states, ranging from fully developed states, with a mixed economy and lesser developed states with a non-market oriented economies, many of which were embracing a socialist ideology, based upon collectivism were included in the drafting process, resulting in a Charter that reflected the diverse and divergent realities, which was a compromise among competing visions of what should emerge as the new economic world order.[762] The result was that the ITO Charter as not well received by the business community in the U.S. It was felt by many that the ITO Charter had drifted too far from the visions of liberalization of global free trade, that the ITO Charter embraced state interventions that encompassed a leftist slant, which did not appeal to U.S. business interests, and further, that the ITO was to interact with the ILO and the UN, and would thus expand the nature of the organization from being solely focused

[759] ibid art 7 [1].
[760] ibid art 7 [2] [3].
[761] Interim Commission of the International Trade Organization, 'Drafts of Agreements Between the International Trade Organization and Other International Organs' ICITO/EC.2/21 (4 October 1948) Draft Agreement between the ILO and the ITO, art IV, art V.
[762] Lang (n 742) 27-28.

on free trade to encompassing social and economic matters.[763] The ITO Charter was never presented to the U.S. Congress for ratification, and although signed by 53 states, the ITO never became an institution.[764] Rorden Wilkinson proclaims that 'The ITO had a very specific social purpose.'[765] Wilkinson goes further notes that while the ITO was most certainly not without its faults, the significance of the ill-fated ITO is:

> that the ITO stands as an example of a form of global trade governance that had the achievement of social goals as its primary purpose and which was connected up to a strong normative agenda with an attendant policy programme to which the fine management of international legal mechanisms was subordinate.[766]

There are many views as to why the ITO never came into effect, most centering on the unfavorable opinion of the U.S. on the Havana Charter. Indeed, with the failure to establish the ITO linked to the UN and the failure to determine *inter alia,* appropriate levels of domestic regulation in facets closely connected to trade – competition and labor – the vision of global governance exalted by the architects at Bretton Woods would not be fully actualized.[767]

2.2. General Agreement on Tariffs and Trade: GATT 1947

In parallel with the negotiations for the ITO Charter, the negotiations were underway with over 23 states concerning tariff reductions based upon bound tariffs, the development of a most favored nation principle, and a code of conduct that would be binding upon all states that were parties to the document, which closely reflected the commercial code of the ITO draft Charter, which was essentially the same in content as Chapter IV of the Havana Charter.[768] This document was known as the General

[763] During negotiations on the ITO Charter, states where asserting their interests in proposing amendments that numbered in the hundreds, which would essentially destroy the very foundation of the proposed institution. For more see: Rorden Wilkinson, *What's Wrong with the WTO and How to Fix It* (Polity Press 2014) 27.
[764] Only two signatory states ratified the ITO and soon after U.S. President Harry Truman declared that the ITO would not be resubmitted to the U.S. Senate, the UK and the Netherlands followed suit. See for more: ibid 28; Lowenfeld (n 18) 28.
[765] Wilkinson (n 763) 135.
[766] ibid 137.
[767] Howse (n 736) 96.
[768] Lang (n 742) 28.

Agreement on Tariffs and Trade[769] was designed as a provisional document[770] and open for signature in October of 1947.[771] The result was that GATT 1947, originally conceived as only a provisional document, would become the document to govern world trade for a period of 50 years. Significant in defining the evolving regulation of trade law throughout the cold war era was that GATT 1947 contained no provisions for employment, economic development, labor standards, and commodity agreements that were essential features of the Havana Charter. Thus, GATT 1947 reflected the U.S. market oriented economic worldview, which then became the model of world trade governance for nearly half a century.[772]

I submit that GATT 1947 reflected a liberalized view of world trade, premised partly upon the classical conception of free trade and partly upon the conception of 'embedded liberalism' as coined by John Ruggie as 'a form of multilateralism that is compatible with the requirements of domestic stability'.[773] In the aftermath of WWII, it was understood by the architects of the Bretton Woods system that global security and peace rested upon peaceful existence and cooperation between states, especially in terms of trade in goods and natural resources.[774] It was further understood that fair and free trade would contribute to the furtherance of justice, to the development of higher living standards, and through free trade, the actualization of human rights was possible.

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[769] The General Agreement on Tariffs and Trade (GATT 1947) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194.

[770] The Protocol of Provisional Application was the legal instrument by which signatories where to apply GATT 1947 to the greatest extent possible 'not inconsistent with existing legislation', with the understanding that upon the establishment of the ITO, Article I and Part II of GATT 1947 would be suspended and superseded by the ITO, thus GATT 1947 would provisionally apply to signatories of the Agreement and when/if the ITO was established, those states would be 'grandfathered' into the ITO. For more see: Amelia Porges, Friedl Weiss and Petros C Mavroids, *Analytical Index of the GATT : Guide to GATT Law and Practice* (General Agreement on Tariffs and Trade 1994) 1071-1073.

[771] Lowenfeld (n 18) 27.

[772] Lowenfeld (n 18) 26-28; Lang (n 742) 27-28.

[773] John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379, 399.

[774] It was understood that states are interdependent on one another, and that differing social and economic needs of states cause externalities due to implementation of domestic policies to meet said needs, which led other states to respond in kind, frequently by enact protectionist trade measurers, which thus triggered a 'race to the bottom' which was seen as one of the causes of the Second World War and the rise of fascism. For more see: Robert Howse (n 736) 94-95.

While GATT 1947 provided a mechanism whereby states could lower tariffs, it did not require them to do so, and it was understood that states having differing needs may at times need to intervene in their domestic economy and GATT 1947 provided mechanisms to do so, in a manner that would not impact other states.[775] Robert Howse maintains this view was the dominant liberal viewpoint in the post WWII era, which encompassed 'embedded liberalism' and free trade, and was in stark contrast to the *laissez-faire* neo-liberalism that would emerge decades later in the 1980s and 1990s.[776]

Despite the failure to establish the ITO, through the development of GATT 1947, coupled with the UDHR, states nonetheless demonstrated a commitment to ensuring global stability and prosperity, and reorienting the world economic order in one premised upon free trade. In recognizing a Keynesian component in the need for state intervention in the economy during difficult times, to maintain full employment and encourage economic development, states were marked by a desire to intervene directly into their domestic economy in times of difficulty and through the establishment of the IMF and World Bank, this was possible, without destabilizing the international financial system.[777] Problematic however, were non-trade issues and policy objectives of states, which due to differences in ideology and legal tradition could potentially have a detrimental impact on other states, but GATT 1947 provided for a means where by states could deviate from their commitments.[778] Under Article XX, states in pursuit of a legitimate public policy, could discriminate against goods from other states as long as it was not indiscriminately applied and not and guised as a

[775] ibid.

[776] Economic liberalism endured until the 1970s, when the Breton Woods quasi-gold standard was abandoned. This coupled with the rise of laissez-faire economic policy and domestic deregulation associated with the election of Margret Thatcher in the UK and Ronald Reagan in the U.S. led the focus of disputes in word trade to be focused upon what was perceived as unfair competitive trade advantages through domestic policy measurers by states, which thus made products from the U.S. not competitive. And further, the economies of Europe and Japan had recovered from the Second World War, which increased imports to the U.S. For more see: ibid 101-104.

[777] The IMF was created inter alia to facilitate financial stability in states experiencing difficulties in balance of payments, without the need to resort to devaluation. For more see: ibid 95.

[778] ibid; Ruggie (n 773) 397.

means of protectionism and under Article XXI. Thus, states could deviate from their commitments in the interests of national security.[779]

Dispute settlement under GATT 1947 was centered on diplomatic means of conflict resolution and thus took into consideration the differing conceptions of governance whilst in pursuit of 'embedded liberalism'. Dispute settlement was expressed in Article XXII, which mandated consultations in trade disputes,[780] and Article XXIII, which addressed instances where a contracting party's benefit under GATT 1947 was being 'nullified or impaired' by another contracting party,[781] both of which reflected Chapter VIII Settlement of Differences in the charter of the failed ITO.[782] However GATT 1947 did not include provisions whereby disputes could be referred to a higher authority for dispute settlement.[783] Dispute settlement in GATT 1947 would be further refined and developed over the course of its lifetime. Reflecting a political bargaining rather than legal norms, under GATT 1947, positive consensus was required to adopt a dispute settlement decision which was supposed to ensure that dispute settlement would be effective, as decisions would need to be tailored in a manner acceptable to all, including the losing party. However, the possibility of one member having a veto over the adoption of a decision reflected the diplomatic nature of dispute settlement, regardless of how much it was moving in the direction of a judicial norm-based system. As Robert Howse noted, a network of trade elite insiders developed the procedural workings of GATT 1947 and set the agenda of the rounds of negotiations over its lifetime.[784] This network of elite distanced themselves from the political dimensions among GATT members and focused on the technical aspect of world

[779] The 'General Exceptions' and the 'Security Exceptions' will be overviewed later in this chapter. For more see: The General Agreement on Tariffs and Trade (GATT 1947) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194 art XX, art XXI.
[780] ibid art XXII.
[781] ibid art XXIII.
[782] 'Final Act and Related Documents, United Nations Conference on Trade and Employment' (Havana Cuba, 21 November 1947–24 March 1948) UN Doc. ICITO/1/4(1948), art 93.
[783] While each contracting party was obligated to engage in constructive dialog, 'sympathetic understanding' to other contracting parties regarding instances of nullification and impairment of benefits owed by the agreement, no reference to a higher authority for dispute settlement was provided in the agreement, aside for consultations with the contracting parties and with the Economic and Social Council of the United Nations, where the contracting parties deem the matter to be serious enough. For more see: The General Agreement on Tariffs and Trade (GATT 1947) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194, art XII, art XIII.
[784] Howse (n 736) 99.

trade, and through embracing embedded liberalism, demarcated trade from non-trade interests, which shaped the focus of GATT 1947 throughout its existence.[785]

Thus, from the onset of the adoption of the UDHR and GATT 1947, human rights and trade regimes operated independently of one another, acting autonomously and independently, while in the pursuit to the same goals and objectives, world peace and security, through international cooperation based upon respect for and recognition of human rights.[786] Settlement of disputes regarding trade operated independently from human rights, with the focus on keeping human rights issues out of GATT 1947 dispute settlement, thus drawing a distinction between trade and human rights, and through the process of dispute settlement via GATT 1947, the focus was keen not to politicize trade relations through linking trade related disputes to human rights.[787]

Accordingly, while the visions of the post WWII planners were to link human rights to trade, and notwithstanding the failure of the Havana Charter to be ratified and create the ITO, it was through domestic policy of states from the adoption of GATT 1947 to the late 1980s which recognized this linkage as necessary to ensure peace, stability, and increased global development and raising the level of living standards, particularly in the developing states, which was the basis for their intervention into domestic matters where human rights were an issue. For 48 years, multi-lateral trade negotiations continued to further liberalize trade and expand the GATT 1947, with rounds of negotiations focusing on matters such as lowering of tariffs, developing rules on non-tariff barriers to trade, agreements on subsidizes, dumping, safeguarding, government procurement, and other measurers, which lead to a deeper economic integration and an expanded community of nations trading using GATT 1947 rules.[788]

[785] ibid 99-101.
[786] Lang (n 742) 41-42.
[787] ibid.
[788] Lowenfeld (n 18) 72.

CHAPTER 3.

INTERNATIONAL ECONOMIC LAW: THE POST-COLD WAR ERA

The Uruguay round of trade negotiations under the GATT system began in September 1986 and focused on an array of non-tariff issues from intellectual property, to services, to investments to reforming the agriculture subsidies.[789] The Uruguay negotiations were marked by disagreements and doubtfulness of success, yet the negotiations were eclipsed by world events that would usher in a new re-ordering of the world not seen since the aftermath of WWII, and thus set the stage for the emergence of a new world economic order.

The resulting document, signed on 15 April 1994 in Marrakesh, Morocco,[790] established the World Trade Organization, an international institution which committed its members to a binding global norm-oriented approach of managing trade, geared towards realizing expanded free trade, with the goal to benefit all stakeholders, each member committed to realize the vision and results of the Uruguay negotiations. The Marrakesh Agreement forms the structure through which the WTO delineates the scope and function of its decision-making bodies and actualizes the operational procedure thereof.[791] Further, the Marrakesh Agreement establishes an international organization with legal personality and an institutional infrastructure, which governs trade relations amongst its members, regulates membership in the organization, and establishes the legal and institutional foundation of the WTO.[792]

As stated in the introduction to this work, I define the contemporary era in world trade to be that of the post-cold war era, marked by the establishment of the WTO, a rules based international organization, arguably the most successful example of global

[789] ibid 66.

[790] WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh Agreement or WTO Agreement) (15 April 1994) 1867 UNTS 154.

[791] ibid art II, art III, art IV.

[792] Article VIII defines the status of the organization, noting that it 'shall have legal personality', art V authorizes the General Council to facilitate arrangements with other international organizations and art VI authorizes the establishment of a Secretariat to be led by a Director-General, both being international in nature For more see: ibid art V, art VI and art VIII.

governance, which in 2021 entered its 26th year of operation. While the WTO has been successful in establishing a multilateral institution premised upon rules rather than power based/political negotiations in regulating world trade amongst its members, divisions among members nonetheless remain and serve as an impediment to actualizing an efficient institution accountable to all stakeholders. In the following chapters, I shall overview the WTO, the development of its jurisprudence, and the challenges – and opportunities – facing the organization in the 26th year of its life.

3.1. The World Trade Organization

While the WTO is an international organization in terms of the establishment of a permanent organization to facilitate the management of world trade, it is nevertheless a continuance of the GATT 1947 system as stated in Article XVI (1) of the Marrakesh Agreement, which stipulates that 'the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.'[793] Further, the General Agreement on Tariffs and Trade 1994[794] (hereinafter GATT 1994) is 'legally distinct from the General Agreement on Tariffs and Trade dated 30 October 1947'.[795] However, while WTO decisions concerning trade disputes frequently draw upon jurisprudence developed under GATT 1947, those decisions thus do not constitute binding precedent.[796] At the inception of the WTO in 1994, there were 128 member states,[797] while in 2021 there are 164 member states and 25 observer states,[798] with Afghanistan becoming the newest WTO member state in 2016.[799]

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[793] ibid art XVI (1).

[794] WTO, 'General Agreement on Tariffs and Trade' (GATT 1994), Marrakesh Agreement Establishing the World Trade Organization Annex 1A, (15 April 1994) 1867 UNTS 187.

[795] WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh Agreement or WTO Agreement) (15 April 1994) 1867 UNTS 154, art II (4).

[796] Robert Howse, in discussing the autonomy of the WTO's Appellate Body, notes in that an early appeal, the Appellate Body, while recognizing the importance of the continuity between the WTO and GATT 1947, rejected the panel's holding that adopted GATT 1947 panel reports constituted binding decisions, and reasoned that adopted GATT 1947 decisions are to be considered as one normative source to be taken into consideration when relevant, but are not binding or authoritative For more see: Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 European Journal of International Law 9, 32.

[797] 'WTO | GATT Members' <https://www.wto.org/english/thewto_e/gattmem_e.htm> accessed 5 March 2021.

The foundational principles of the WTO are nondiscrimination among its members as expressed by the MFN principle[800] and the National Treatment principle[801] in terms of regulations impacting trade. Further, the WTO is committed to deepening trade integration through rounds of negotiations among its members aimed at further liberalizing markets and lowering of tariffs. Unlike GATT 1947, disputes among WTO members are administered through a dispute settlement procedure, which encompasses a binding dispute settlement system with an enforcement mechanism. Further, the totality of the WTO encompasses more than trade in goods through the addition of norms for trade in services through the General Agreement on Trade in Services[802] (hereinafter GATS), protections for intellectual property through the Trade Related Aspects of Intellectual Property Rights[803] (hereinafter TRIPS) and norms for aspects of foreign domestic investment under the Agreement on Trade Related Investment Measurers.[804] Also, lesser measurers, which were added to GATT 1947 through the years of trade negotiations, form a legal continuum, some of which were modified at the Uruguay Conference, which encompass the totality of the WTO Agreement and further, are the basis for much of WTO law.[805] These include the Agreement on Subsidies and Countervailing Measurers[806] the Dumping and Anti-

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[798] 'WTO ¦ Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 5 March 2021.

[799] 'WTO | 2016 News Items - Afghanistan to Become 164th WTO Member in One Month's Time' <https://www.wto.org/english/news_e/news16_e/acc_afg_29jun16_e.htm> accessed 5 March 2021.

[800] The Most Favored Nation principle is expressed in Article I of GATT 1994, in Article II of the GATS Agreement and Article IV of the TRIPS Agreement.

[801] The National Treatment principle is expressed in Article II of GATT 1994, in Article XVII of the GATS Agreement and in Article III of the TRIPS Agreement.

[802] WTO, 'General Agreement on Trade in Services' (GATS), Marrakesh Agreement Establishing the World Trade Organization Annex 1A, (15 April 1994) 1869 UNTS 183.

[803] General Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 299.

[804] Agreement on Trade-Related Investment Measures (TRIMS) (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 186.

[805] Through multiple rounds of trade negotiations, the GATT 1947 was expanded to impose obligations on its members in areas such as subsidies and antidumping, for example, and often these additional obligations did not embrace the fundamental principle of most favored national treatment, such as the so called 'codes' on measurers that were of non-tariff measurers negotiated during the Tokyo Round of Negotiations (1973-1979) resulting in a fragmented application as being only applicable to those Contracting Parties involved in bilateral agreements, resulting in different treatment to Contracting Parties. During the Uruguay Round of Negotiations, such measures were made applicable to all WTO members, resulting in a more uniform body of trade law. For more see: Mary E Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Martinus Nijhoff Publishers 2006) 3-5.

[806] WTO, 'Agreement on Subsidies and Countervailing Measures' (SCM), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, (15 April 1994) 1869 UNTS 14.

Dumping Code[807] the Technical Barriers to Trade Agreement[808] the Agreement on Safeguards[809] the Agreement on Agriculture[810] and the Sanitary and Phytosanitary Agreement.[811]

Article III of the Marrakesh Agreement defines five functions of the WTO, the first of which proclaims 'The WTO shall facilitate the implementation, administration and operation and further the objectives of this Agreement'[812] which indicates the authority for the establishment of an instructional framework to provide for the functions of the WTO.[813] Second, the WTO shall provide a forum for negotiations among WTO members concerning trade relations covered by the WTO agreement and associated annexes.[814] Third, the WTO provides for a dispute settlement mechanism to be administered by the WTO.[815] Fourth, the WTO administers the Trade Policy Review Mechanism, which entails surveillance of WTO members trade measurers undertaken which may impact the functionality of the world's trading system.[816] The fifth function of the WTO is to cooperate with the IMF and the World Bank with the aim to achieve greater unity in global economic policymaking.[817] The WTO has been

[807] WTO, 'Agreement on Implementation of Article VI of GATT 1994', Marrakesh Agreement Establishing the World Trade Organization, Annex IA (15 April 1869) 1868 UNTS 201.
[808] WTO, 'Agreement on Technical Barriers to Trade' (TBT), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (15 April 1994) 1868 UNTS 120.
[809] WTO, 'Agreement on Safeguards', Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (15 April 1994) 1869 UNTS 154.
[810] WTO, 'Agreement on Agriculture', Marrakesh Agreement Establishing the World Trade Organization Annex 1A, (15 April 1994) 1867 UNTS 410.
[811] WTO, 'Agreement on Sanitary and Phytosanitary Measures' (SPM), Marrakesh Agreement Establishing the World Trade Organization Annex 1A, (15 April 1995) 1867 UNTS 493.
[812] WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh Agreement or WTO Agreement) (15 April 1994) 1867 UNTS 154, art III.
[813] Footer (n 805) 25.
[814] As noted by scholars and as indicated its founding document, the WTO is a member driven institution rather than institutional driven and the forum described as the function of the WTO alludes to WTO members acting as individual states, which then interacting with one another rather than an organization where WTO members act collectively. See for more: ibid 26-30; WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh Agreement or WTO Agreement) (15 April 1994) 1867 UNTS 154, art III.; David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press 2009) 64.
[815] The details for the operation of the Dispute Settlement Understanding are outlined in Art 3 of Annex II See: WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh Agreement or WTO Agreement) (15 April 1994) 1867 UNTS 154.
[816] ibid; Lowenfeld (n 18) 75; Footer (n 805) 31-32.
[817] WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh Agreement or WTO Agreement) (15 April 1994) 1867 UNTS 154, art III; Footer (n 805) 32.

described as a legal system with a set of primary and secondary rules, rules of recognition, rules of adjudication, and rules of change.[818] David Palmer noted that soon after the establishment of the WTO, that 'WTO Members – who comprise most of the world's governments – have seen fit to create and submit to a far more developed legal system in the WTO than they are willing to create and submit to in other areas'.[819]

Indeed, the mandate of the WTO far exceeds GATT 1947, encompassing much of what was envisioned with the ITO, and further, the WTO actively cooperates with other institutions of international economic law in a quest for deeper integration and development of the world's trading system.[820] In the following sub-sections, I will overview the WTO institutional structure, operations, dispute settlement, and enforcement of decisions from a descriptive approach, without making any normative claims. In the final sub-section on the jurisprudence of the WTO, I will describe how contested normative aspects of the dispute settlement procedure have been interpreted through procedural rulings, primarily devoted to transparently issues and the inclusion of submissions by non-state actors.

3.2. Organizational Structure of the WTO

The highest WTO body is the Ministerial Conference, which consists of representatives of all WTO members.[821] It is the supreme decision-making authority over all WTO matters.[822] The Ministerial Conference has very broad powers[823] and frequently issues declarations and decisions on a variety of issues including

[818] David Palmeter, 'The WTO as a Legal System' (2000) 24 Fordham International law Journal 444, 466-479.
[819] ibid 479.
[820] Stoll and Schorkopf (n 738) 15.
[821] The Ministerial Conference meets at least once every two years. It is the highest level of meetings of the WTO members. See for more: WTO, 'Marrakesh Agreement Establishing the World Trade Organization' (Marrakesh Agreement or WTO Agreement) (15 April 1994) 1867 UNTS 154, art IV.
[822] Michaela Eglin, 'The Development of Multilateral Trade Agreements' in Jonathan Reuvid (ed), *A Handbook of World Trade: A Strategic Guide to Trading Internationally.* (2nd edn, GMB Publishing Ltd 2004) 20-21; Stoll and Schorkopf (n 738) 16.
[823] Meetings at the Ministerial Conference are the highest meetings, attended by Trade Ministers of WTO members, and they exercise broad, legally binding power, and are apprehensive about delegating powers to institutional bodies, as by retaining the power, they can the assert direct control over the WTO. See for more: Footer (n 805) 43.

subsidies,[824] electronic commerce,[825] and matters impacting least developed countries.[826] WTO members also compose the General Council, which meets frequently to manage the affairs of the WTO, to administer WTO dispute settlement and to discharge the duties of the Trade Policy Review Board.[827] Further, the General Council oversees the work of the Council on Trade in Goods, the Council on Trade in Services, and the Council on Trade Related Intellectual Property Rights.[828]

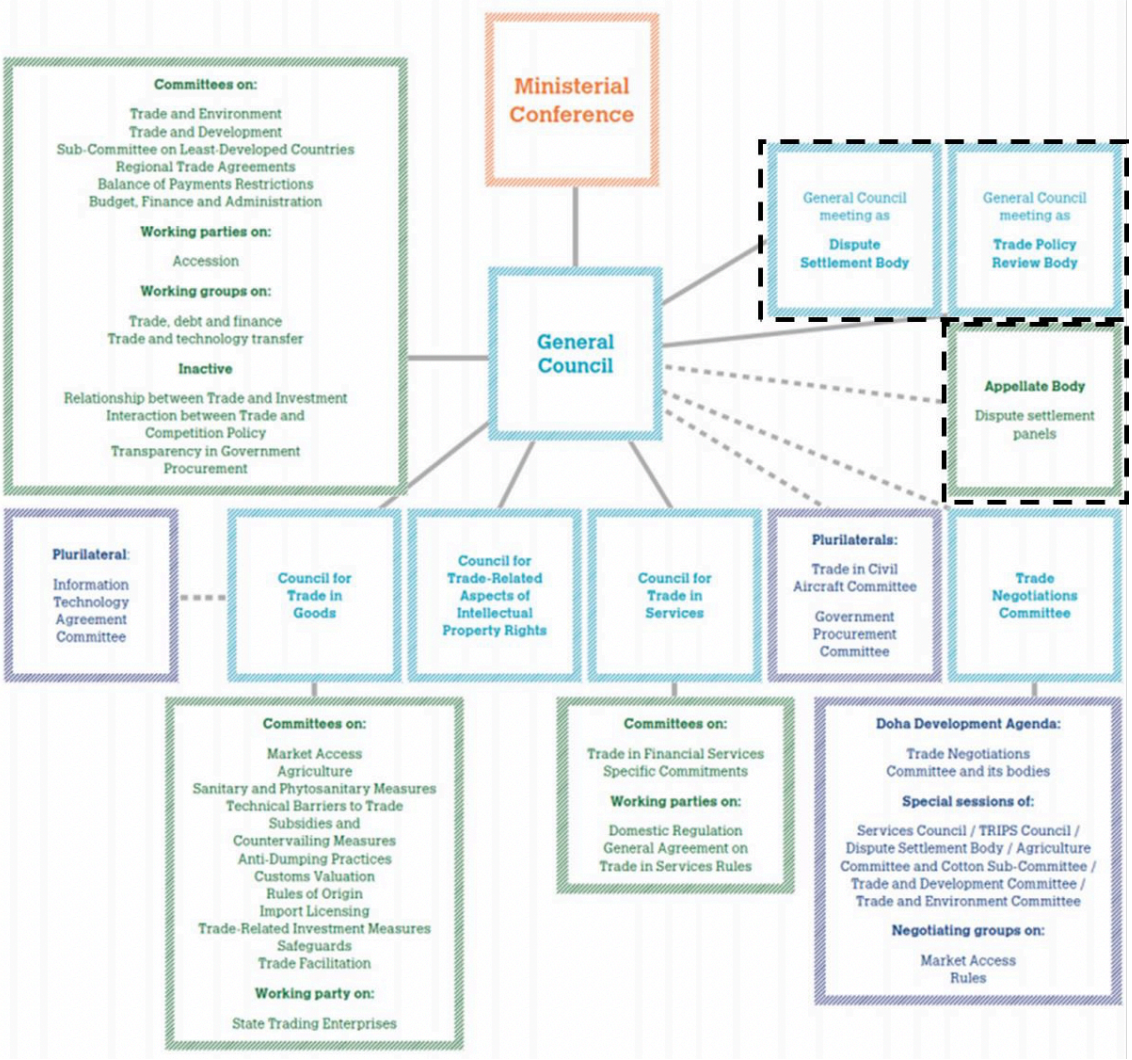

Table 1. Organizational Structure of the WTO illustrating the relationship between the Ministerial Conference, General Council, Dispute Settlement Body, Trade Policy Review Body, and other councils and working groups of the WTO. Source: WTO. Available online at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm

[824] WTO Ministerial Decision on Fisheries Subsidies 13 December 2017 (WT/MIN) (17)/ (64).
[825] WTO Ministerial Declaration on Global Electronic Commerce 20 May 1998 (WT/MIN) (98)/DEC/2.
[826] WTO Ministerial Nairobi Declaration 19 December 2015 (WT/MIN) (15)/DEC.
[827] Eglin (n 822) 21; Footer (n 805) 35.
[828] Eglin (n 822) 21-22.

The Secretariat of the WTO is responsible for the many administrative functions of the WTO, including record keeping, disseminating information to the public and member states, and providing legal advice during the dispute settlement procedure.[829] The Director General is appointed by the Ministerial Conference and has supervisory authority over the Secretariat.[830] The Director General does not formulate policy or act independently, but is charged with implementing policy as determined by the Ministerial Conference.[831]

3.3. Dispute Settlement in the WTO

As discussed previously, dispute settlement under GATT1947 was totally ineffective due to the requirement of positive consensus among all contracting parties to adopt a panel decision.[832] Thus with positive consensus required to adopt a panel report, the "losing party" could effectively block the decision from being adopted.[833] To remedy this deficiency of GATT1947, dispute settlement in the WTO was developed as a normative system through the Understanding on Rules and Procedures Governing the

[829] Stoll and Schorkopf (n 738) 18.

[830] ibid 18-19.

[831] As noted by David Kinley, the Director General has no autonomy to make policy or act independently, as the direction of the WTO is determined by its members. See for more: Kinley (n 814) 64.

[832] In the early years dispute settlement under GATT 1947 was carried out by diplomats and economists, not lawyers. It was not until 1952 that the process changed to third party panels and took on more of a judicial proceeding, with written submissions and references to earlier panel decisions. Throughout the 1960s and 1970s, dispute settlement under GATT 1947 haphazardly functioned, largely through compromise, with resistance to reforming the system by both the European Community and the U.S. It was not until 1981 under Director-General Arthur Dunkel that a GATT Office of Legal Affairs was established. See for more: Lowenfeld (n 18) 150-158; Ernst Ulrich Petersmann, 'The Establishment of a GATT Office of Legal Affairs and the Limits of Public Reason in the GATT/WTO Dispute Settlement System' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015) 186-188.

[833] Michaela Eglin, 'Legal Elements of the WTO' in Jonathan Reuvid (ed), *A Handbook of World Trade: A Strategic Guide to Trading Internationally*. (2nd edn, GMB Publishing Ltd 2004) 41; Stoll and Schorkopf (n 738) 71-72.

Settling of Disputes[834] (hereinafter DSRP) and has thus changed substantially from a system characterized as a power/political aligned system to a normative system.[835]

As stipulated in DSU Article 2, the Dispute Settlement Body (hereinafter DSB) is authorized to 'establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.'[836] Dispute settlement in the WTO is subject to a strict timeline starting from the initial request for consultations by the complainant, during which time, the parties to the dispute attempt to settle the dispute through negotiations/consultations and after 60 days of consultations, the complainant member may ask the DSB to establish a panel which will adjudicate the dispute.[837] The rules require that a panel must be established within 45 days of the request by the complaining member.[838]

Upon the establishment of a panel and the agreement of its scope and terms of reference, the panel has, at the earliest, up to six months to complete its work and issue the decision, and in matters of urgency, the panel must complete its work and

[834] The DSU is applicable to all WTO members and covers disputes arising from all WTO Agreements. For more see: WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU), Marrakech Agreement Establishing the World Trade Organization, Annex 2, (15 April 1994) 1869 UNTS.; Lowenfeld (n 18) 162.

[835] However, as Andreas Lowenfeld correctly notes, it is incorrect to assert that dispute settlement under the WTO is a pure legal system, free from economic and political influence. For more see: Lowenfeld (n 18) 160.

[836] The Dispute Body of the WTO constitutes all WTO members meeting for the consideration of dispute settlement issues, inter alia, authorizing the establishment of a panel, adopting a panel report or an appellate body decision, or authorizing concessions or retaliatory measures. For more see: WTO, 'DSU' art 2.2.

[837] However, in cases of urgency, (perishable goods are mentioned), the process may be accelerated. For more see: ibid art 4, sections 3, 7 and 8.

[838] Panels are normally composed of three members, however, upon agreement of the parties, a five-member panel shall be established. Panels are composed of third parties unless the parties' consent to a allowing citizens of members parties to the dispute to serve as a panelist. The Secretariat maintains a list of individuals to serve as members of a panel and the members of the dispute decide between themselves the composition of the panel, and may suggest alternative individuals (not on the list maintained by the Secretariat). If the parties cannot agree on the composition of the panel within twenty days of the establishment of the panel, either party may request the Director-General to decide on the members of the panel, and after consulting the Chairman of the DSB and the relevant committee or council, the Director General has ten days to compose the panel. And further, when the dispute is between a developing country and a developed country, upon a request from the developing country, one member on the panel should be from a developing country. See for more: ibid art 8, sections 3-10.

issue the decision in three months.[839] If the panel needs additional time to complete its work, it must inform the DSB, state the reason for needing additional time and provide an estimate of when it will complete its work, however per the DSRP, the panel report must be circulated to the DSB no later than nine months after the panel is composed.[840] The panel can suspend its work upon request by the complainant party however, if the suspension exceeds 12 months, the authority for establishing the panel will expire, and should the parties fail to reach an agreement, the establishment of new panel may be requested by the complaining member.[841] Special provisions are made for developing members throughout the process.[842] Upon notification to the DSB of the dispute, other members can become "third parties" to the dispute through notification to the DSB premised upon a compelling interest in the dispute, and further, "third parties" to a dispute may submit written submissions and participate in oral hearings before the panel.[843]

Upon the establishment of a panel, a date for the first round of oral hearings is scheduled and parties to the dispute submit written submissions to the panel before the first oral hearing.[844] Per the DSRP, oral hearings are confidential, with attendance limited to the complainant, respondent and third parties.[845] After the first oral hearing a date is scheduled for the second oral hearing, and the panel may ask for additional information from the parties, to be submitted in writing before the second oral hearing.[846] The panel is authorized to solicit information from either of the parties, and also, from any other relevant source or expert (scientific or technical or otherwise) if so desired to aid in interpretations of factual and technical matters.[847]

After reviewing the written submissions, rebuttal written submissions, and any other information requested to aid in deciding the dispute, the panel issues its findings to the parties in the form of an interim report and specifies a time period in which the

[839] ibid art 12, section 8.
[840] ibid art 12, section 9.
[841] ibid art 12, section 12.
[842] ibid art 24.
[843] ibid art 10.
[844] ibid art 12, sections 3, 5 and 6.
[845] ibid art 10, section 2, art 12 section 6, DSU Working Procedurers Appendix 3, section 2 .
[846] ibid art 12, sections 5 and 6.
[847] ibid art 13.

parties can submit final written comments on the findings expressed in the interim report, and, if requested, meet once more to discuss issues of concern identified by the parties in the interim report.[848] The panel report is then issued to the members of the DSB for consideration, including any arguments made by the parties during the interim review.[849] Panel reports can be considered for adoption 20 days after circulation to WTO members and within 60 days of circulation the panel report shall be adopted by the DSB, unless a party to the dispute notifies the intention to appeal, or if there is consensus by the whole of the DSB not to adopt the panel report.[850]

Unlike dispute settlement under GATT 1947, the WTO DSRP provides for the appeal of a panel report. Appealing a panel report is limited to parties to the dispute.[851] While panels are composed of members suggested by the Secretariat or as agreed by the parties, the WTO Appellate Body (hereinafter AB) is a permanent feature of the WTO and is composed of seven members appointed for a four year terms.[852] As stipulated in the Working Procedures for Appellate Body Review, three members of the AB meet as a 'Division' to adjudicate appeals.[853] Like most appellate courts, the Division considers legal interpretations by the panel and issues of law, and does not consider new facts.[854] The party seeking to appeal a panel report initiates the process by submitting in writing its notification of appeal with the DSB and the Secretariat.[855]

Upon filing notification to appeal, the appellant has ten days to submit a written appeal to Secretariat, to the other party, and third parties, stating the legal basis of the appeal (legal errors) and arguments developed in the appeal.[856] Other parties to the dispute then have 15 days from the notice of appeal to join the appeal or initiate a

[848] If neither party submits comments within the specified interim review period, the interim report is finalized and issued to the members of the DSB. For more see: ibid art 15.
[849] ibid art 15, sections 2 and 3 and art 16.
[850] Third parties cannot appeal the panel report. For more see: ibid art 16, sections 1 and 4.
[851] Third parties may however provide written submissions and be heard by the Appellate Body. For more see: ibid, art 17, section 4.
[852] ibid, art 17, sections 1-3.
[853] WTO, 'Working Procedures for Appellate Review' (15 September 2010) WT/AB/WP/6, rule 6.
[854] WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU), Marrakech Agreement Establishing the World Trade Organization, Annex 2, (15 April 1994) 1869 UNTS, art 17, section 6.
[855] ibid, art 16, section 4.
[856] WTO, 'Working Procedures for Appellate Review' (15 September 2010) WT/AB/WP/6, rule 21, section 2 and rule 18, section 2.

cross appeal.[857] Appellees and third parties have 25 days upon notification of the appeal to file written submissions contesting arguments, issues and alleged legal errors as outlined in the appellant's submission, and stating their position on the panel report, and ruling sought from the AB.[858] An sole oral hearing is scheduled 30 to 45 days after the notice of appeal, in which the parties to the dispute and third parties may attend.[859] The Division sets the time limitation for statements and presentations of the parties, may engage in discussions with parties during their oral statements, and after the oral hearing, may ask for additional information from the parties to be submitted in writing within a specified time, which is then disseminated to other parties with an opportunity for them to reply.[860] As with panel hearings, as stipulated in the DSRP, proceedings of the AB are confidential.[861]

Upon the conclusion of oral hearings, members of the division hearing the appeal discusses the case with the other members of the AB, but the decision is made only by the members of the division.[862] The decision should address each of the issues raised in the appeal, is limited to issues of law or interpretations expressed in the panel report.[863] The AB may modify, uphold or reverse the findings of the panel, and issue suggestions of means to comply with the WTO agreement.[864] Once the AB has finalized the decision, it is circulated to WTO members, and unless there is consensus not to adopt the decision within 30 days, it is adopted.[865] Unlike with panel decisions, there is no interim review nor is there a possibility to appeal further, as the AB is the

[857] ibid, rule 23, section 1.
[858] ibid, rule 22 and rule 24.
[859] ibid, rule 27, sections 1 and 3.
[860] ibid, rule 27, section 4 and rule 28.
[861] WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU), Marrakech Agreement Establishing the World Trade Organization, Annex 2, (15 April 1994) 1869 UNTS art 17, section 10.
[862] To ensure consistency in developing WTO jurisprudence, the members of the division consult with the other four members of the Appellate Body in discussing the dispute at hand. However, the ultimate decision of the appeal is rendered by the members of the division assigned to the appeal. For more see: WTO, 'Working Procedures for Appellate Review' (15 September 2010) WT/AB/WP/6, rules 3 and 4.
[863] WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU), Marrakech Agreement Establishing the World Trade Organization, Annex 2, (15 April 1994) 1869 UNTS, art 17, section 12.
[864] Recommendations may be issued where the AB finds that a measure undertaken by a party is incompatible with the WTO agreement. The AB cannot make new law, but applies WTO law. For more see: ibid, art 17, section 13 and art 19, section 1.
[865] ibid, art 17, section 14.

WTO's court of last resort. Members can however issue statements on the AB report, but once adopted the decision is binding. The entire procedure of the appeal is limited to 60 days from the notification of appeal to the issuance of the decision and while additional time may be given upon notification to the DSB by the AB, the totality of the time should not exceed 90 days.[866]

Within 30 days after the DSB has adopted a panel report or AB decision, the party found in breach of a WTO agreement shall inform the DSB of its intention to comply with the decision.[867] The member must give an estimate of the time needed to comply with the decision and if it is impractical to comply within a reasonable period of time, the member must state the reason for needing additional time. Typically the time needed to comply will be decided in consultation with the parties to the dispute.[868] Where the parties cannot come to an agreement, the matter may be referred to arbitration.[869] If the complainant member is not satisfied with the measure undertaken by the respondent to comply with the decision, a compliance panel can be requested to settle the matter.[870] In the instance of continued non-compliance, the affected member may ask the DSB for authorization to impose retaliatory trade sanctions, known as suspension of concessions, to be set at a level that corresponds to the level of the nullification or impairment caused by non-compliance.[871]

This amounts to compensation within the language of the WTO, yet it is not the payment of monetary compensation, but the authorization to impose additional tariffs on a class of goods that would offset the economic loss due to non-compliance with a panel or AB's decision. The DSB shall authorize the suspension of concessions within 30 days and if a dispute arises about the procedural aspects or level of concessions proposed, the matter shall be resolved by the original panel or by an arbitrator appointed by the WTO Director General.[872] The DSB maintains surveillance on the implementation of measurers undertaken by a member to comply with decisions of a

[866] ibid, art 17, section 5.
[867] ibid, art 21, section 3.
[868] ibid, art 21, section 3 (b).
[869] ibid, art 21, section 3 (c).
[870] The panel convened should be the panel that decided the dispute. For more see: ibid, art 21, section 5.
[871] ibid, art 22, section 2 and section 4.
[872] The decision should be rendered within 60 days. See for more: ibid art 22, section 6.

panel or AB[873] and in instances where suspension of concessions have been authorized, the DSB maintains surveillance until a time when the measure has been remedied, thus suspension of concessions are temporary and shall end upon compliance with the decision.[874]

3.4. Transparency and Participation in WTO Dispute Settlement

Since the inception of the WTO, NGOs have sought access to the decision-making process, arguing that the welfare of the entire world should be taken into consideration by the WTO in the interest of transparency.[875] What exactly is meant by 'transparency' in the context of the WTO? In a recent publication, Leonardo Borlini rightly proclaims that 'Transparency is commonly understood as the quality of being easy to see through, a quality that reality may or may not possess.'[876] This is certainly the instance with DSRP in the WTO when compared to national and international courts. Borlini goes on to note that while the notion of transparency is known in a general sense by almost everyone, as referred to in various international agreements, procedures and institutions, its normative meaning and legal concept differ depending on the context, with no one precise definition.[877]

Steve Charnovitz, arguing in 1996 for the need to gain the public's trust in the recently created institution, noted that transparency and public participation in the WTO predated the WTO, tracing its origins to the U.S. objectives during the Tokyo Round of multilateral trade negotiations under GATT 1947 for the implementation of 'international fair labor standards and of public petition and confrontation procedures in the GATT.'[878] Charnovitz further noted that NGOs seized on the term "transparency" as a means to pressure for more openness in WTO, which resulted in

[873] ibid, art 21, section 6.
[874] ibid, art 22, section 8.
[875] Charnovitz, 'Participation of Nongovernmental Organizations in the World Trade Organization' (n 755) 332-335.
[876] Leonardo Borlini, 'A Crisis Looming in the Dark: Some Remarks on the Reform Proposals on Notifications and Transparency' [2020] Questions of International Law. 83, 87.
[877] ibid 88.
[878] Quoting from U.S. trade law at the time. For more see: Charnovitz, 'Participation of Nongovernmental Organizations in the World Trade Organization' (n 755) 332.

limited success in increasing communication to the public on internal studies and informal consultations with NGOs.[879] Borlini further notes that transparency is concentrated on three interrelated, yet separate functions; WTO institutional decision making; WTO dispute settlement proceedings; and institutional rules designed to provide legal certainty within the WTO, thus ensuring stable domestic policies among its members and economic actors.[880] In this sense, transparency of the WTO is primarily internal as it concerns the inner-workings of the institution and relations among its members, yet WTO transparency is to a degree external regarding the perception of the WTO by the global community.[881] However, references to transparency in the WTO agreements are centered on internal transparency, thus limiting the WTO's focus on external transparency.

In 1996, the WTO General Council addressed NGOs concerns regarding external transparency by adopting a set of Guidelines for Arrangements on Relations with Non-Governmental Organizations[882] (hereinafter 1996 Guidelines) which recognized the importance of NGOs and their role in enhancing transparency within WTO, yet as noted, also limited the involvement of NGOs in proceedings and decision making in the WTO.[883] In 2002, the Grand Council adopted a decision to further enhance transparency both internally and externally, by providing a delineated timeline whereby certain WTO communications and documents would be classified as unrestricted, translated into the working languages of the WTO (English, French and Spanish), and made available to the general public on the WTO's website.[884]

While the 1996 Guidelines and the decision of the Grand Council in 2002 were important steps at enhancing transparency, jurisprudence developed through WTO

[879] ibid.
[880] Borlini (n 876) 88.
[881] Michelle R Sanchez, 'Brief Observations on the Mechanisms for NGO Participation in the WTO' (2006) 4 International Journal on Human Rights 103, 106.
[882] WTO, 'Guidelines for arrangements on relations with Non-Governmental Organizations, Decision adopted by the General Council on 18 July 1996' (1996 Guidelines) (18 July 1996) WT/L/162.
[883] Sarah Joseph, *Blame It on the WTO: A Human Rights Critique* (Oxford University Press 2015) 59.
[884] Subject to exceptions provided for in the decision, information shared with the WTO membership pertaining to a specific dispute, and other WTO information (minutes of meetings, working group reports, etc.) is available to the general public through the WTO's website. For more see: WTO, 'Procedures for the Circulation and De-restriction of WTO documents, Decision adopted by the General Council on 16 May 2002' (16 May 2002) WT/L/452.

case law has went further in enhancing external transparency through the involvement of NGOs in WTO dispute settlement. Having overviewed the structure of the WTO and DSU proceedings in the previous sections, I will first discuss how legal interpretations of DSU norms have enhanced external transparency by paving the way for written submissions by non-state actors in trade disputes before a Panel and during appeals before the AB. I will then discuss how legal interpretations of DSRP norms have opened the door to public observation of oral hearings before a Panel and AB. Both developments have led to enhanced transparency in WTO dispute settlement beyond the textual scope as defined in the DSRP[885] and the 1996 Guidelines. Though NGOs involvement in dispute settlement proceedings is limited, as are instances of open hearings, this increased external transparency may expand the possibility of connecting trade disputes to other aspects of international law.

3.4.1. *Amicus Curiae* Submissions by Non-State Actors

Amicus curiae briefs are a common law instrument, submitted to a court in writing by a non-party to the dispute that wishes to bring certain facts and legal interpretations to the attention of the court.[886] In 1998, the AB first addressed the issue of participation by NGOs in DSRP proceedings through submissions of unsolicited amicus curiae briefs. Earlier unsolicited submissions by NGOs in environmental and health issues were ignored by the Panels.[887] However, in the *U.S. Shrimp-Turtle* Case, the Panel

[885] The DSU explicitly mentions 'transparency' in the context of internal transparency between parties and third parties to a dispute. Further, as mentioned earlier, information pertaining to a dispute that is made available to the WTO membership is accessible to the public on the WTO's website. For more see: WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU), Marrakech Agreement Establishing the World Trade Organization, Annex 2, (15 April 1994) 1869 UNTS, DSU appendix 3.10.

[886] Dating from Roman law, amicus curiae briefs are used in common legal systems throughout the world and are also frequently used in international courts, most notably by human rights courts. And while modern civil legal systems did not historically embrace amicus submissions, this changed in the latter half of the twenty century, through formal recognition and establishing procedures for amicus submissions and through informal submissions by NGOs to civil law courts. For more see: Steven Kochevar, 'Amici Curiae in Civil Law Jurisdictions' (2013) 122 Yale Law Journal 1653, 1653-1662.

[887] NGOs submitted amicus submissions to the second WTO Panel, US – Gasoline WT/DS2/R and later to the Panel in EC – Hormones WT/DS26/R. However, in keeping with GATT 1947 jurisprudence, which rejected interests of non-parties to a dispute, hence, Panels did not address the submissions. Rüdiger Wolfrum and Peter-Tobias Stoll, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' in Rüdiger Wolfrum, Peter-Tobias Stoll and Karen Kaiser (eds), *WTO: Institutions and Dispute Settlement.* (Brill Nijhoff 2006) 421.

addressed *amicus curiae* submissions in its report, holding that acceptance of unsolicited curiae to be contrary to DSRP rules.[888] Two NGOs submitted *amicus curiae* briefs to the panel in support of the U.S.[889] The complaining parties objected to the amicus submissions, arguing that the Panel should not consider the briefs, while the U.S. argued that the Panel should consider the briefs.[890] The Panel held that per Article 13 of the DSRP, 'the initiative to seek information and to select the source of information rests with the panel'[891] and thus accepting non-requested information would be 'incompatible with the provisions of the DSRP.'[892] The Panel did however declare that any party to the dispute could include amicus curiae briefs to its own submissions, just as the U.S. had done with the inclusion of the *amicus curiae* briefs in the second Panel submission.[893]

The U.S. subsequently appealed the Panel's decision, arguing, *inter alia,* that the Panel erred when finding that a Panel's acceptance of unsolicited *amicus* submissions by NGOs would be contrary to the DSRP. The AB addressed the issue of unsolicited *amicus curiae* submissions, declaring 'the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU.'[894] While the AB disagreed with the Panel's reasoning regarding unsolicited information being inconsistent with the DSRP, the AB affirmed that participation in WTO dispute settlement is limited to WTO members and third parties, that only those WTO members have the legal right to have submissions considered in dispute proceedings, and further added that a Panel is legally obligated to consider and give due consideration to said submissions.[895] Thus, while NGOs may submit unsolicited information to a Panel, it is completely within

[888] WTO, *US – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Panel* (15 May 1998) WT/DS58/R.
[889] Amicus curiae briefs were submitted by two environmental NGOs and; the World Wide Fund for Nature. See for more: Steve Charnovitz, 'Opening the WTO to Nongovernmental Interests' (2001) 24 Fordham ILJ 173, 182.
[890] WTO*, U.S. – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Panel* (15 May 1998) WT/DS58/R. (n 853) 279-280.
[891] ibid 280 at 7, 8.
[892] ibid.
[893] ibid.
[894] WTO*, US – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58R and WT/DS58/AB/R, 39 at 110.
[895] ibid 35 at 101.

the Panel's 'discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.'[896]

The decision was both welcomed and criticized, with some WTO members arguing that submissions from NGOs would be biased, that the work of the dispute settlement is limited to WTO members, and by allowing non-state actors to participate, the dispute settlement system risks moving from a norm based dispute settlement system to one pressured by non-legal arguments, while other members criticized the decision, contending that it paved the way for big business to influence the DSRP proceedings through encouraging WTO members to become third parties as proxies for the sake of advancing the interests of big business.[897] Notwithstanding conflated views among WTO members, the AB's decision in the Shrimp-Turtle case ushered in a welcomed opportunity for social justice interests to have an impact on the WTO dispute settlement, and paved the way for NGOs to submit amicus curiae briefs to Panel proceedings, as evident by over one hundred *amicus* submissions in Panel proceedings from 1998 to 2020.

In subsequent cases the issue of NGOs submissions was revisited, focused on submissions of unsolicited amicus curiae briefs to the AB. The most significant precedent setting cases being appeals to the AB in the U.S. Countervailing Duties on *Lead and Carbon Steel Products*[898] and the *EC – Asbestos* Case.[899] In the former, unsolicited submissions were submitted by NGOs to the AB, not as a submission by either the parties to the appeal, nor third parties, but as direct submissions. The AB noted that while nothing in the DSU and the Working Procedures for the AB provides for the acceptance of submissions other than those by parties to the dispute or third parties, nothing prohibits the acceptance nor consideration thereof either.[900] The AB noted that per Article 16 paragraph 1 of the Working Procedures, discretion is given

[896] ibid 38 at 108.
[897] Charnovitz, 'Opening the WTO to Nongovernmental Interests' (n 889) 185.
[898] WTO, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom – Report of the Appellate Body* (10 May 2000) WT/DS138/AB/R.
[899] WTO, *European Communities – Measurers Affecting Asbestos and Asbestos – Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R.
[900] WTO*, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom – Report of the Appellate Body* (10 May 2000) WT/DS138/AB/R. (n 863) 14.

to the AB in developing procedural rules in instances where the issue is not defined by existing procedure, provided that 'as long as we act consistently with the provisions of the DSRP and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.'[901]

In the *EC – Asbestos* Case, the AB relying on earlier case law invoked Rule 16(1) of the Working Procedures in adopting and communicating an "Additional Procedure" which provided for a transparent procedural process whereby interested parties (parties other than those to the dispute, i.e. NGOs) could submit *amicus curiae* briefs to the AB.[902] Thus the AB had effectively reached out to NGOs inviting their participation through a detailed procedure whereby amicus submissions could be submitted for the appeal. However, this proved to be a charged decision, as upon circulation of the decision to adopt the "Additional Procedure" for the appeal, many WTO members reacted negatively to the action taken by the AB. A special meeting of the WTO General Council was requested by Egypt on behalf the Informal Group of Developing Countries to discuss the AB's adoption of the "Additional Procedure".[903]

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[901] ibid [39].

[902] Five *amicus curiae* submissions were submitted to the Panel. The AB envisioning additional submissions due to the public interest in the dispute adopted an 'Additional Procedure' for the appeal, which delineated and communicated a procedure whereby interested non-parties could submit an application to submit amicus curiae briefs. Upon review the of applications, the AB at its discretion would grant leave to submit amicus curiae briefs, in accordance with procedural requirements established by the 'Additional Procedure', which would then be circulated to all parties to the appeal, giving them an opportunity to respond to the submissions by non-parties to the dispute. Both the amicus curiae applications and accepted briefs were to be in writing, limited in pages and were to solely address legal issues and interpretations of law in the panel report. Applications were to disclose any relations with parties or third parties to the dispute, identify the nature of the interest in the appeal, state the nature and legal status of the entity, and state why it would be in the interest of the AB to consider the positions of the non-party. And it was noted that the AB would be under no obligation to address in the AB Report the legal position and arguments expressed in accepted briefs. The 'Additional Procedure' was communicated to WTO members and posted on the WTO website on 8 November 2000. For more see: WTO, *European Communities – Measurers Affecting Asbestos and Asbestos – Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R. (n 864) 18-23.

[903] The Informal Group of Developing Countries argued the AB exceeded its authority in a number of ways; 1. That by establishing a procedure to solicit submissions from parties other than those to the dispute, the AB de facto amended the DSU; 2. That while the DSU provides for a Panel to solicit information of a technical nature to aid it in understanding facts to render a fair finding, the AB is to adjudicate matters of law and legal interpretations developed in the Panel report and as AB members possess expertise in law, trade, and WTO agreements it "was therefore difficult to contemplate the need for" briefs concerning issues of law; 3. The timing was suspect, as the communication to WTO

Most WTO members felt that the AB had exceeded its authority, while the U.S. was one of the few members that supported the action undertaken by the AB.[904] Against this setting, the AB received 17 applications, six of which were submitted after the deadline (and thus rejected) and the AB, upon review of the 11 applications that were submitted on time, declined to give leave to any of the applications to submit a brief.[905]

Indeed, there is a dichotomy of views among WTO members regarding amicus submissions by non-state actors. In a June 2019 special session of the DSB to discuss proposals to reform the DSRP, members opposed to greater transparency stated that it would undermine the intergovernmental nature of the institution, overburden developing members, and further, argued that there already exists a good amount of transparency in the DSRP.[906] Members supporting greater transparency argued such would lead to enhanced legitimacy of the institution, that deficiency of transparency in WTO dispute settlement gives the public the impression that the WTO has something to hide, and further, that transparency in the WTO dispute settlement is deficient compared to other international courts.[907] The DSU has never been

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members a day before informal discussion by the GC on external relations with NGOs; 4. The AB operates within the WTO, not outside and it was up to the GC to make arrangements for consultations with NGOs, not the AB; 5. There was no agreement among WTO members regarding amicus curiae briefs and the WTO being an inter-governmental institution, the decision made by the AB encroached on WTO members' rights concerning the involvement of NGOs; 6. Fairness was given as a reason for the decision, yet nothing in the DSU rules seem unfair, necessitating the involvement of NGOs; 7. WTO members would be harmed and suffer from the involvement of non-WTO members, as such non-members as NGOs, business, and other interest groups could communicate their views on disputes, while WTO members not party to the dispute, nor third parties could not communicate their views on disputes; 8. The 'Additional Procedure' would not limit amicus curiae submissions, but would invite them and legalize them; 9. Notwithstanding the contention that the 'Additional Procedure' would apply only to the current appeal, it would nevertheless serve as precedent and impact WTO jurisprudence; 10. The beneficiaries would be from those NGOs from developed WTO members and they could actualize the 'Additional Procedure' more readily than could entities from lesser developed WTO members, which lacked the financial and technical resources to do so. For more see: WTO, General Council Minutes of Meeting held on 22 November 2000 (27 January 2001) WT/GC/M/60, [11] - [21].

[904] The U.S. argued that the AB acted appropriately and within its authority under 16(1) of the Working Procedures. For more see: ibid [57].

[905] WTO, *European Communities – Measurers Affecting Asbestos and Asbestos – Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R. (n 864) [57].

[906] WTO, Dispute Settlement Body Special Session (17 June 2019) WT/TN/DS/31, 33 at 2.96.

[907] ibid 2.97.

reformed, and *amicus* submissions continue to be a source of controversy as the WTO enters its jubilee.[908]

3.4.2. Open Panel and Appellate Body Hearings

The second aspect of external transparency in WTO dispute settlement concerns the secretive nature in oral hearings before a Panel and the AB. As discussed in section 4.3.3, oral hearings before a Panel and an AB are subject per the DSU to confidentiality, as defined in the Working Procedures of the DSRP. However, the aforementioned issue of confidentiality in Panel hearings was cast aside in 2005 when a Panel, upon a joint request by parties to the *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*[909] and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*[910] agreed to open hearings whereby members of the general public and WTO members could observe oral hearings via closed-circuit TV broadcast in the General Council room at the WTO headquarters.[911] The Panel reasoned that DSU Art. 12.1 allowed a panel to deviate from the Working Procedures upon consultation with parties to the dispute and further, that by opening oral hearings to the public, the requirement of confidentially in Article 18.2 of the DSRP, with respect to written submissions of the parties would not be breached.[912] To interpret the meaning of "panel deliberations shall be confidential", as expressed in DSRP Article 14.1, the Panel reasoned that deliberations in this sense referred to the

[908] Theresa Jeanne Squatrito, 'Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?' (2017) 17 World Trade Review 65, 68-70.
[909] WTO, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute - Report of the Panel* (31 March 2008) WT/DS320/R.
[910] WTO, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Panel* (31 March 2008) WT/DS321/R/Add2.
[911] WTO, Communication from the Chairman of the Panels, United States—Continued Suspension of Obligations in the EC-Hormones Dispute, Canada—Continued Suspension of Obligations in the EC-Hormones Dispute, (2 August 2005) WT/DS320/8, WT/DS321/8.
[912] The Panel in noting the significance of the first open hearing of a panel elaborated in great detail on their reasoning for open hearings. Key arguments in their reasoning was that all parties to the dispute requested open hearings, and thus open hearings would not breach the provisions of Article VII of the Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes, as by requesting open hearings, the parties had effectively waived their right to confidentiality. See: WTO*, United States – Continued Suspension of Obligations in the EC – Hormones Dispute - Report of the Panel* (31 March 2008) WT/DS320/R. (n 874); WTO, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Panel* (31 March 2008) WT/DS321/R/Add.2. (n 875) 141-144.

internal discussion of a Panel to reach a decision on the dispute, and not an exchange of arguments by the parties in an oral hearing before a panel.[913] The decision was not taken lightly, as several third parties to the dispute arguing against open hearings, the crux of their arguments being that the Panel had exceeded its authority.[914] However, the Panel did not open third party hearings to public observation, as there was lack of consensus among third parties to open hearings.[915]

In the appeal of the aforementioned cases, the parties requested open hearings before the AB. In their submissions, the European Communities[916] and the U.S.[917] differed in their reasoning in defining the scope of the language expressed in Article 17.10 (regarding confidentiality of the "proceedings"), yet the crux of their position was the same; what is "confidential" in Article 17.10 regarding the "proceedings" is the internal deliberations by the AB and not oral hearings before a Division or a panel.[918] In deciding on the issue of confidentiality in the appeal the AB, solicited submissions from third parties to ascertain their position (most of which, as in the panel stage, objected to open hearings) and ultimately held that the language of "proceedings" be given broad interpretation, while authorizing limited public hearings upon a joint

[913] The Panel reasoned that the context and meaning of DSU Article 14 concerns confidentiality of the Panel in its internal deliberations, while DSU Article 12 concerns the conduct of the proceedings. Thus Article 14 does not apply to hearings, and thus by opening hearings to the public does not constitute a breach of Article 14. For more see: ibid 143.

[914] Brazil argued that the decision exceeded the Panel's mandate. India noted that transparency was under discussion in a special session by the DSB and as there was no consensus on the matter of open hearings, they should remain closed, and that panels do not have the authority to modify the substantive provisions of the DSU regarding confidentiality. For more see: ibid 138-140.

[915] ibid 144.

[916] WTO, Before the Appellate Body Request for an open appellate hearing by the European Communities, United States – Continued Suspension of Obligations in the EC – Hormones Dispute and Canada – Continued Suspension of Obligations in the EC – Hormones Disput 2008 available at < https://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139526.pdf> last viewed 10 March 2020.

[917] WTO, Before the Appellate Body Opening Statement of the United States of America on the question of whether to allow observation by the public of the oral hearing, United States – Continued Suspension of obligations in the EC – Hormones Dispute, AB-2008-5, . (7 July 2008) available at: <https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/dispute_settlement/ds320/asset_upload_file46_7903.pdf> last visited 25 March 2020.

[918] WTO*, United States – Continued Suspension of Obligations in the EC – Hormones Dispute,* Report of the Appellate Body (16 October 2008) WT/DS320/AB/R, Procedural Ruling of 10 July 2008 to Allow Public Observation of the Oral Hearing, Annex IV.

request by the main parties, subject to maintaining the integrity of the adjunctive function of the AB.[919]

Following the aforementioned decisions, when both parties to a dispute have asked for an open hearing, open hearings have been granted and when third parties did not concur, the hearings were closed. Problematic however are instances where one party requested an open hearing while the other party opposed an open hearing. In such instances, panels have declined a partly open hearing, yet in *United States – Measurers Concerning the Importation, Marketing, and Sale of Tuna and Tuan Products*[920], against the objections of Mexico, the Panel allowed open hearings of the U.S., yet affirmed it was not allowing for a fully open meeting, as consensus among the parties was not present. Upon appeal, the AB did not address the issue of a partly open hearing, but added that its decision not to address the action taken by the Panel 'should not be construed as an endorsement of Panel's decision to conduct a partially open meeting'.[921]

As of June 2019, the Appellate Body has authorized open hearings in 17 cases.[922] Most open hearings have been conducted through closed circuit TV broadcast with the public viewing the proceedings in a separate room at the WTO's headquarters in Geneva. There has been no attempt to stream the hearings on the Internet; most attendees are students, academics and a few NGOs.[923] No joint request for open hearings have been denied and aside from the aforementioned U.S. Tuna case, in

[919] The AB further noted that the language in Art. 18.2 provided support that the confidentiality in Art. 17.10 was not absolute and if parties to a dispute so desired to make their statements public by means of an open hearing, DSU rules permitted it and the AB had the authority to hold open hearings. For more see: ibid; Alberto Alvarez-Jiménez, 'Public Hearings at the WTO Appellate Body: The Next Step' (2010) 59 International and Comparative Law Quarterly 1079, 1079-1081.

[920] WTO*, United States – Measurers Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, Report of the Panel (15 September 2011) WT/DS/381R.

[921] WTO*, United States – Measurers Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products, Recourse to Article 215 of the DSU by the United States and Second Recourse to Article 215 of the DSU by Mexico,* Report of the Appellate Body (14 December 2019 WT/DS/381R/AB/RW/USA, WT/DS381/AB/RW2) 111, [7.15].

[922] WTO, Analytical Index of the Working Procedures for Appellate Review – Rule 27 (2020) available at:< https://www.wto.org/english/res_e/publications_e/ai17_e/wpar_rul27_jur.pdf> last visited 12 March 2020.

[923] Graham Cook, 'Confidentiality and Transparency in the WTO's Party-Centric Dispute Settlement System' in J Huerta-Goldman and Marco Tulio Molina Tejeda (eds), *Practical Aspects of WTO Litigation* (Kluwer 2019) 11-12.

instances where there is not agreement between the parties for open hearings, open hearings have not been allowed. The issue of open proceedings, like that of amicus submissions, remains a point of disagreement among WTO members, and the U.S. continues to express disappointment in the inner workings of the WTO dispute settlement system, reaffirming its position in July of 2019 by stating that nothing in the DSRP precludes open hearings.[924]

[924] WTO, Statement by the United States on Transparency in WTO Dispute Settlement at the Meeting of the WTO Dispute Settlement Body (22 July 2019), available at <https://geneva.usmission.gov/wpcontent/uploads/sites/290/July22.DSB_.Stmt_.as_.delivered.Item_.4.

CHAPTER 4.

THE WORLD TRADE ORGANAZATION AND HUMAN RIGHTS

In this chapter I will discuss the relationship between human rights and the WTO. My analysis will expand on jurisprudence developed through WTO DSU discussed in the previous section of this chapter. The WTO does not concern itself with human rights or other issues having a non-economic nexus in disputes related to the trade of goods or services or the international protection thereof. However, there are a number of cases with issues, which are closely aligned with human rights, specifically in trade distorting measurers undertaken by WTO members to advance policy outcomes in protecting the environment, in the conservation of exhaustible natural resources and in protections for human, animal and plant life. However before overviewing WTO jurisprudence on the aforementioned issues, and the likely outcome on human rights issues, it is pertinent to discuss the concept of a "social clause" and "social dumping". This is necessary to illustrate that notwithstanding the failure of the ITO, initiatives were pursued by GATT 1947 members early on to address negative impacts of free trade. This led to a division between GATT 1947 members, largely delineated between the more economically developed states and the lesser economically developed states, a division, which continues to endure into the 21st century.

4.1. The Concept of a Social Clause

In the Uruguay round of GATT 1947 negotiations, which ultimately led to the establishment of the WTO, the U.S. and France, with tacit support from other states sought to connect trade with social justice in the WTO, which would have provided for, *inter alia*, the protection of workers' human rights.[925] However the proposed linkage was rejected, primarily by objections from developing states. The argument against the inclusion of a "social clause" which included minimum labor standards was premised upon the unequal level of economic development between the

[925] Sarah H Cleveland, 'Human Rights Sanctions and the WTO' in Francesco Francioni (ed), *Environment, Human Rights and Free Trade* (Hart Publishing 2001), 199-202.

"developed states" and that of the "developing states" with developing states arguing their level of economic development was not at that of developed states, and that one of their key competitive advantages was in labor, and that to condition membership in the negotiated institution to be predicated upon labor standards amounted to neo-colonialism. While discussion of the inclusion of a "social clause" premised market access based upon labor conditions persisted, it was never actualized.[926] Nonetheless, history has shown that economic globalization, coupled with the erosion of capital controls, tends to facilitate a capital intensive environment, marked by TNCs investing capital inwardly in other states by purchasing existing factories or establishing novel manufacturing centers, leading to increased competition, resulting in negative economic and social impacts.[927] Further, this trend of TNCs to relocate high labor intensive manufacturing operations offshore, to developing countries in south-east Asia such as India, Vietnam, Bangladesh and also to Eastern Europe, a practice which frequently results in workers in the home country being made redundant, resulting in negative social impacts in the home country of TNCs.[928] While this is certainly an economic benefit to TNCs, resulting in lower costs associated with labor, operations, transportation, and easier access to resources, this practice results in a negative externality, that of a 'leaky economic environment'[929] which necessitates international regulation to address the negative impacts resulting from offshoring manufacturing. Acknowledgment of the aforementioned resulted in discussions on a proposed "social charter" to be included in the WTO to address these problematic issues, which resulted a dichotomy between the developed and developing states on

[926] Patricia Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights : A Proposal for Addition to the World Trade Organization' (1996) 11 American University International Law Review 1, 36.

[927] Haoqian Chen, 'Social Clause in Trade Agreements and China's Experience' (2015) 06 Beijing Law Review 1, 1-2.

[928] As noted by Bob Hepple, as transnational corporations offshore their manufacturing leads to unemployment in EU states and in the U.S. as both high and low skilled workers are offshored to countries where unions are not active, resulting in social problems in both the home and host countries, a phenomenon characterized as "social dumping". For more see: Bob Hepple, *Labour Laws and Global Trade* (Hart Publishing 2005) 6-9.

[929] Three types of leakiness environments are identified by Thomas Palley: macroeconomic leakiness; microeconomic leakiness; and financial leakiness. This results in policymakers pursuing policy suited to business and financial interests-often to the determent of social policy and protections. For more see: Thomas I Palley, 'The Economic Case for International Labour Standards' (2004) 28 Cambridge Journal of Economics 21, 25-27.

controversial issues such as protectionism and differing levels of economic development.[930]

As discussed earlier in this chapter, worker rights were envisioned in the proposed ITO. Further, recall the issues of transparency and openness in the WTO as discussed in the previous section, which were envisioned in the ITO through the participation of NGOs in policy formulation. While the ITO did not become an institution, throughout the operational period of GATT 1947, the U.S., supported at times by other member states, proposed the inclusion a "social clause" in the form of harmonized labor standards during various rounds of negotiations that refined GATT 1947 over the course of its life.

4.1.1. Social Clause Deliberations under GATT 1947

The first proposal to add a social clause was in 1953 when the U.S. sought to address differing labor standards among GATT 1947 contracting parties through the inclusion of a rule 'stating that unfair labor standards, particularly in production for export, "create difficulties in international trade which nullify or impair benefits under this Agreement".'[931] The proposal was not adopted due to disagreements over what constituted unfair labor standards.[932]

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[930] The question of linkage of international trade and labor standards can be traced to the development of labor standards, recognizing that differing labor standards amounted to a competitive advantage. As noted in proceeding chapter of this work, the internationalization of labor law was driven by the desire to harmonize labor standards, resulting in the establishment of the ILO in the aftermath of WWI, with the goal to actualize the "workers magna carta". Differing levels of economic development between states resulted in differing views on harmonized labor standards, with lesser developed states stanchly opposed to harmonized labor standards resulting in fewer ILO Conventions and recommendations being adopted, whereas more developed states frequently adopted the ILO Conventions and recommendations, and deepening economic integration at the European level, resulted in the inclusion of a "social clause" in the treaty establishing the European Coal and Steel Community and social policy clauses in later treaties, geared towards inter alia harmonization of labor standards. This results in the so called "North-South" divide on harmonized labor standards, with developing states viewing harmonized labor standards as a "western Trojan horse" which would undermine their economic development, while the U.S. and some European states which sought to implement harmonized labor standards via the WTO viewed it as a means to raise standards worldwide. For more see: JM Servais, 'The Social Clause in Trade Agreements: Wishful Thinking or an Insrument of Social Progress?' (1989) 128 International Labour Review 423, 423-426; Javed Maswood, *International Political Economy and Globalization* (World Scientific Publishing Co Pte Ltd 2000) 269-274.

[931] Steve Charnovitz quoting from the U.S. Commission on Foreign Economic Policy: Staff papers, February 1954, 437. The proposal defined unfair standards as 'maintenance of labour conditions below

A second attempt was initiated by the U.S. in 1974 through the Trade Act of 1974, in with the U.S. Congress outlined as a goal in the Tokyo Round of GATT 1947 negotiations to press for the adoption of an international fair labor standards code and with it, the means of enforcement.[933] Sweden pressed for the inclusion of a "social clause" whereby GATT 1947 contracting parties could 'protect their workers against imports from countries with substandard labor conditions.'[934] These efforts however were not successful.[935]

In 1979, the U.S. recommended minimum labor standards related to occupational safety and health in following up on recommendations of the International Confederation of Trade Unions to expand GATT 1947 Articles XIX and XX to enable the possibility of limiting imports of goods produced in conditions detrimental to workers lives.[936] Norway was the only Contracting Party to support the U.S. proposal for 'a minimum labour standard for GATT that was directed at "certain working conditions that are dangerous to life and health at any level of development.",[937] During the Uruguay round of GATT 1947 negotiations, the issue of workers' rights and international labor standards was paramount, with the initiative being led by the U.S., leading to the request for a working group to be established to link international trade with international labor standards.[938] While the U.S. had support from the EU, other European states, Japan, Canada New Zealand and developing states were against the initiative and it was not successful.[939]

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those which the productivity of the industry and the economy at large would justify'. For more see: Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime - A Historical Overview' (1987) 126 International Labour Review 565, 574-575.

[932] Wolfgang Plasa, *Reconciling International Trade and Labor Protection: Why We Need to Bridge the Gap between ILO Standards and WTO Rules* (Lexington Books 2015) 21.

[933] Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime - A Historical Overview' (n 931) 575; Plasa (n 932) 21-22.

[934] Plasa (n 932) ibid.

[935] ibid 22.

[936] Charnovitz (n 931) 572.

[937] ibid.

[938] Plasa (n 932) 22.

[939] The U.S. was rebuffed by developing states in discussing labor standards during the Uruguay negotiations and in establishing a working group on the issue. For more see: Hepple (n 928) 130; Plasa (n 932) ibid.

4.1.2. Social Clause Deliberations in the WTO

During the Marrakech Conference finalizing what would become the WTO, the inclusion of a "social clause" which would include labor standards, was placed on the agenda for discussion, but the divisions among states remained, leading to only a reference of the need to continue to work on settling the issue in later ministerial meetings.[940] Thus, the WTO was established without reference to a "social clause" encompassing labor standards, largely due to divisions between and within the developed and least developed states. This was a missed opportunity to revert to the visions and goals of the ITO and of the ILO, not to treat labor as a commodity in the creation of an institution to govern world trade, predicated on principles of inclusiveness, transparency and worker rights.

Soon after the establishment of the WTO, the issue of labor standards was raised again by developed states at the 1996 Singapore Ministerial Meeting[941] and again, soundly rebuffed by developing states.[942] As discussed earlier in this work, and widely noted by scholars, the effort while unsuccessful, nonetheless resulted in the WTO acknowledging in the Singapore Ministerial Declaration[943] a commitment to advancing and observing core labor standards through free trade, while delineating the responsibility of formulating labor standards to the ILO, and rejecting the use of labor standards as a means of protectionism, through the affirmation of differing labor standards among states as legitimate competitive advantage in trade.[944]

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[940] Plasa (n 932) 22.

[941] Canada, the EU, Japan and the U.S. sought to place labor standards on the agenda. For more see: ibid.

[942] Joseph (n 883) 132; Plasa (n 932) 22.

[943] WTO 'Ministerial Singapore Declaration' 13 December 1996 (WT/MIN MIN) (96)/DEC/18.

[944] The mere mention of labor standards in the declaration is widely acknowledged by scholars as officially linking labor standards and trade by the WTO (Plasa and Hepple for example). Sarah Joseph noted that despite the failure to consider a social clause encompassing labor standards, the delineation between the WTO and the ILO regarding labor standards and trade and the ineffectiveness of the ILO in 'enforcing labor rights necessitates pursuing 'explicit linkage of trade and labour within the WTO framework.' Hernández-Truyol, Berta Esperanza, and Stephen Joseph Powell note the contradiction in the ILO's Declaration on Fundamental Rights and Principles at Work, which obligates ILO members to adhere to the underlying conventions, notwithstanding the status of ratification and the statement in the WTO Singapore Declaration, which affirms the competitive advantage of developing countries with differing labor standards and rejects using labor standards as a means of protectionism, the dichotomy being that participation in free trade for some states 'relies on not fully granting these rights to their

Former U.S. President William J. Clinton, in his opening statement at the second WTO Ministerial Meeting in Geneva in 1998, recalled the vision of U.S. President Franklin D. Roosevelt as expressed in his "Four Freedoms", the achievements in the aftermath of WWII with the creation of the IMF, the World Bank and GATT 1947. He looked to the challenges facing the global community in the next century and outlined six points to build upon for trade in the 21st century to 'create a world trading system attuned to the peace and scope of the new global economy, one that offers opportunity to all our people…to build a modern WTO ready for the 21st Century.'[945] Clinton's seven points were:

> First, we must pursue an ever-more-open global trading system….Second, we must recognize that in the new economy, the way we conduct trade affects the lives and livelihoods, the health and the safety of families around the world….Third, we must do more to harmonize our goal of increasing trade with our goal of improving the environment and working conditions….Fourth, we must modernize the WTO by opening its doors to the scrutiny and participation of the public….Fifth, we must have a trading system that taps the full potential of the Information Age….Sixth, a trading system for the 21st Century must be comprised of governments that are open, honest, and fair in their practices...Finally, we must develop an open global trading system that moves as fast as the marketplace.[946]

In expanding on the above points, President Clinton noted that 'Globalization is not a policy choice – it is a fact'[947] and the challenge is to level up, not down when it comes to regulations on the environment and labor standards.[948] President Clinton noted that the WTO should be open to discussions with the peoples of the world in policy formulation and should embrace transparency and inclusiveness in its meetings and deliberations, reflecting on past experiences and observations that 'governments work

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citizens.' For more see: Hepple (n 928) 130; Esperanza Hernandez-Truyol and Powell (n 27) 138-140; Joseph (n 883) 132; Plasa (n 932) 23.

[945] President Clinton noted President Roosevelt's vision of a world of permanent peace, recognizing a decent standard of living for all being essential to attaining world peace; invoking Roosevelt's words "'Freedom from Fear' is eternally linked with 'freedom from want'". For more see: 'William J. Clinton, "United States Statement" (Second WTO Ministerial Conference, Geneva, 18 May 1998) <https://Www.Wto.Org/English/Thewto_e/Minist_e/Min98_e/Anniv_e/Clinton_e.Htm> Accessed 10 September 2020'.

[946] ibid.

[947] ibid [12].

[948] Noting the need to avoid a global race to the bottom, which would lower rather than raise living standards for people, the challenge is to level up on standards so as to gain the confidence and trust of people in the world's trading system. For more see: ibid [14].

best when their operations are open to those who are affected by their actions.'[949] And significantly for my thesis, President Clinton acknowledged that states are sovereign and free to set regulations on environmental protections and regulations on safe and healthy working conditions for workers 'stronger than international norms'[950] while calling for the ILO and the WTO to work together to ensure that '*open trade lifts living conditions, and respects the core labour standards that are essential not only to workers* [sic] *rights, but to human rights everywhere.*'[951] The vision outlined by President Clinton for the WTO was a throwback to the social protections, inclusion, transparency and participation by all stakeholders as envisioned in the ITO and significantly delineated core workers' rights as human rights, and noted they are applicable everywhere. Further, President Clinton proclaimed the necessity for the WTO to 'provide a forum where business, labour, environmental and consumer groups can speak out and help guide the further evolution of the WTO.'[952] While the EU supported the establishment of the aforementioned forum, there was little support among other WTO members and consequently, the proposal failed.[953] President Clinton's vision was progressive and forward looking, and failure to actualize it was a missed opportunity that contributed to the problems of today.

Beaten, though still with life, the issue of a "social clause" in the WTO would be raised once again before the end of the 20th century at the contentious 1999 Seattle Ministerial Meeting.[954] President Bill Clinton expanded on his earlier vision of a joint working group between the ILO and the WTO to tackle the issue of labor and trade, yet in the months leading up to the third WTO Ministerial Meeting President Clinton 'went further and suggested that the United States might impose sanctions against

[949] The need to listen to people of the world is essential in gaining their trust and through participation of all stakeholders in the institution is essential for it to be successful. Transparency in the sense of open hearings for the public and access to briefs submitted in DSU proceedings. For more see ibid [15] [21] [22] [23].
[950] ibid [17].
[951] President Clinton called for institutional corporation between the ILO and the WTO in core worker rights, as envisioned by the not yet adopted ILO Declaration on Fundamental Principles and Rights at work. For more see: ibid [18].
[952] ibid [15].
[953] Plasa (n 932).
[954] Characterized by Plasa as 'perhaps the most divisive issue' the U.S., with support from Canada proposed a working group on trade and labor while the EU 'proposed a ILO/WTO Standing Working Forum.' For more see: Hepple (n 928) 130; Plasa (n 932) 23-24.

countries that violated core labor standards.'[955] As noted by Clyde Summers and characterized at the time as the "Battle of Seattle" by the media, some 30,000 to 40,000 anti-globalist, environmental, human rights, and labor activists blocked WTO member delegates from entry into the meeting hall and continued to protest for days, the crux of their activism being 'that the WTO, in developing its rules and procedures for promoting free trade, had not given adequate, or any, consideration to labor rights, environmental problems, or human rights.'[956] Summers goes onto to note that ILO core labor rights are human rights, belonging to individuals not premised on their status as workers, but as human beings and through the inclusion of a "social clause" whereby punitive action could be taken against goods produced in breach of human rights is social rather than economic regulation, yet economic regulation would be the means utilized to protect human rights.[957] Yet as with previous efforts, resistance against a "social clause" hardened among developing states and the third WTO Ministerial meeting would come of an end with no consensus among WTO members on the question of a "social clause" in the WTO.[958]

With the turn of the millennium, the issue of a "social clause" having been soundly defeated along the lines of the so called "North-South Divide" – a division between the economically developed states and the economically least developed or developing states.[959] The question of the inclusion of labor standards in the WTO, either in the form of a "social clause" or in alternative means, would be raised again in subsequent WTO Ministerial Meetings in the 21st century, yet with the same outcome on each occasion.[960] WTO member proposals for a social clause has since weaned in WTO Ministerial Meetings in the 21st century, with later initiatives on core labor standards directed at individual WTO members, undertaken by labor

[955] Drusilla K Brown, 'International Labor Standards in the World Trade Organization and the International Labor Organization' (2000) 82 Federal Reserve Bank of St. Louis Review 105 <https://doi.org/10.20955/r.82>, 105.
[956] Clyde Summers, 'The Battle in Seattle: Free Trade, Labor Rights, and Societal Values' (2001) 22 University of Pennsylvania Journal of International Economic Law 61, 61.
[957] ibid 65-68.
[958] Plasa (n 932) 22.
[959] Maswood (n 930) 271.
[960] The U.S. would again raise the issue of labor standards at the Doha (2001) and Cancun (2003) WTO Ministerial Meetings to no avail, and while expanding Article XX general exceptions to include labor conditions is viewed as an alternative method to capture regulatory compliance within the WTO, it has yet to be proposed. For more see: Hepple (n 928) 130; Joseph (n 883) 271; Plasa (n 932) 24.

organizations and other NGOs via submissions to WTO bodies.[961] Still, there exist compelling arguments for a social clause, which I will turn to in the conclusion of this work.

4.2. Exceptions to WTO Agreements

Connected to free trade are issues, which indeed have a negative societal impact beyond labor standards, issues such as environmental protection, distributive justice, and human rights. While numerous scholars argue for the need to reform the WTO to address the aforementioned issues, recall from the previous section, the mere inclusion of a "social charter" encompassing labor standards results in a division among WTO members, leading to lack of consensus, resulting in a stalemate within the institution. Thus, advancing the above-mentioned issues would likely result in the same fate – a division among WTO members – as has been illustrated in discussing linking labor standards and trade.

Notwithstanding the difficulty and calls for a linkage between trade and human rights within the WTO, there are, however, provisions in the WTO Agreements, which could be relied upon by a WTO member, theoretically, as a means of protecting human rights, and arguably, to incentivize other states to protect human rights by applying these provisions in an outward manner. The provisions I will focus on in this part are the exceptions Articles to GATT 1994. It will be shown that Article XXI has been utilized under GATT 1947 in an outward manner for the purpose of protecting human rights. While Article XX may seem promising exception to rely on for a PPM designed to protect human rights, if past WTO jurisprudence upon reliance of a section of Article XX is any indicator of the external application of a policy measure, say, a WTO member's measure to protect human rights, it would most probably fail. Should that be the case? I think not.

[961] For example: 'Internationally Recognised Core Labour Standards in Hong Kong, Report for the WTO General Council Review of Trade Policies of Hong Kong' (International Trade Union Confederation 2006).

To make my case, I shall first discuss the aforementioned WTO Articles. I shall then discuss their interpretation as developed through WTO jurisprudence developed in DSU proceedings. I will then discuss the likelihood in reliance on the exceptions articles as a means to compel states to protect human rights.

4.2.1. Article XX

While the goal of the WTO is to eliminate trade barriers in pursuit of free trade, Article XX, General Exceptions, permits WTO members to deviate from GATT 1994 commitments in pursuit of domestic policy objectives so long as doing so does not amount to protectionism and that the measure is applied equally among WTO members. The chapeau to Article XX can be seen as providing prerequisite conditions, which a WTO member must adhere to if invoking one of the ten general exceptions. It provides that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:[962]

Article XX then goes on to list ten areas (a-j) in which a WTO member may formulate policy inconsistent with its WTO obligations, thus serving to nullify and impair benefits to other WTO members. It is my contention that four of the ten *could be* relied upon to impose trade restrictions based on human rights grounds. Those four areas are:

> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> (e) relating to the products of prison labour;
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;[963]

[962] WTO, 'General Agreement on Tariffs and Trade' (GATT 1994), Marrakesh Agreement Establishing the World Trade Organization Annex 1A, (15 April 1994) 1867 UNTS 187, art XX.
[963] ibid.

While GATT 1994 Article XX general exceptions article applies to trade in goods, Article 14 of GATS provides for general exceptions in trade in services[964] and Article 27.2 of the TRIPS provides for general exceptions in granting of patents[965]. Article XX was envisioned to be a part of the ITO.[966] The Chapeau of Article XX can be traced to proposals by the UK delegation at the 1946 London Conference of the Preparatory Committee for the ITO.[967] The general exceptions were enumerated in Article XX were negotiated and refined in the subsequent conferences of the aforementioned committee and finalized at the 1947 Geneva Conference.[968] The text of Article XX was unchanged in GATT 1994, though a body of WTO jurisprudence centered upon Article XX disputes before the establishment of the WTO.

In surveying the literature analyzing the jurisprudence of the WTO in Article XX, I find it has frequently been relied upon by states in pursuit of policy objectives, as a mechanism to deviate from its WTO obligations, thus impacting trade between other members.[969] Under GATT 1947 there were instances when a dispute arose to the level in which a panel was established. With the establishment of the WTO, the use of Article XX has frequently been relied upon as a defense to policy measurers, which distorted trade with other members. The policy measure may impact both imported and exported goods, thus resulting in extraterritorial application of domestic regulations, frequently on measurers deemed to be part of the production processes and methods (hereinafter PPMs) used in the production of goods, frequently, resulting in negative impacts to the environment and to the health of human beings.[970]

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[964] WTO, 'General Agreement on Trade in Services' (GATS), Marrakesh Agreement Establishing the World Trade Organization Annex 1A, (15 April 1994) 1869 UNTS 183.
[965] General Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 299.
[966] Brandon L Brown, 'The World Trade Organazation and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, In Light of Recent Developments' (2001) 29 Georgia Journal of International and Comparative Law 181, 183-184.
[967] Douglas A Irwin, Petros C Mavroids and Alan O Sykes, *The Genesis of the GATT* (Cambridge University Press 2008), .
[968] Subsequent meetings of the Preparatory Committee for the ITO charged with negotiating the GATT took place in New York, Geneva and Havana. The 1927 International Convention for The Abolition of Import and Export Restrictions heavily influenced what would become the list of general exceptions. For more see: ibid 119-120, 162-164.
[969] Rachel Harris and Gillian Moon, 'GATT Article XX and Human Rights: What Do We Know from the First 20 Years?' (2015) 16 Melboure Journal of Itnernational Law 1.
[970] Robert Read, 'Process and Production Methods and the Regulation of International Trade' in Nicholas Perdikis and Robert Read (eds), *The WTO and the Regulation of International Trade: Recent*

For example, if a WTO member were to formulate policy designed to protect human rights, by increasing tariffs on a class of goods imported from states, in which it can be shown that forced labor was used to assemble the goods, labor would not a feature of the good, in establishing likeness for example, but could be deemed to be a PPMs.[971] A general exception of Article XX could be invoked as a defense to any dispute which may arise over such measure. Rachel Harris and Gillian Moon opine that based on past WTO jurisprudence on Article XX and human rights, sections (a) (b) and (d) of Article XX could be invoked as a defense to trade distorting policy measurers enacted to protect human rights.[972] In my example, section (e) could be relied upon based on human rights, if it could be demonstrated that overly oppressive labor conditions constituted prison labor. Like the ill-fated "social clause" discussed earlier, PPMs create divisions among WTO members, which developing states opposed to PPMs for the same reasons as their opposition to the previously discussed "social clause".

Jurisprudence of the WTO has developed a two-tier test to determine of the measure is justifiable. First, the measure must fit into one of the Article XX general exceptions. That is to say the policy measure must fit into one of the ten general exceptions to the article. If the measure is deemed to fit, it must meet the requirements of the chapeau, which acts as a way to assess the measure. Much has been written about the application of Article XX and the use of the two-tier test.[973] In most

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Trade Disputes Between the European Union & the United States (Edward Elgar Publishing 2005), 239-240.

[971] As discussed earlier in this dissertation, and noted by Robert Read, while labor standards are not a part of the WTO rules, consumers are the driving force for the consideration of PPM in products, and it could be asserted that consumers in the state with the trade distorting policy premised on oppressive working conditions constituting forced labor become a PPM of the goods produced, with its nationals was found to be against public morals (a) or arguably constitute products produced by slave labor (e). For more see ibid 241, 243.

[972] Rachel Harris and Gillian Moon, 'GATT Article XX and Human Rights: What Do We Know from the First 20 Years?' (2015) 16 Melboure Journal of Itnernational Law 1, 22.

[973] *See Generally:* Rodoljub Etinski, 'A Critical Review of Interpretation of Articles III and XX of the GATT 1994' (2018) 52 Zbornik radova Pravnog fakulteta, Novi Sad 819; Misha Boutilier, 'From Seal Welfare To Human Rights: Can Unilateral Sanctions in Response To Mass Atrocity Crimes Be Justified Under the Article Xx(a) Public Morals Exception Clause?' (2017) 75 University of Toronto Faculty of Law Review 101; Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 American Journal of International Law 95; Brown, 'The World Trade Organazation and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, In Light of Recent Developments' (n 966).

instances, measurers are deemed not to be justified, as even if the measure fits into one of the general exceptions, when conducting the second part of the test, the application of the chapeau, the measure will likely fail. The language of the chapeau is clear; PPMs and other exceptions are permitted so long as they:

> are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.[974]

Much discussion throughout the lifetime of the WTO centers on the possibility to use Article XX exceptions for human rights measurers. The public morals argument has been touted as perhaps the most possible area for a WTO member to rely on an exception for a human right centered policy measure, which impacts trade with other members, yet problematic is the subjectivity of the meaning of public morals. In a recent case, in which the U.S. relied on the public morals as an exception in defense of tariffs against China, the panel, drawing on past WTO jurisprudence in its consideration of the U.S. argument, applied a three-part test to access public morals:

> Determine whether the claimed policy is a 'public morals' objective within the meaning of Article XX (a)…whether the measure is 'designed' to protect that public morals objective…whether the measure is "necessary" to the protection of public morals, which envisages a process of "weighing and balancing" of a series of factors and, in most cases, a comparison between the challenged measure and reasonably available WTO-consistent alternative[975]

The U.S. argued that the tariffs were added to goods as a response to violations of right and right, the measurers being necessary 'to "'obtain the elimination' of conduct that violates U.S. standards of rights and wrong… in particular the prohibition of theft, extortion, cyber-enabled theft and cyber-hacking, economic espionage and the misappropriation of trade secrets, anti-competitive behavior.'[976] The panel however, rejected the argument of the U.S., holding that the U.S. failed to demonstrate the need of the measure to protect the public morals, nor how the measures effectively

[974] WTO, 'General Agreement on Tariffs and Trade' (GATT 1994), Marrakesh Agreement Establishing the World Trade Organization Annex 1A, (15 April 1994) 1867 UNTS 187, art.XX chapeau.
[975] WTO, *US – Tariff Measures on Certain Goods from China* – Report of the Panel (15 September 2020) WT/DS543/R, [7.110].
[976] ibid [7.113].

achieved the aim sought-the protection of public morals, and thus by the failure to do so, the use of an Article XX general exception could not be justified.[977]

Rachel Harris and Gillian Moon analyze the possibility of using an Article XX exception for human rights and find that over the first 20 years of the WTO, past jurisprudence has shown the panel and AB willing to read the terms of Article XX broadly.[978] They find the willingness to interpret the WTO Agreements, including DSRP in a manner in a manner that reflects societal values, thus capable of evolving[979]. However, when considering the trade distorting impact of the measure, jurisprudence has developed around a weighing and balancing test, to see what the impact of the measure is, and if there was a lesser trade distorting measure which could be relied upon for the desired outcome.[980]

Harris and Moon explored the possibilities of a measure targeting fundamental labor rights to determine how, based on past jurisprudence, how a panel would determine if the measure was justified. The hypothetical envisioned was directed outwardly, so goods made in states not observing fundamental labor rights would be targeted with increased tariffs, making the goods more expensive, so as to incentivize states to observe fundamental labor rights.[981] Not a bad idea if I must say so. First, the measure was analyzed with the exception (a), necessary to protect public morals. Human rights could, based protecting public morality could have some success, due to past broad approach given in interpretation however, it would be difficult to pass the weight and balance test, and the necessary test.[982] Turning to apply the measure outwardly, and ascertain it with the Article XX test, the policy objective of the measure – to incentivize other states to comply with FLRs, if accepted that not complying with FLRs was immoral, and then what other alternative could be offered to achieve the same result, and as it would be difficult to use an alternative policy, the test turns then

[977] ibid [7.236,] [7.238] [7.241] [7.242].
[978] Harris and Moon (n 972) 21-22.
[979] WTO, 'General Agreement on Tariffs and Trade' (GATT 1994), Marrakesh Agreement Establishing the World Trade Organization Annex 1A, (15 April 1994) 1867 UNTS 187.
[980] The burden of proof rests with the respondent, who must pass the test, by demonstrating that the measure is one which fits within the general exceptions, and must pass the chapeau test, and then, the complainant member must prove that an alternative, less trade distorting method exists, which should be used. For more see: Harris and Moon (n 972) 24-26.
[981] ibid 29-34.
[982] ibid 36-37.

to the chapeau, which, given that the measure was applied equally, that is to all WTO members that did not comply with FLRs, then it would not be deemed to be a means of protectionism, which in theory is promising.[983]

4.2.2. Article XXI

A WTO member may rely on Article XXI in deviating from its GATT 1994 commitments in the enactment of measurers deemed necessary for its national security interests. In contrast to Article XX General Exceptions, Article XXI Security Exceptions a is more straight forward approach, in the sense that it does not have prerequisite conditions for a measure to be qualified, as was the instance in Article XX. Article XXI provides that:

> Nothing in this Agreement shall be construed
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
> (i) relating to fissionable materials or the materials from which they are derived;
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> (iii) taken in time of war or other emergency in international relations; or
> I to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[984]

Article XXI is almost identical to Article 99 in the ill-fated ITO and was included at the instance of the U.S.[985] It defers to WTO members to decide themselves when to invoke the security clause, thus it has been described by Roger Alford as 'a self-judging provision'[986] Alford goes on to note how for over sixty years, the security clause has been sparingly challenged, and never before with a binding decision, due to

[983] ibid 37-38.
[984] ibid art XXI.
[985] Michael Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 Michigan Journal of International Law 558, 568.
[986] Roger P Alford, 'The Self-Judging WTO Security Exception' [2011] Utah Law Review 697, 698, 757-758.

it being used rarely.[987] Invoking Article XXI for human rights could be envisioned if it were widely accepted that human rights violations constitute an "emergency in international relations" as defined in Article XXI (b) iii.[988] Further, as Article XXI (c) explicitly mentions actions taken by a state in order to compliance with decisions of the UN, then UN resolutions linked to human rights would allow a WTO member to deviate from its GATT 1994 obligations.[989] The Trump administration relied on Article XXI when challenged for increasing tariffs on goods steel and aluminum, arguing provisions of U.S. domestic law declared the aforementioned classes of goods as vital for U.S. security interests, justifying increasing import tariffs.[990] Other WTO members have relied in recent years on Article XXI for questionable ends.[991] Increased reliance on Article XXI has contributed to recent dialog about the need to reform the WTO.[992] While clarification on the interpretation of Article XXI would be welcome, it would in my view be difficult to expand the scope of Article XXI to encompass workers' human rights. Indeed, invoking security exemptions is limited on human rights grounds to prohibitions or quantitate restrictions on goods whose import or export may be used to facilitate and or finance terrorism or armed conflict in the instance of an internal armed conflict in a state torn in civil unrest.

[987] The first discussions about Article XXI was in 1949 over a dispute between the U.S. and Czechoslovakia regarding disbursement of Marshall plan funds, which however did not lead to the establishment of a panel. For more see: ibid 699, 709-710.
[988] Buhm-Suk Baek, 'Economic Sanctions Against Human Rights Violations', *Cornell Law School Inter-University Graduate Student Conference Papers. Paper 11.* (2008) 76-78.
[989] Sanctions are not imposed by the WTO, but Article XXI gives WTO members the legal means to introduce sanctions on goods as authorized by the UN. For more see: Ilaria Anna Colussi, 'International Trade Sanctions Related to Dual-Use Goods and Technologies' (2016) 2 Athens Journal of Law 237, 238, 241-242.
[990] The increased tariffs imposed by the U.S. on steel and aluminum were imposed under section 232 'Safeguarding national security' of the Trade Expansion Act of 1962, which exempted four WTO members from the tariffs. When challenged on the measure, the U.S. responded the measurers were not safeguarding, as subject to the WTO Agreement on Safeguarding, but were justified by Article XXI. For more see: Tania Voon, 'The Security Exception in WTO Law: Entering a New Era' (2019) 113 AJIL Unbound 45, 47-49; Brandon J Murrill, 'The "National Security Exception" and the World Trade Organization' (2018), 1.
[991] ibid 46.
[992] ibid 49.

4.3. Expanding WTO Exceptions

As discussed earlier in this chapter, the U.S. has sought repeatedly to include a "social clause" in the GATT 1947 and the WTO. Further, noting that the U.S. has long advocated for workers' rights throughout the world, Carol Pier and Elizabeth Drake argue the U.S. should take the initiative in through bold policy measures designed to incentivize oppressive regimes in a positive manner or through a penalties manner as a means to 'change the behavior of those nations that simply lack the political will to respect workers' rights or that tolerate their violation in an attempt to win the proverbial "race to the bottom."'[993] They go on to note problems in the U.S., with respect to workers' rights that should be addressed as well, such as the weakness in the NLRA for workers to organize due to the freedom of employers to mandate attendance at meetings where anti-union messages are conveyed, which serves to intimidate workers from voting in favor of unionizing the workplace.[994]

Pier and Drake go on to state that while the U.S. should endeavor to comply with international law with respect to workers' rights, that to address deficiencies in workers' rights internationally, the most promising measure is through linking worker rights with trade through amending the WTO agreement to expand Article XX to allow states to invoke the general exceptions if a state repeatedly violates ILO fundamental rights, (those core conventions that encompass the fundamental rights) and increasing tariffs or imposing a quota or other measures to incentivize the offending state to comply with ILO fundamental rights.[995] Expanding the list of general exceptions, the authors argue, would indeed be a good fit with the existing general exceptions.

Further, a more radical approach would be to create a new WTO agreement on workers' rights, similar to the TRIPS and TRIMS agreements, which would define the

[993] Carol Pier and Elizabeth Drake, 'Prioritizing Workers' Rights in a Global Economy' in William F Schulz (ed), *The Future of Human Rights : U.S. Policy for a New Era* (University of Pennsylvania Press 2008) 157.
[994] Many workers fall outside of the NLRA due to classification of low-level workers as supervisors though they actually have minimal supervisory authority and still, that other workers such as agricultural and domestic workers also fall outside of the NLRA, which is a violation of international law. For more see: ibid 158.
[995] ibid 162.

ILO fundamental rights as those which all members are obliged to respect and enforce. This would then obligate all members to abide by the ILO fundamental rights. This would be more authentic than *ad hoc* proceedings initiated if expanding article XX to include worker rights.[996] The authors note that political will must be present to move forward with such initiatives and inter-institutional cooperation between the ILO and WTO would go a long way to advancing the aforementioned initiatives.[997]

4.4. The World Trade Organization at its Silver Jubilee

As the WTO enters its 25th year, the world has changed significantly in terms of economic globalization from the inception of the WTO in 1994. Membership in the WTO at the end of 1995 stood at 112 states[998] while in 2020 membership in the WTO stands at 164 states, with 22 states seeking to join the WTO.[999] Seemingly, states recognize the importance of a multilateral trading system premised upon enforceable rules rather than politics and have thus sought membership into the WTO as a means of accessing the world's markets.[1000]

Compared to other international organizations, one of the shining achievements of the WTO is its DSU, in which WTO members are compelled to participate in dispute settlement proceedings and abide by decisions rendered; indeed, the DSU is the teeth

[996] The authors argue that few states would initiate proceedings through an expanded art XX while the addition of a separate agreement would enjoy broader compliance. For more see: ibid 163.
[997] The authors note that confiding norm interpretation to the ILO for violations of worker rights and leaving it up to the WTO to determine the level of retaliatory measures as one way of inter-institutional cooperation. For more see: ibid 163-164.
[998] WTO, News 'Overview of developments in International Trade and the Trading System' (1 December 1995) WT/TPR/OV/1, <https://www.wto.org/english/news_e/pres95_e/ov11.htm> accessed 25 July 2020.
[999] The European Union is a member of the WTO as are its member states. For more see: WTO, *Annual Report 2020* (2020) page 184 <https://www.wto.org/english/res_e/publications_e/anrep20_e.htm> accessed October 2020.
[1000] However, some scholars argue that states feel compelled to become members of the WTO, which thus equates to bargaining among unequal members, as competition defines the multilateral trading system, pitting developed states against least developed states, which are often impacted negatively by a past marked by colonialism and authoritative regimes. For more see: Janet Dine, *Companies, International Trade and Human Rights* (1st edn, Cambridge University Press 2005) 126-127; Wilkinson (n 763) 46-66.

of the WTO, serving as a means to make the rules matter.[1001] Arie Reich notes that dispute settlement in the WTO far outpaces other international courts and while the system is certainly not without its faults, the fact that it is used so frequently reflects the fact that WTO members have confidence in it.[1002] Reich further noted the most active users of DSU were members with the largest economies; the U.S. and the EU.[1003] The study went on to note the least active users of DSU are the least developed countries, which according to the study comprise 22% of WTO members, yet those members, almost a quarter of WTO members, account for only 0.17% of requests for consultations, and zero requests for panels.[1004]

This data further supports the position argued by many scholars that the WTO, while being an organization predicated on discrimination, as expressed by the principles of MFN and national treatment, is actually oriented to the developed economic powerhouses largely due to their ability to set the agenda and maintain representation in Geneva.[1005] It is costly to initiate DSU proceedings, and while the WTO does have provisions in place to support least developed members in DSU proceedings, this support is limited, especially when considering the complexity of trade law and the need for detailed expert analysis to argue successfully in DSU proceedings.[1006]

[1001] Unlike the International Court of Justice, the WTO's DSU mandates compulsory participation by its members in panel proceedings. For more see: Steve Charnovitz, 'The World Trade Organization in 2020' (2005) 1 Journal of International Law & International Relations 167, 172.

[1002] Professor Reich writing in 2017 places the number of cases brought before the WTO DSU at almost 600, while noting that the International Criminal Court has dealt with 23 cases and the International Tribunal for the Law of the Sea has dealt with 25 cases. He further notes that only cases before international investment arbitration are more than WTO dispute proceedings, yet those are fragmented, in that they are not institutionalized. For more see: Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' [2017] EUI Department of Law Research Paper No. 2017/11 <https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1> accessed 15 February 2020, page 1.

[1003] ibid 5.

[1004] ibid 7.

[1005] Wilkinson characterizes the advantage enjoyed by the industrialized members as the 'Geneva Advantage' due to their ability to maintain dedicated WTO representatives and support staff permanently in Geneva. He notes that only 34 WTO members have dedicated representatives in Geneva while 17 WTO members have no representatives whatsoever in Geneva. WTO members that are also EU member states enjoy a greater advantage in that they can draw upon the strength of the EU as a whole. For more see: Wilkinson (n 763) 56-61.

[1006] Reich (n 1002) 10-11.

Further, the most active users of DSU also happen to be the targets of requests for suspensions of concessions for failure to comply with DSB rulings.[1007]

As discussed earlier in this Part, from its inception, the WTO has been criticized for its lack of transparency. Looking at the past 25 years, the WTO has taken steps to alleviate this concern, with the first step taken by yielding to pressures from NGOs with the issuance of the 1996 Guidelines, whereby NGOs gained limited access to discussions on WTO issues during *ad hoc* symposiums conducted by the WTO.[1008] Further, through jurisprudence of the WTO DSU, external transparency and participation has been enhanced by allowing NGOs to submit *amicus* submissions to panels and AB divisions, and granting open hearings when asked for by parties to a dispute. Compared to other international and regional courts where public access to hearings are the rule, in the WTO, public access to hearings are rather the exception rather than the rule.[1009] A study analyzing amicus submissions through 2014 concluded that in the period examined, 148 actors submitted 98 *amicus* submissions, with actors often joining together in the submission.[1010] The study found that the vast majority of *amicus* submissions were not accepted by a panel or AB and declared that the reasons for not considering *amicus* submissions is due to the political constraints imposed upon international courts.[1011]

A further problematic issue concerning transparency and NGO participation in WTO DSU is there is no formal procedure for submission and acceptance of *amicus*

[1007] The U.S. holds a disproportionate share of suspension concessions for non-compliance at 68.42% for the years 1995-2015 and the EU at 15.78%. For more see: ibid 18-19.
[1008] WTO, 'Non Governmental Organizations (NGOS) Guidelines' (23 July 1996) WT/L/162, at IV.
[1009] The International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the European Court of Human Rights, and the Inter-American Court of Human Rights all have public hearings as a general rule. However, each has the right to hold hearings in private, typically upon request of the parties to the dispute and concerning issues related to confidentiality. For more see: Alvarez-Jiménez (n 919) 1080.
[1010] Squatrito (n 908) 65 at 72.
[1011] The analysis found panels are more likely to consider amicus submissions. While *amicus* submissions are received, in the period of the study 81.5% were rejected for consideration due to a number or reasons, most typically being that the information was not necessary to consider. In seeking to explain why amicus submissions are not considered, the study alluded to political constraints faced by international courts, political here meaning to maintain the integrity of the institution (not to be swayed by political opinions) and also legal constraints, which is especially applicable to the appellate body considering appeals are limited to interpretations of law and legal arguments/reasoning developed by the panel. For more see: ibid 75-77.

submissions. Thus, the panels and AB are under no obligation to state a reason for not considering *amicus* submissions and without guidelines, it is likely that while *amicus* submissions will continue to be submitted, it is unlikely that panels and AB will consider them in formulating a decision on the dispute. The most frequent users of WTO DSU continue to press for open hearings and *amicus* submissions. An additional argument that the WTO lacks transparency is asserted by scholars arguing that the WTO is still cloaked in secrecy both outward and within regarding negotiations at ministerial conferences in which economically powerful WTO members come to agreement with one another in consultation outside of the larger WTO membership and then impose their will upon the majority.[1012] The issue of exclusion continues to be a concern of least developed states. However, inclusion of Brazil and India, for example is illustrative of enhancement and inclusion of least developed states in the negotiating process, though many states with smaller economies are still left out.[1013]

As noted by several scholars, the WTO legal system is structured much like a municipal legal system while sharing characteristics of international law and while functioning as a direct democracy though its members, it lacks the ability to create legal rights, but certainly it has the ability to change the rules, albeit with great difficulty.[1014] The textual scope of the WTO agreements is limited to economic matters, specifically trade and trade related aspects of intellectual property, services, and investment (as stimulated in the covered agreements) yet many scholars, NGOs, and states argue that the world's trading system should be viewed 'as "constitutional" in nature – as higher *law*, not simply dependent on economic science but on juridical

[1012] These meetings are so called 'Green Room' meetings, in which a small group of WTO members gather to discuss difficult or sensitive issues with the aim to reach an agreement before discussing said issues with the whole of the WTO membership. See for more: Dine (n 284) 129; Margaret Liang, 'Evolution of The WTO Decision-Making Process' [2005] Singapore Year Book of International Law and Contributors 125, 126-127 <http://www.commonlii.org/sg/journals/SGYrBkIntLaw/2005/10.html>.

[1013] Clara Brandi and Matthias Helble, 'The End of GATT-WTO History?-Reflections on the Future of the Post-Doha World Trade Organization. German Development Institute. Discussion Paper. 13/2011.' (2011) 12-13.

[1014] Changing the rules requires consensus of the membership, which inevitably makes changing the rules difficult, as any one member can effectively block the change. While many WTO rules are stated in general terms, *ex-ante* understanding of the rules during negotiations may differ from ex-post application (interpretation by a panel or the AB) and changing them is difficult due to the aforenoted requirement of consensus. For more see: Palmeter (n 818) 479-480; Howse (n 736) 107.

and even moral *grundnormen*.'[1015] Robert Howse goes onto note that other scholars see the WTO as an institution that needs to balance non-trade issues (such as human rights) with its fundamental principles, and that if defining trade as a human right, this necessitates balancing it with other human rights, which then questions if the DSU of the WTO is the appropriate venue to adjudicate such a matter or if organs of the UN might be the correct venue.[1016]

Lastly, as the WTO moves beyond its silver jubilee, despite its many successes, it finds itself at a moment of crisis – paralyzed. Since 2017, the U.S. has continued to block the appointment of members to the AB, and with the AB having one member as of 2019, it is thus unable to function, leaving the WTO paralyzed when it comes to dispute resolution.[1017] The fear among many is that with the WTO unable to function, the world is teetering towards a period of instability that characterized the inter-war period of the 1930s.[1018] While the critical position of the Trump administration towards the WTO was not new (past administrations have also been critical of the WTO)[1019] the impact of the U.S. blocking vacant AB positions coupled with its trade war against China and other states through the imposition of protectionist trade measurers is certainly cause for alarm. However, with the inauguration of the 46th U.S. president, Joseph Biden, the approach of the U.S. towards the WTO may change. The first African and first woman, Ngozi Okonjo, was selected as the WTO Director General was selected on 15 February 2021.[1020]

Of course, arguments for reforming the WTO are again topical, due to the paralyses, which ensued with the previous U.S. presidential administrations blocking the nomination of AB members. In the conclusion and recommendations part of this work, I will offer an argument for reforming the WTO so as to incorporate the ILO core conventions, with the addition of OSH conventions as minimum labor standards,

[1015] Howse (n 736) 105.
[1016] ibid 105-106.
[1017] Ernst Ulrich Petersmann, 'How Should WTO Members React to Their WTO Crises?' (2019) 18 World Trade Review 503, 503-504.
[1018] ibid.
[1019] Howse (n 761) 11-12; Charnovitz, 'A WTO If You Can Keep It' (n 734) 7-10.
[1020] 'WTO | Director-General: Ngozi Okonjo-Iweala' <https://www.wto.org/english/thewto_e/dg_e/dg_e.htm> accessed 18 June 2021.

applicable to all WTO members, and for inter-institutional cooperation between the ILO and the WTO in DSU proceedings concerning a beach of the aforementioned.

PART III. SUMMARY

This Part sought to trace the development of international economic law and its relationship with human rights. The analysis proceeded with a brief overview of views on trade relations with early states, dating from ancient times, which viewed relations with others with suspicion, with the Aristotelian view enduring well into the 17th century. With the emergence of the nation-state and notions of national sovereignty, a balance of power emerged with states embracing a mercantilist economic policy in relations with each other, which would endure well into the 18th century. With advances in technology, ushering in the division of labor in the manufacturing process, and spurred on by economists Adam Smith and Richard Ricardo, the concept of absolute and comparative advantage emerged, which championed free trade with other states, leading to the abandonment of mercantilist economic policy.

Throughout the 19th century, the industrial revolution led to the expansion of production facilities and trade, facilitated by haut*e finance,* leading to the development of markets for goods, and of labor. The century was marked by bilateral trade agreements and with the emergence of the concept of the "most favored nation" bilateral trade agreements became multilateral agreements, leading to a network of such agreements. Near the close of the century, economic conditions worsened, leading to a great depression, resulting in the slowing of trade liberalization and alignment of like-minded states, trading goods among themselves. Further, the beginnings of the institutionalism of trade law began, with the establishment of the International Union for the Publication of Customs Tariffs, which was far from an international institution did nonetheless possess features of an institution.

In the aftermath of WWI and the creation of the League of Nations, the concept of an international organization regulating world trade emerged. In the inner-war period, a number of treaties dealing with aspects of trade were signed, notably one which conferred jurisdiction upon the Permanent Court of International Justice to settle disputes. Yet with economic conditions worsening leading to the worldwide Great Depression of the 1930s, states increasingly enacted protectionist measures, and formed alliances with one another, premised upon ideological lines. The Second

World War erupted at the close of the decade, leading to six years of war, which was truly worldwide.

In the aftermath of WWII, the allied planners sought to create a more effective institution dedicated to global governance, that being the United Nations. The post-WWII economic order was structured on two distinct international organizations, both of which exist in 2021; the IMF and the World Bank. A third international organization, the ITO, was envisioned to govern world trade, yet due to hostilities in deepening economic integration, it did not emerge, but the document drafted to regulate trade in the interim period before its establishment, GATT 1947, did survive and was used to govern world trade for almost 50 years, though lacked the features of an institution, and operated more along the lines of political pressure frequently, especially when adjudicating trade disputes among its members.

With the collapse of the Soviet Union, GATT 1947 was abandoned with the creation of the WTO in 1994. The WTO is an international organization, with legal personality and unlike GATT 1947, is a normative based institution. The foundational principle of the WTO is nondiscrimination among its members and goods, grounded in the MFN and national treatment principles. The WTO however does allow for dissimilar treatment in certain instances. The WTO, unlike GATT 1947, has a rules-based dispute settlement system. It is complete, with a permanent appellate body, in which when the members of the WTO adopt a decision, it is binding. Jurisprudence of the WTO has developed to increase openness and transparency of the organization and its dispute settlement procedures and participation by NGOs. With the creation of the WTO, the U.S. and certain European stats pressed to include a “social charter” which would entail minimum labor standards, which each member should adhere to. Actually, seeking to include labor standards began already with GATT 1947. However, divisions emerged with economically developing states, and lesser economically developed states resisting the inclusion of a “social charter”, arguing labor to be one competitive advantage they possess and viewing international labor standards as protectionist measures.

The WTO Agreements do provide for exceptions, which can arguably be relied upon by a state whose domestic policy amounts to distortions in trade among other

members. The exceptions offer the most promising route for a state to enact policy aimed at protecting human rights. A number of instances of states enacting policy measures designed to meet the requirements of the exceptions have been enacted over the years, that while not aimed directly at human rights, are aimed at non-economic matters, such as the protection of the environment, protection of health, and protection of exhaustible national resources. However, none of the measurers has been upheld, (aside from one case), as they were deemed not to comply with the exceptions to the WTO Agreements. Promising for human rights however are policy measures designed to protect public morals, though it remains to be seen if this can be relied upon due to the inherent subjective nature of public morals. However, it is clear that most certainly, policy measures designed to protect human rights, centered on workers' human rights, or otherwise, that if past jurisprudence of the WTO is any indicator, that states replying on the exceptions would not be successful in justifying the trade distorting measure. Thus, much discussion has centered on expanding the exceptions to include human rights or even pronouncing trade to be a privilege, to be premised upon the recognition of human rights. As the WTO enters its 26th year, it emerges from a state of paralysis, due to a non-functioning appellate procedure, resulting from blocking of the appointment of appellate body members by the U.S., which resulted in discussion of the need to reform the WTO. It also enters into its 26th year with the first woman and African, selected to become the Director General of the WTO.

Thus, it is submitted that international economic law proceeded in development without consideration for workers' human rights. However, with the reordering of the world after WWII, workers' human rights were envisioned to become part of the world's regulated trading organization, the ITO. Yet with the failure to establish the WTO, GATT 1947 governed world trade until the collapse of the Soviet Union and the emergence of the WTO. However, in the years since the negotiations of the ill-fated ITO and the establishment of the WTO, neo liberalism economic policy has been the driving force, which, when coupled with TNCs and business in general, discussion of workers' human rights has left the stage, and further, lesser economically developed states are abhorrent to the inclusion of human rights provisions in the WTO. Not only does unequal labor standards create a division between WTO members it distorts competition, as goods from states with rampant workers' human rights violations compete with goods from states with protections

and respect for workers' human rights. This coupled with the emergence of TNCs – with no allegiance of any one state – amounts to a global race to the bottom in terms of low-cost production, frequently to the determent of workers human rights, the environment, and an array of other problematic issues.

CONCLUSIONS AND RECOMMENDATIONS

In this closing section, I will draw upon conclusions, issues and points made earlier in this dissertation and contribute my vision, and the necessity to act. The starting point of this discussion is the conditions necessary for human rights. Much has been written about the necessary conditions in which human rights flourish, that is to say, for an individual to realize and be secure in their human rights by both public and private actors, to have human rights protected and having access to justice to redress violations of human rights. Some scholars insist that for a human right to be recognized, and thus be relied upon, necessitates that those human rights be codified into domestic law. This condition, codification into domestic law, can be said to be a "fundamental" association of the human right into the legal order by the political process. However other scholars insist that human rights can be asserted by any human being, irrespective of if the human right in question has been codified or not. Scholars professing this view see human rights as universal and arising out of the natural condition, that is to say, the status of being cognizant of one's existence.

An implication drawn from both views is that yes, human rights are not conditional, nor bestowed by an authority, but are inherit to humans due to their being, to their very existence. Yet if in a norms-based society, when one's human rights are breached, one should have access to justice, thus human rights should be codified, enabling standing before a court in seeking justice for instances where one's human rights have been infringed upon, by both public and private actors. Indeed, human rights are enforced locally, by the state having recognized the international or regional human right instrument, or signed onto one of the additional protocols of the additional covenants to the UDHR. Individuals then, in certain instances, cannot rely on those human rights instruments in the courts of the forum state, due to the state not having received those human rights into domestic law. Accordingly, individuals and states that do not have the protections written into their legal order cannot rely and seek relief in their courts for an infringement of said human rights.

As discussed in the chapter on the path to human rights, regional human rights instruments provide for a normative legal order, with access to justice, for violations

of human rights; for example, the ECHR provides for the European Court of Human rights. Likewise, the Interamerican Human Rights, among others do the same, though not as effective as the ECHR. Further, some states have provisions for the protection of the human rights in the domestic legal order that are actually stronger than those in the various international instruments, in particular those the composed the International Bill of Rights. Thus, those human rights are directly in force in the courts of that state, without any references to human rights instruments in which said rights are enumerated, depending on whether that state is a dualistic state.

Further, it is necessary to also discuss the issue a state sovereignty, defined in this work as the state having sovereignty over its internal domestic affairs and free from interference by other parties in such affairs. When states sign onto an international human rights document, especially a treaty on human rights, they are legally bound to receive and give all consideration to the human rights enumerated in said instrument, into their domestic law. However, with many international human rights instruments, states are signed on yet do not do not provide for effective protection of human rights because due to a non-functioning legal system or the state turning and looking a blind way for many reasons, some of which were discussed earlier in this dissertation. Especially problematic is the matter of enforcing international human rights, particularly workers' human rights. As discussed in Part II, with the expansion of the first industrial revolution, so too did the expansion and development of worker rights, and the concept of a company acting globally. Private and public actors can violate human rights; problematic especially is where the former has leverage on the latter, especially with deepening economic integration among states. Offshoring production by TNCs to lesser developed states frequently leads to violations human rights, because sometimes, the host state is more interested in retaining and accommodating the needs of TNCs rather than protecting the human rights of their citizens.

Human Rights Violations

There are numerous examples of violations of workers' human rights by companies, states and TNCs. Violations of workers' human rights dates, from the emergence and expansion of the industrial revolution, and with it, the market. Indeed, the most

horrific violations of human rights by companies predate contemporary human rights norms, and indeed, contributed to the impetus for the UDHR. Human rights violations by TNCs can be said to partly emulate from differing regulations existing at the nation-state level on a variety of issues with equate to a cost for the firm, ranging from taxation, to environmental regulations, and labor standards, each of which can arguably be grounded in human rights.

Environment, Life and Labor

While an exhaustive list of human rights violations by TNCs over the years would be well beyond the length of this dissertation, notable instances since the inception of the WTO are chronicled on Annex B. While the problem is indeed worldwide, the conditions in which workers labor in countries such as China, where workers do not have the ability or assemble and organize, to engage in collective bargaining, because unions, other than the mandated party sanctioned unions, are forbidden, is especially troubling, as this is very much like laws against workers assembling and unionizing, as discussed, early 18th century England, the U.S. and elsewhere where such was a criminal offense. Depriving workers of actual real power in terms of collective bargaining is especially problematic because frequently the enterprises in China are partly owned by the Chinese government. Also problematic is the failure to follow the international requirements regarding child labor laws. But especially problematic is how some individuals are required to labor in certain countries. For example, allegations of abuse in China of an ethnic minority, the Uighur people, are put into reeducation camps, where they frequently are forced to work, arguably in slave like conditions, with no compensation whatsoever for their labor and no choice in having to labor or having the freedom not to labor.[1021] Arguably it could be said the Chinese

[1021] Under the Trump administration, the U.S. halted imports of goods manufactured in facilities where Uighur people are forced to labor, citing the 1930 Tariff Act, which forbids imports of goods produced with slave or prison labor. The abuse of the Uighur people has been widely reported and the Biden administration is continuing to restrict imports of goods manufactured in said facilities, which amount to forced labor. The UN estimates that over one million Uighur people are detained in internment camps. Among brands alleging to benefiting from this horrible practice are Apple, Disney and Volkswagen. For more see: 'Top Brands ″using Forced Uighur Labor″ in China: Report | News | DW | 02.03.2020' <https://www.dw.com/en/top-brands-using-forced-uighur-labor-in-china-report/a-52605572> accessed 28 April 2021; 'Uighur Abuse: MPs Criticise Companies over China Forced Labour - BBC News' <https://www.bbc.com/news/business-56423366> accessed 28 April 2021; Ben

then violate the slavery convention as well. Most recently this was again in the news in June when the G7 released a statement about the human rights violations of the Uighur people by China, discussing, among other things, forced labor.[1022]

Further the conditions in which workers are compelled to labor in many of the developing states amounts to almost slave like conditions, and indeed, not so dissimilar to conditions that existed at the dawn of the industrial revolution, for which the very first labor laws can be traced with the aim to protect the health and safety of workers.[1023]

Basic Human Rights

When speaking of human rights frequently one refers to the international bill of human rights discussed in chapter 2 of Part I. However, many scholars are of the opinion that not all of the rights enumerated it the UDHR are actually a human right, in the sense that individuals cannot rely on those rights that are mere aspirations that states are striving to obtain overtime. As discussed in Part I, these can be divided into positive and negative rights, dependent on if the right requires action by state or forbids actions by a state. Many scholars are of the opinion that even with those negative human rights, not all are universal and basic. My argument is that workers' FLRs are basic human rights, because they relate to the most basic human right of all, the right to life. For example, as shown in Part II, unsanitary, unsafe, and unhealthy working conditions were linked to the first labor laws, which mandated factory

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Fox, 'US Halts Imports from China's Uighur Region for Forced Labor - ABC News' <https://abcnews.go.com/Business/wireStory/us-halts-imports-chinas-uighur-region-forced-labor-73008434> accessed 28 April 2021; 'Biden to Push G7 on Uighur Forced Labour in China's Xinjiang' <https://www.msn.com/en-us/news/world/biden-to-push-g7-on-uighur-forced-labour-in-china-e2-80-99s-xinjiang/ar-BB1fZu1G> accessed 28 April 2021.

[1022] 'G7 Chides China on Rights, Demands COVID Origins Investigation | Reuters' <https://www.reuters.com/world/china/china-cautions-g7-small-groups-dont-rule-world-2021-06-13/> accessed 14 June 2021.

[1023] Richard McIntyre identifies outsourcing labor to lower cost as a "sweating system" and notes several cases of workers being exploited in both developing and in fully developed states. He further states that workers being exploited is a natural phenomenon of the capitalist system and reflecting on the regulation of the labor market via institutionalism as the means whereby low wages and dangerous working conditions can be minimized, drawing upon the position put forth by JR Commons that regulation via institutions is the best way to protect workers. For more see: Richard P McIntyre, *Are Worker Rights Human Rights?* (The University of Michigan Press 2008) 1, 33-34.

inspections, as workers laboring in unsafe conditions, using unsafe machinery and processes, is a threat to one's life. However, one of the problems with having a very limited set of basic human rights is that they are not specific enough. Thus, if rights are not specific enough it means, that there can be a problem with enforcement because, without the specifics delineated, it is not possible to enforce to the extent needed, nor to a greater extent, than what is enumerated. A second potential problem with failure to be sufficiently specific is when a court, or any other authority, has to interpret the right, may erroneously word through their own judgment, a rendering of the meaning of the statute, without consideration for the intention of the drafters, that's to say, what was originally intended to be included, but was left out.

My conception of basic human rights encompasses only a few and those are as follows: firstly, the right to physical security, which is necessary for life. Secondly, individual autonomy to act as independent agent, that is the right to freedom not only of action, for example, physical movement and assembly with others, but also the freedom to import words and receive words, to communicate with others. Another equivalent term would be liberty. My third conception of a basic human right would be that of equality of access, that is to say the equality of people, thus no discrimination, related to one's ability to access institutions and organs in a civilized society, or to access a certain profession, provided an individual has the qualifications needed for said profession. In my view, the right to access relates to the equality of people, and not however equality of outcome, because we are all individuals endowed with certain individual abilities, which surly do differ. However, everyone should have equal opportunity and non-discrimination in accessing opportunities. My fourth conception of a basic human right is the right of subsistence. Thus, my conception of basic human rights is those that are universal for all peoples, irrespective of where and under what type of government, they happen to be located.

A question naturally arises as to what extent do the aforementioned basic human rights can be defined in legislation. For example, the right to physical security entails the being secure, being assured of protections to safeguard one's life. As this can be seen as the most fundamental human right, the question naturally arises as to what extent a state must legislate to insure an individual's right to life; the balance is then in how far the positive action should extend, while being mindful of negative

externalities of state action. Problematic are differing interpretations and applications of international human rights, as exercised by courts or any other institution or individual or the executive. Thus, the interpretation of basic human rights needs to be textually defined in a precise and exact manner, so as to ensure that the right exists and is accessible. Admittedly, in defining the spectrum of what is entailed in a right is debatable. Problematic is the varied differences of states in terms of conceptions of the state itself, cultural differences, economic differences, and political differences, which leads to differing levels of commitment by the state to human rights.

It is important to further contemplate the question of "what the quality of life Is for the worker", that is to say, what amounts to "decent work and working conditions" in line with the 2008 ILO Declaration on Decent work. The concept of dignity for a human being, as discussed in Part I, is linked to human rights. Thus, one's dignity must also be considered along with the conditions in the workplace, so as to ensure the terms and conditions of work are such, that the work is can be characterized as "decent work" in line with the 2008 ILO declaration. Labor standards directly impacting the workplace, which are also necessary for the protection of life and health, arguably entail minimal occupational safety and health laws, which then can be seen that fundamental labor rights, directly relate to basic human rights. Likewise, this question also presents itself considering autonomy, that is to say liberty. This relates to what extent a public or private actor may interfere with the individual's liberty, that is their freedoms. Does this the limitation of an individual's liberty preclude the association with others, and the freedom to exchange and impart ideas, the freedom to converse with others, as was the instance before repealing combination laws, in England, the U.S. and elsewhere? Further if accepted to encompass liberty, then do restrictions only apply at the state level, or does this also extend to private actors, in the sense of an employer and employee relationship? And to what extent should or would it be proper to legislate and a workers' right to join a labor union or to not join a labor union, or the right to not participate in ex prate discussions on the impact of voting to unionize a workplace? As was discussed in Part II, the path the worker rights, the very early combination acts criminalized workers combining, that is to say, associating together to bargain collectively for better working conditions and terms with their employer. Consider also in the meaning of autonomy in a state, while allowing workers to associate, unionize and bargain collectively, that also additional

legislation should give workers the freedom of action not to associate and bargain collectively with other workers and their employer if they so desire.

Scholars with various conceptions of basic human rights differ into the number of human rights into how far they extend related to action or in action that a state should take with regards to an individual being able to actualize their rights. One of the more topical basic human rights is the rights to subsistence, that is the right to be able to secure the material needed that one as an individual needs to have to live, which of course is related to the remuneration offered for work, which relates to the right to choose to associate or not to associate, and further the right to that have equal access, that is to say, equal access to opportunity. Indeed, these basic human rights can be seen to correlate strongly together with regards to a worker, that is a worker's right to fair and decent work, life, and living conditions, and the ability to sustain one's existence, by bargaining collectively with the employer for those rights. This also includes the issues of wages, including possible minimum wages, which can differ regarding as to what the cost-of-living is in different areas, but as a minimum means that nutrition must be guaranteed; food and water. Further, it means that the housing has to be guaranteed either by wages sufficient to allow a worker to rent or own housing facilities, which may be provided by the employer, which then would again need to be adequate minimum standards of habitability.

Scholars whose influence in arguing for basic human rights which I mostly tend to agree with are Henry Shue, Richard J. Talbott and James Griffith. While each of these scholars differ in their number and conception of basic human rights, common to all is the notion that, in terms of rights which can be said to be universal, are very limited, indeed with no more than seven for some and with others, as few as three. These and other scholars believe that the many other rights expressed in major international human rights instruments while worthwhile endeavors, are difficult to attain universally. Noting the discussion between the dichotomy of the university and the relative view of human rights I submit that the aforementioned basic human rights are universal and should be actualized equally irrespective of the country in which an individual lives and works.

The Nexus of Worker Rights and Human Rights

In this section I will briefly discuss the relationship between worker rights and human rights from the perspective of past violations of workers human rights by companies, starting from emergence of the factories in industrial England, progressing chronologically to the contemporary era. For example, as demonstrated in the overview of the path to worker rights, it was shown how the earliest labor laws in England related to laws that were made to ensure the health and safety of a worker and to preserve the workers right to life. This is evidenced by the early laws requiring safety equipment and guards on machinery, working hours, and limitations of working hours for women and children. The establishment and protection of those rights became part of the important body of human rights that developed more fully decades later. A recent example that comes to mind is the plight of workers and the conditions in which they labor in many of the factories, which are located in economically developing countries, such as Bangladesh and China, with much of the exploitation of workers occurring in exclusive export zones.

In the nexus of worker rights and human rights, consider the working conditions in manufacturing facilities located in economically developing states. In Bangladesh a fire in 2012 took the lives of 112 works, yet a few months later an accident would take the lives of thousands.[1024] As detailed in introduction to the U.S. Senate reports:

> the workers of Rana Plaza refused to enter the building that housed their factories because they feared it would collapse. Managers threatened to withhold their pay and the workers, desperate for their meager average monthly income of $74 and lacking union representation and a unified voice, reluctantly entered the building. The building collapsed later that day, killing 1,131 and injuring hundreds. Simply put, had the workers of Tazreen Fashions or Rana Plaza be- longed to strong, independent unions, they would not have perished in such tragic circumstances.[1025]

In neither facility were workers unionized. The response was the enactment of the National Tripartite Plan of Action on Fire Safety and Structural Integrity, which, at

[1024] Robert Menendez and others, 'Worker Safety and Labor Rights in Bangladesh's Garment Sector' (2013) <http://www.gpoaccess.gov/congress/index.html>.
[1025] ibid.

the time, was failing to live up to expectations.[1026] The U.S, suspended participation in GSP, while the EU, the ILO, with support from the U.S. signed the 'Stability Compact' to assist Bangladesh in increasing the number of factory inspections.[1027] Bangladesh reformed its labor laws in 2013, problematic however is the existence of Export Processing Zones, (present not only in Bangladesh) which limits workers' fundamental rights.

To improve workers' rights based on perceived deficiencies or shortcomings, in the past legislation was approached from the perspective of improving workers' rights without drawing the connection to human rights. This is because of different human rights being adopted by different states, and often, if not always, these rights are adopted in compliance or in furtherance of their obligations under human rights instruments that may be obligatory for those states for a variety of reasons. Further, when I define workers' rights as human rights, as discussed earlier, I am not addressing workers' rights in the collective of sense of a special set of human rights that apply only to workers, rather I am defining worker rights as human rights in the individual sense. Human rights relate to those individual human rights that workers possess which are basic human rights, and workers' rights as human rights are an extension of basic rights, and connected to those basic rights, which aligns very closely with position put forth by Henry Shue, that only with basic rights in place can an individual can secure the position for the actualization and respect and adherence of worker rights, which if worker rights are not in place would mean that those basic rights were also not in place.

Worker Rights Are Human Rights

In this section, I will briefly discuss the various labor rights in bilateral and regional trade agreements, particularly those entered into recently by the European Union and the United States. Arguably the use of such clauses in trade agreements amount to extraterritorial applications of PPM, and problematic with this approach is that it is much like the so-called Tokyo Codes, which resulted in a distorted trading market at

[1026] ibid.
[1027] ibid.

the time, leading to tensions between GATT 1947 contracting parties. As discussed in Part III, the emergence of the MFN principle can be traced to early trade agreements made between states in the latter half of the 19th century, some of which, interestingly viewed differing labor standards as distorting competition.

Recognition of the need for universal labor standards is best illustrated by the architecture of the ill-fated ITO, which called for universal labor standards among its members. Efforts at incorporating labor standards into GATT 1947 and efforts in the first decade of the WTO to do the same through a social clause, as discussed in Part III, all failed. Further, when considering the involvement of non-governmental organizations in formulating trade policy and with openness and transparency envisioned in operation of the ITO as an institution, it can be said the architects envisioned more openness and inclusion, than what is present in the WTO, which was expanded through WTO jurisprudence, as discussed in Part III. Through a reformed WTO, with institutional cooperation with the ILO in matters related to FLRs, can be characterized as acceptance of workers' rights as human rights. To make the case for workers' rights and to show how they should be understood and protected in the globalized world of the 21st century, it is necessary to discuss protecting workers' human rights.

Protecting Workers' Human Rights

As Jack Donnelly and others have noted, human rights are protected through domestic legislation. However as previously discussed, regional and supernatural regimes that also offers protections for human rights. Also, as noted in the previously, bilateral and regional trade agreements and preferential trading agreements also provide for protection of workers' rights. I am of the opinion that such agreements seek to undermine the world trade organization, with one set of rules to be followed by all members. Much like the separate codes, a product of the Tokyo round of GATT 1947 trade negotiations, served to undermine the MFN concept, and was recognized as doing so, thus it this was a condition did that not manifest itself in the WTO. The need for universal labor standards was recognized with the internationalization of worker rights through the creation of the ILO. A discussed in Part II, acknowledging workers'

contributions to the war efforts, was part of the motivation for the establishment of the ILO to continue the work of the organization's predecessor, the International Association of Labor Legislation, codifying and disseminating various labor standards, with the goal to harmonize the standards among its members. Indeed, I submit the underlying belief was that diminished labor standards not only results in a competitive advantage in the production of goods, but inhumane and oppressive labor standards contribute to the misery of the workers livelihoods.

The repeal of laws against workers associating together and collectively bargaining, led to the development of the workers associations in England, Germany and the U.S. for example, which also led to the establishment of political movements and parties, which reflecting a class struggle between the workers and the employers. As discussed in Part II, the International Workingman's Association, later became the First International and later, the Second International. The conflict between the worker and the factory owner dates back to an eternal class struggle, which developed amongst humans, as humans progressed from living in small family groups, to the clan-like structure, and on, the road to develop civilizations, as discussed in the introduction to this dissertation, and at points through it, when discussing the development of the globalized world of the 21st century, as viewed through a chronological progression, centered on human rights, worker rights, and international economic law.

While the WTO finds itself in 2021, emerging from a crisis, that of the appellate body being rendered ineffective, as discussed in Part III, with changes in national politics, international relations and the Covid-19 pandemic, perhaps it opens a door for a possible reform of the WTO. As discussed, earlier in this dissertation, the EU, U.S. and Europe and other WTO members have raised discussion about the reform of the WTO. While largely centered upon a more effective means of dispute resolution, noting the number of disputes, and the overburdened work of the Appellate Body, necessitates an expansion in members of the AB, and a more objective way to choose and select AB members.

An expanded role for the ILO in working together with the work of the WTO when it comes to dispute settlement in cases involving workers' rights is desirable.[1028] Indeed, this strikes me as a return to the much argued for social clause within the WTO, perhaps expanded, one whereby its members agree to abide by basic human rights standards and to consider the impacts of TNCs on the environment, workers and local stakeholders in the community in which they operate. The inclusion of a "social clause for the 21st century" can be seen as an indirect means to hold TNCs accountable for negative externalities imposed on communities and states in which they operate. As was discussed earlier, it was recognized among workers in the late 1800s that trade agreements with other states would be detrimental to workers if labor standards were lesser. Worker rights are increasingly a part of trade agreements in today's globalized world, yet I believe it more desirable to have a common set of worker rights, which can be seen as human rights, and the most appropriate institution to utilize to enforce workers' rights is the WTO. As discussed in Part III, the WTO in terms of disputes between states, is the most successful international dispute settlement system, with worldwide reach.

Notwithstanding the importance of all human rights, with my focus on workers' human rights, as connected to basic rights, and reflecting on efforts to hold TNCs accountable for human rights violations, it was shown in Part II, when discussing the internationalization of worker rights, and the concept of Fundamental Labor Rights, that binding commitments are difficult to achieve. This was particularly illustrated with the 2003 UN Draft Norms and the pressure of groups aligned with big business, which led to the abandonment of the 2003 UN Draft Norms without even a vote. Voluntary initiatives, such as the Global Compact, and the UN Guiding Principles as developed by Professor Reggie, both of which are voluntary or are serve as guidance

[1028] Inter-institutional cooperation between the ILO and the WTO has been suggested as a means whereby the WTO will serve to advise the ILO in formulating new instruments (Conventions). I however argue for more than a peer review cooperation between the two, as drawing on the expertise of the ILO in labor related trade disputes is desirable and moreover, through an expanded art. XX general exceptions, or an additional annex, the WTO can effectively raise the bar when it comes to labor issues. While the peer review cooperation could perhaps address deficiencies in terms of labor issues, I feel that it would not go far enough. Still, it is a positive move to suggest inter-institutional cooperation between the ILO and the WTO. For more about the peer review inter-institutional cooperation. For more see: Sungjoon Cho and Cesar F Rosado Marzan, 'Labor, Trade, and Populism: How ILO-WTO Collaboration Can Save the Global Economic Order' (2020) 69 American University Law Review 1771, 1816-1821.

for TNCs, lack the teeth of a hard law and amounts at best as a bit better approach than naming and shaming, but is far from lacking the force of law.

However, the need to hold TNCs accountable for human rights violations persists, with the latest efforts underway since 2015 on the drafting of a binding treaty on business and human rights. As discussed in Part II, if it were to become adopted in its most recent incarnation, most probably, few states would ratify the treaty, meaning it will have little realistic impact. This is due to the current draft being too all encompassing; the instrument would simply be too broad, as it envisions protections for all internationally recognized human rights. This is especially problematic considering the difficulties of defining which human rights all members of the international community recognize. It is my contention then that the proposed treaty on business and human rights will not be adopted due also to pressure from big business and that the latest incarnation of the draft is overly broad in the inclusion of all legally recognized human rights, for the reasons noted above.

Further, it is my contention that worker rights can be directly connected to basic rights in the sense of an individual's security right, a basic right as defined by Shue. Working in unsafe and unsanitary conditions are determinant to human life and if such conditions exist, then one cannot actualize one's basic right to security. A similar analogy can be offered for the other fundamental labor rights as enumerated in the 1998 ILO Declaration. For example, if workers are not allowed to associate and collectively bargain as a group for better pay and working conditions, which can be connected to the basic right of liberty. Further, in absence of the possibility to collectively bargain, the remuneration offered by the employer may be insufficient for workers to sustain themselves, which is then denial of the basic right of substance.

It is thus submitted that workers basic human rights can be best protected with either an expanded Article XX provisions, or through an additional annex to the WTO Agreements, whereby fundamental labor rights as enumerated in the 1998 Declaration, with the addition of a fifth fundamental labor right, that of the right to a safe and healthy working environment, would be binding on all WTO members. Further, if either method was used to expand the WTO normative order to include protections for workers' human rights, in instances of future related trade disputes

between WTO members, a panel, could draw upon the expertise of the ILO in adjudicating disputes. As was discussed in Part III, the AB expanded and clarified the DSRP regarding submissions of *amicus* briefs for consideration by panels. Through inter-institutional cooperation between the ILO and the WTO in dispute settlement via an expanded Article XX or with the additional annex for workers' rights, a panel or the AB division would be aided by the expertise of the ILO in such matters. Indeed, it would be efficient for the two institutions to work together, and would serve as a means to de-commoditize labor. Universal labor standards for WTO members would also make for a more competitive market, perhaps raising the costs for TNCs and raising protections for human rights, rather than rewarding WTO members that do not respect and protect workers' human rights.

Under the WTO rules, Generalized Systems of Preferences (hereinafter GSPs) exist. This is a legacy from GATT 1947 which allows developed WTO members to enter into non-reciprocal preferential trade agreements with developing members, whereby tariff free access is granted for classes of goods.[1029] The U.S. Trade Act of 1974 as amended, stipulates that GSP status should not be given if the state 'has not taken or is not taking steps to afford internationally recognized worker rights in the country (including any designated zone in the country); has not implemented its commitments to eliminate the worst forms of child labor.'[1030] Further, the U.S, Trade Act of 1974 delineates a list of worker rights, which parties to trade agreements are to recognize.[1031]

While states do have means to exert extraterritorial protection for human rights violations, it is done selectively and amounts to a power exchange relationship between the targeted state and the state exercising its laws extraterritorially through a trade agreement or a preferential trading partnership. For example, the regional trade agreement between the U.S., Canada, and Mexico, known as the North American Free Trade Agreement, signed in 1993, included side agreement, North American

[1029] Plasa (n 932) 111.
[1030] ibid.
[1031] ibid 114-115.

Agreement on Labor Cooperation.[1032] It created between the parties to the North American Free Trade Agreement, the creation of international and national labor institutions, complete with a system for dispute settlement. The scope of the Agreement was focused on FLRs, and further, included safe working conditions and compensation for instances of occupational injuries and illness. The Agreement is significant as it is the first such agreement entered into by the U.S. which links labor rights with a trade agreement, and further, the Agreement provided for trade sanctions in instances of non-enforcement of its own labor laws in areas such as OSHS and the use of child labor.[1033]

On July 1, 2020, the United States-Mexico-Canada-Agreement (hereinafter USMCA) entered into force, replacing the North American Free Trade Agreement.[1034] Of significant importance for my purposes is the extent that the USMCA expanded access to dispute settlement system, and specifically, the requirement that parties adopt provisions to comply with worker rights as enumerated in the 1998 Declaration, with the inclusion of OSHS, and limitations on working hours.[1035] Further the USMCA included a commitment by Mexico to strengthen its federal labor law to provide protection for workers from an array of harms, such as forced labor, retaliatory measures by public authorities related to efforts at forming a union, and imposes obligations on private actors to recognize the right of workers to strike and form unions through a secret balloting procedure, including deciding on the leadership of unions.[1036]

In the European Social Charter, as revised, of the 31 Articles, over half relate directly to workers' rights, Most notably for my purposes are Article 2, 'The right to just conditions of work'; Article 3, 'The right to safe and healthy working conditions'; Article 5, 'The right to organize'; Article 6 'The right to bargain collectively'; Article 20, 'The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex'; and Article 26, 'The

[1032] US Department of Labor, 'North American Agreement on Labor Cooperation: A Guide' (2005) <https://www.dol.gov/agencies/ilab/trade/agreements/naalcgd> accessed 10 June 2021.
[1033] M Angeles Villarreal and Cathleen D Cimino-Isaacs, 'USMCA : Labor Provisions' (2021).
[1034] ibid.
[1035] ibid.
[1036] ibid.

right to dignity at work'.[1037] As noted by Janet Dine, the European Social Charter includes an elaborate reporting enforcement, and monitoring procedure, and is characterized as being of lesser importance due to the perception of economic and social rights as second tier rights.[1038] Problematic however is this equates to a fractured landscape in the protection of human rights, which in my view, undermines the idea of a regulated world trading system, that of, the equal application of standards, in this instance, of labor standards, among its members. However, the European Union has an instrument where by human rights, among them, worker rights are enumerated, and can be relied upon in cases before the courts of the EU. This instrument is the Charter of Fundamental Rights of the European Union, which has among its rights and entire Chapter IV, related to workers; for example, the right to information, consultation, collective bargaining, fair and just working conditions, and limitations and prohibitions in the employment of minors.[1039]

As discussed in Part III, the external application of a PPM as a means to compel WTO members to adhere to basic human rights provisions would most certainly not prevail in a WTO dispute settlement procedure due to past jurisprudence, and the interpretation of Article XX and PPMs. Providing an additional annex of the WTO for the protection of worker rights, as basic human rights, would enhance the social contract between WTO members. This additional annex could then provide the specifications whereby a member could apply an Article XX general exceptions clause for a PPM targeting human rights. Further, it could mandate the inclusion and consultation of experts from the ILO in instances of trade disputes centered on the annex. Experts from the ILO could then advise panel or AB members in such disputes, thus providing much better clarity and legal certainty in the application of the aforementioned annex. Notable scholars have expressed a similar vision for the WTO and its relationship between human rights, and also, the preference to one universal set of world trading standards, applicable to all WTO members, rather a

[1037] European Social Charter (singed 18 October 1961, entered into force 26 February 1965, as Revised) CETS No: 035.
[1038] Janet Dine, *Companies, International Trade and Human Rights* (1st edn, Cambridge University Press 2005), 185.
[1039] European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, available at: https://www.refworld.org/docid/50ed4f582.html [accessed 10 June 2021], art 27, art 28, art. 31, art. 32.

fractured landscape of assorted bilateral and regional trading agreements that serve to undermine the universality of the WTO laws rules.

Recall from Part III arguments rejecting the notion of worker rights to be included in the WTO Agreements, opining that fully developed states, such as EU members, the U.S., and other states had centuries to expand, progress and economically develop, while economically developing states, frequently eastern Asian states, had not, at the time, attained an advanced level of economic development and wealth. Those states resisted the inclusion of a "social clause" arguing that labor standards are one of the competitive advantages they have to offer, acquainting labor as a commodity. I argue that in 2021, especially in the instance of China, that given the rate of progress and economic development since its admission into the WTO, that China is an economic powerhouse worldwide, frequently referred to as "the world's factory" which also happens to be one of the most frequently cited states that abuse human rights in general, and workers' rights specifically.

The Way Forward

The Conclusions are many and the Recommendations are few. I have a list of eight, which I consider to be the most important from this project. They are as follows:

First, while, human rights are universal in terms of a historical overview and an instrumental analysis of human rights. However, there are only so many universal basic human rights, as many of the human rights enshrined in the International Bill of Rights are deemed to be aspirations to which states commit themselves to achieving. Problematic is the adoption of human rights instruments. While regional human rights regimes provide for protection of human rights and access to justice, they differ in effectiveness and are limited in coverage.

Second, that fundamental labor rights, as defined in the 1998 ILO Declaration, with the inclusion of worker rights to safe and healthy working environment, are linked to basic rights, as conceived by Henry Shue and others. The aforementioned are linked to Shue's conception of the right to physical security, the right to freedom, and the right to subsistence. The worker right to a safe and healthy working environment

should be added to the 1998 ILO Declaration, as workers laboring in unsafe and unhealthy working conditions means that a worker is not physically secure. The fundamental worker right of association and collective bargaining is linked to liberty, workers choosing to associate and collectively bargain for better working conditions. It is also related to subsistence, as workers unable to collectively bargain are frequently exploited and oppressed, for example when forced to accept work at pay below the level required to sustain one with a decent life, thus depriving them of the right of subsistence. Thus, fundamental labor rights as defined above and elsewhere in this work are universal, basic human rights, which should be binding on all states. Promising is recent decision by the ILO to proceed with taking the necessary steps to include safe and healthy working conditions among its fundamental rights.

Third, the internationalization of worker rights grew from the industrial revolution, as early labor laws as developed in England, which developed in response to an increased awareness of the plight and exploitation of the worker. Early labor laws enabled collective bargaining by workers, which had in many states was illegal. Labor law spread to other states, as they too industrialized. Drawing on differences in class, political movements emerged which were grounded in worker rights, which also contributed to the internationalization of worker rights. Fundamental labor rights as defined above, are not, but should be, binding on WTO members, as a means to close the gaps between labor standards between its members, and to create a more competitive market for its members, a market in with human rights protections for workers.

Fourth, eliminating violations of human rights by transnational corporations is problematic. Efforts to enact binding international treaties have failed in the past due to pressure from the business community, which finds voluntary business and human rights programs more appealing. Linked to trade, workers' rights are frequently a part of a trade agreements between states, as allowed under WTO rules. This creates a fractured labor regulatory environment, which is not desirable.

Fifth, past jurisprudence of the WTO indicates that if a state were to enact a measure to protect workers' human rights, and the measure was targeted outwardly, directed at goods from states without protections as defined by said measure, the measure if challenged would most probably be unjustified under Article XX.

Sixth, recognizing that fundamental labor rights as defined in the 1998 ILO Declaration, and the inclusion of worker rights to safe and healthy working environment should be included in the WTO Agreements, the most effective method would be to expand Article XX or to create an additional annex to the WTO Agreements making it binding among all WTO members, and in instances of dispute settlement involving worker rights, the panel or appellate body division hearing the dispute consult with experts from the ILO in deciding the dispute. Hence, inner-institutional cooperation is desirable on trade/labor related disputes.

Seven, arguably oppressive conditions at work could be envisioned as amounting to forced labor, which, perhaps, would be a difficult argument to make. However, considering inhumane working conditions and accusations of forced labor in one of the largest exporting countries, with a abysmal record on human rights, a WTO member could enact a trade measure targeting goods produced under such conditions, and rely on Article XX general exception (e) allows as a general exception a for WTO member in taking measures to restrict the import of goods produced by prison labor. A tough argument to make, yes, but possible. Indeed, state intervention can be used as a policy tool of states to ensure that individuals have recourse to their basic right; indeed, to the most fundamental right, the right to life, in the sense of physical security.

Eight, the WTO enters its 26th year emerging from a crisis, amidst talk of reforms, and under the leadership of the first woman and African as the General Director. The issue of a "social charter" in the WTO has been discussed since the inception of the WTO and in the days of GATT 1947. Among reforms to the WTO, the inclusion of a "social charter" should be at the top of the list.

This dissertation argues for the need to include protections for workers' human rights, as the gap between the levels of economic development has narrowed since the inception of the WTO over 25 years ago. Indeed, it is my contention that workers' rights are basic fundamental human rights and worthy of and deserving of protection through a reformed WTO and inter-institutional cooperation with the ILO.

Times of crisis present challenges and opportunities. Notwithstanding its accomplishments and its deficiencies, the WTO has been an effective institute in

enforcing its rules, though admittedly, it needs fine tuning. Reflecting on worker rights and the envisioned international trade organization, perhaps now is the time to enact the vision of the Havana Charter, including labor standards, and linkage to the ILO, as an additional annex to the WTO Agreements, or through an expanded Article XX. The WTO, despite the very real political interplays among its members, is a rules-based institution, with a record of 26 years in dispute settlement between its members. The WTO should be reformed, with an annex and mechanism of monitoring of fundamental worker rights, in consultation and possible conjunction with the ILO in settlement of WTO member disputes connected to said annex or an expanded list of general exceptions.

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ANNEXES

Annex A

The top 20 economies as measured by GDP

Ratification of the eight Core ILO Conventions

Country	C29	C87	C98	C100	C105	C111	C138	C182
U.S.					X			X
China				X		X	X	X
Japan	X	X	X	X			X	X
Germany	X	X	X	X	X	X	X	X
UK	X	X	X	X	X	X	X	X
India	X			X	X	X	X	X
France	X	X	X	X	X	X	X	X
Italy	X	X	X	X	X	X	X	X
Canada	X	X	X	X	X	X	X	X
S Korea	X	X	X	X		X	X	X
Russia	X	X	X	X	X	X	X	X
Brazil	X		X	X	X	X	X	X
Australia	X	X	X	X	X	X		X
Spain	X	X	X	X	X	X	X	X
Indonesia	X	X	X	X	X	X	X	X
Mexico	X	X	X	X	X	X	X	X
Holland	X	X	X	X	X	X	X	X
Switzerland	X	X	X	X	X	X	X	X
Saudi-Arabia	X			X	X	X	X	X
Turkey	X	X	X	X	X	X	X	X

The eight ‘core’ ILO Conventions are:

C29 Forced Labour Convention, 1930
C87 Freedom of Association and Protection of the Right to Organise Convention, 1948
C98 Right to Organise and Collective Bargaining Convention, 1949
C100 Equal Remuneration Convention, 1951
C105 Abolition of Forced Labour Convention, 1957
C111 Discrimination (Employment and Occupation) Convention, 1958
C138 Minimum Age Convention, 1973
C182 Worst Forms of Child Labour Convention, 1999

Source for the top 20 states GDP in current prices: IMF World Economic Outlook 2020 Oct. https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020

Annex B

Selected incidents of workers' rights in the 21st century

2/2021 **H&M probes abuse at Indian factory after a death of a woman worker**

Fashion retailer H&M said on Tuesday that it would investigate reports of sexual harassment at a supplier's factory in southern India following the death of a female employee and the arrest of a male co-worker on suspicion of her murder. More than two dozen workers at the plant in Tamil Nadu state have spoken out about harassment since the 20-year-old's body was found near her home on January 5, a labour rights group said, as H&M pledged "an independent third-party investigation".

https://www.aljazeera.com/economy/2021/2/2/hm-probes-abuse-at-indian-factory-after-death -of-woman-worker

12/2020 **Report: iPhone factory in India committed multiple labour law violations, underpaid wages**

Multiple labor laws were violated at an iPhone manufacturing facility in the southern Indian state of Karnataka. Taiwanese contractor Wistron Corp allegedly engaged in exploitative practices such as underpayment of wages, irregular hours and poor working conditions in its iPhone assembling factory. The Apple contractor's human resources department reportedly had poor knowledge of labor regulations in India and it lacked adequate personnel to manage the factory's 10,500 workers.

https://www.forbes.com/sites/siladityaray/2020/12/18/report-iphone-factory-in-india-committ ed-multiple-labor-violations-underpaid-wages/?sh=3b574153527f

11/2020 **Indian factory workers supplying major brands allege routine exploitation**

Indian workers in factories supplying the supermarket chains Marks & Spencer, Tesco and Sainsbury's, and the fashion brand Ralph Lauren, told the BBC they are being subjected to exploitative conditions. Women working at a Ralph Lauren supplier said they had been forced to stay overnight to complete orders, sometimes requiring them to sleep on the factory floor. "We're made to work continuously, often through the night, sleeping at 3am then waking up by 5am for another full day," one woman said in an interview.

https://www.bbc.com/news/world-asia-54960346

10/2020 **U.S accused of violating international labor laws, forced-labor protections in new complaint**

Leaders representing a large number of U.S. trade unions filed a complaint with the United Nations' labor agency Wednesday, arguing that the country under President Trump has violated international labor standards during the coronavirus pandemic. Some of the complaint's harshest words were reserved for the Trump administration's orders declaring industries such as meatpacking essential, compelling them to stay open even amid potential novel coronavirus outbreaks, while federal agencies, including OSHA, declined to issue enforceable safety regulations. "These executive orders gave a green light for employers to force workers to report for work and risk their lives or lose their jobs," said the complaint, signed by Trumka and SEIU President Mary Kay Henry. "This is tantamount to forced labor."

https://www.washingtonpost.com/business/2020/10/08/international-complaint-worker-protec tions/

7/2020 **Cleaning firms abuse workers, suffer no consequences**

An investigative report by daily Helsingin Sanomat has uncovered a number of injustices experienced by workers in the cleaning industry. According to the paper, workers often have to deal with overly-long working days, insufficient breaks and no time off. It found irregularities in worker treatment by cleaning firms that provided services for municipal schools and daycare centres, for example. The investigation also revealed large-scale and systematic abuse of workers, at worst describing working conditions as inhuman and reminiscent of human trafficking. HS also said that over the years victim support hotlines have received many reports of worker abuse

https://yle.fi/uutiset/osasto/news/daily_cleaning_firms_abuse_workers_suffer_no_con sequen ces/11433992

6/2020 **2020 ITUC Global rights index: violations of workers' rights at a seven year high**

This trend, by governments and employers, to restrict the rights of workers through limiting collective bargaining, disrupting the right to strike, and excluding workers from unions, has been made worse by a rise in the number of countries that impede the registration of unions. A new trend identified in 2020 shows a number of scandals over government surveillance of trade union leaders in an attempt to instill fear and put pressure on independent unions and their members.

https://www.ituc-csi.org/violations-workers-rights-seven-year-high

1/2020 **Chipotle is fined $1,4 million in vast child labour case**

Massachusetts said Chipotle let teenagers work too many hours per week and too late on school nights. The chain settled without admitting to the estimated 13,000 violations. The fine is the largest child labor settlement in Massachusetts state's history. Chipotle also agreed to pay an additional $500,000 for youth education programs on child labor laws. Attorney General's office launched an investigation into the popular burrito chain in 2016 after a parent of an employee complained to the attorney general. The investigation found 13,253 instances of the restaurant chain working teenagers past the state-mandated nine-hour daily limit and other child labor law violations.

https://www.nytimes.com/2020/01/28/business/chipotle-child-labor-laws-massachusetts.html

9/2019 **Apple and Foxconn confirmed they broke a Chinese labour law by employing too many temporary workers at the world's biggest iPhone factory**

China Labor Watch's report said that in August 2019, 50% of the workforce was made up of temporary or "dispatch" workers. According to Chinese law, dispatch workers can only make up a maximum of 10% of any company's workforce. Apple and Foxconn denied the majority of allegations listed in the report, but confirmed in statements to several media organizations that the proportion of temporary workers at the factory was higher than 10%.

https://www.businessinsider.com/apple-foxconn-breaking-chinese-labor-law-2019-9?r=US&IR=T#:~:text=Apple%20and%20Foxconn%20confirmed%20they,the%20world's%20biggest%20iPhone%20factory&text=China%20Labor%20Watch%20published%20a,iPhone%20fact ory%20in%20the%20world.

9/2019 **Tesla violated labor laws by blocking union organizing, judge rules**

Tesla must reimburse workers and hold a public meeting in its factory explaining how it broke labor laws after unfairly preventing employees from unionizing, a judge ruled in a National Labor Relations Board complaint Friday, according to media reports. Administrative Law Judge Amita Baman Tracy found that CEO Elon Musk violated national labor laws when he implied via tweet that Tesla workers who unionized would have to give up their company stock options.

https://www.cnbc.com/2019/09/27/tesla-violated-labor-laws-by-blocking-union-organi zing-judge-rules.html

6/2019 **Hershey, Nestle and Mars broke their pledges to end child labour**

When asked this spring, representatives of some of the biggest and best-known brands — Hershey, Mars and Nestlé — could not guarantee that any of their chocolates were produced without child labor. One reason is that nearly 20 years after pledging to eradicate child labor, chocolate companies still cannot identify the farms where all their cocoa comes from, let alone whether child labor was used in producing it.

https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-chil d-labor-west-africa/

12/2018 **Nightmare conditions at Chinese factories making Hasbro and Disney toys**

Investigators found there were serious violations at the factories which were endangering workers. In peak production season, employees were working up to 175 overtime hours per month. Workers were also not being given the legally required 24-hour safety training before commencing work, meaning they were unaware of how to protect themselves from toxic chemicals. Investigators also found that workers were being forced to sign blank employment contracts and were provided with poor living quarters, which often housed eight people in one room with unsanitary facilities and no hot water.

https://www.cnbc.com/2018/12/07/nightmare-at-chinese-factories-making-hasbro-and-disney -toys.html

6/2018 **British employers find it surprisingly easy to flout out labour law**

Employment rate is at an all-time high, but there is a dark side to this. One in five low-paid workers is paid less than the legal minimum wage. Some firms unlawfully make big deductions from workers' pay-packets for things like uniforms or accommodation. Roughly 5% of employees do not receive holiday pay, to which they are legally entitled. Workers in the fast-growing "gig economy" may be wrongly classified as self-employed, which allows their paymasters to avoid giving them rights.

https://www.economist.com/britain/2018/06/14/british-employers-find-it-surprisingly-easy-to -flout-labour-law

6/2018 **Abuse is daily reality for female garment workers for Gap and H&M, says report**

Pressure to meet fast fashion deadlines is leading to women working in Asian factories supplying Gap and H&M being sexually and physically abused, according to unions and rights groups. More than 540 workers at factories that supply the two

retailers have described incidents of threats and abuse, according to two separate reports published last week by Global Labour Justice on gender-based violence in Gap and H&M's garment supply chains.

https://www.theguardian.com/global-development/2018/jun/05/female-garment-workers-gap- hm-south-asia

5/2017 **Tesla factory workers reveal pain, injury and stress**

Musk's account of the company's approach differs from that of the 15 current and former factory workers who told the Guardian of a culture of long hours under intense pressure, sometimes through pain and injury, in order to fulfill the CEO's ambitious production goals. Ambulances have been called more than 100 times since 2014 for workers experiencing fainting spells, dizziness, seizures, abnormal breathing and chest pains, according to incident reports obtained by the Guardian. Hundreds more were called for injuries and other medical issues.

https://www.theguardian.com/technology/2017/may/18/tesla-workers-factory-conditions-elon -musk

10/2016 **Child workers found in clothing supply chain: ASOS, Marks & Spencer implicated**

Iconic retail brands have been recently implicated in a BBC investigation into the unethical practices of Turkish textile industry. ASOS, an online fashion company and Marks & Spencer, an iconic British high street retailer, have both been identified as possessing child workers in their supply chains. In one case, the investigators found 7-8 year-old children sewing boxer shorts. The BBC found children exhausted from working 60-hour weeks and are unable to attend school.

https://www.forbes.com/sites/jwebb/2016/10/25/child-workers-found-in-clothing-supply-chai n-asos-marks-spencer-implicated/?sh=7fb1767c4b12

8/2016 **Deaths of Foxconn employees highlight pressures faced by China's factory workers**

Suicides occur at the Foxconn factory from time to time. A young man had been at the job only for a month until he jumped off the factory building. Especially entry-level Foxconn workers are those who commit suicides. This reflects the precarious existence of Chinese migrant workers and their lack of money and resources to solve personal problems.

https://www.wsj.com/articles/deaths-of-foxconn-employees-highlight-pressures-faced-by-chi nas-factory-workers-1471796417

1/2016 **Apple, Samsung and Sony face child labour claims**

Human rights organisation Amnesty has accused Apple, Samsung and Sony, among others, of failing to do basic checks to ensure minerals used in their products are not mined by children. In a report into cobalt mining in the Democratic Republic of the Congo, it found children as young as seven working in dangerous conditions

https://www.bbc.com/news/technology-35311456

10/2013 **Bangladesh Garment Factories Often Evade Monitoring; Safety Improves but Wage, Overtime Violations Remain Common**

The company regularly keeps many of its 4,500 workers late--sometimes until 5 a.m.--to meet production targets set by retailers like Gap, VF Corp. and Tommy Hilfiger parent PVH Corp. The workers themselves sometimes welcome the extra pay, but the practice apparently conflicts with the retailers' stated policies and a Bangladeshi law that prohibits more than 10 hours of work a day, including two hours of overtime.

Banjo, Shelly.**Wall Street Journal (Online); New York, N.Y.** [New York, N.Y]03 Oct 2013: n/a.

1/2012 **Apples iPad's and the human costs for workers in China**

Apple's factories in China are prone to accidents, eg. explosions killing workers. This happened in an iPad factory where inter alia, a young man was killed. Apple itself says its improving working conditions and following labour rules, but the reality is very different. Workers have to work in extremely bright light standing up working twelve hours or even more. Customers buying Apple's products care more about a new iPhone than workers conditions.

https://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-f or-workers-in-china.html

2/2012 **Qatar criticized over migrant worker abuse**

According to the report, many migrant workers are lured by irresponsible companies who make false promises of big salaries and good conditions before withholding wages and taking away passports once the workers arrive. Qatari law requires that wages be paid on time and that housing meet minimum standards of comfort, but most companies are never forced to comply, according to the report. Qatar does not have a minimum wage, has not signed key international human rights agreements and prohibits unions, the report said.

https://www.aljazeera.com/economy/2012/6/12/qatar-criticised-over-migrant-worker-abuse

4/2013 **The Rana Plaza Accident and its aftermath**

The collapse of the Rana Plaza building in Dhaka, Bangladesh, which housed five garment factories, killed at least 1,132 people and injured more than 2,500. These disasters, among the worst industrial accidents on record, awoke the world to the poor labour conditions faced by workers in the ready-made garment sector in Bangladesh.

https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm#:~:text=The%20Rana%20Plaza%20disaster%2C%20Savar,and%20injured%20more%20than%202%2C500.

5/2008 **China confronts news of another child-labor ring - Youths forced to work 300 hours a month**

More than 100 children were rescued from factories in the city of Dongguan, one of the country's largest manufacturing centers for electronics and consumer goods sold around the world. The officials said they were investigating reports that hundreds of other rural children had been lured or forced into captive, almost slave-like conditions for minimal pay. The children, mostly between the ages of 13 and 15, were often tricked or kidnapped and they were sometimes forced to work 300 hours a month for little money.

Barboza, David.**International Herald Tribune; Paris** [Paris]02 May 2008: 3.

1/2008 **In Chinese factories, lost fingers and low pay**

Chinese workers face serious abuse. For example, in the Pearl Delta region factory workers lose or break about 40,000 fingers on the job every year. Some of the workers are too young to be working. It is hard to change this since China is unable to enforce its own labour rules. Factories are quite noisy, and workers stand up all day, 12 hours, and there's no air-conditioning, "We get paid by the piece we make but they never told us how much. Sometimes I got $110, sometimes I got $150 a month", says a worker who was interviewed.

https://www.nytimes.com/2008/01/05/business/worldbusiness/05sweatshop.html

RESUMEN AMPLIADO

Introducción

Podemos especular que, en la prehistoria, probablemente, existía una división del trabajo definida por género, edad y estatus. Con el paso del tiempo, el ser humano incrementó en número, civilizaciones complejas emergieron a partir de pequeños clanes y, dentro de los inicios de esta estructura, la división del trabajo también se alineó con el género, edad y el estatus individual (o el estatus de la familia) dentro de esa civilización. Según el mundo primitivo comenzó a interconectarse –globalizándose- a través de contactos entre civilizaciones, se inició el intercambio de bienes y tecnologías, bien a través de conquistas o a través del comercio. Por lo tanto, desde la salida del estado de naturaleza de la humanidad en favor de agrupaciones en clanes y más tarde en civilizaciones con estructuras más complejas, la división del trabajo se mantuvo alineada según roles de género, edad y rango dentro de la estructura social.

En el S. XXI, el mundo está más interconectado que nunca antes. Los bienes y tecnologías se intercambian a través de un sistema mundial organizado y regulado entre naciones. Largo ha sido el camino de la humanidad entre los sistemas de clanes poco organizados e interconectados de la prehistoria hasta llegar al concepto de civilización del S.XXI. La actual estructura de civilización compleja se organiza en Estados Nación, que cooperan para dar solución a asuntos que impactan a la comunidad global en su conjunto, incluyendo el mercado internacional. Desde este prisma, en 2021, el mundo está globalizado como nunca antes.

Un gran hito en el largo camino de la interconexión es la aparición de los Derechos Humanos. Los Derechos Humanos son aquellos que todos los seres humanos poseen por virtud de su rasgo común, la humanidad. Estos Derechos están unidos a la dignidad inherente del individuo. Existe multitud de clasificaciones de los Derechos Humanos, pero, comúnmente se pueden agrupar en ‘’generaciones de los Derechos Humanos’’ para indicar que implican los derechos en sí; y en ‘’derechos humanos positivos y negativos’’ para indicar la acción frente a la inacción en relación a la obligación del Estado y los actores privados en cuanto a los medios para ver sus estos

derechos protegidos y materializados. La clasificación generacional alude a los derechos de naturaleza civil y política, los derechos de naturaleza económica y social y los derechos de naturaleza colectiva, cultural y medioambiental. La clasificación positiva-negativa distingue entre lo que debe o no hacer el individuo para materializar el derecho, esto es, si una acción es requerida por el individuo para materializarlo se considerará positivo, o, en cambio, son necesarias restricciones o ataduras para materializar ese derecho se considerará negativo

Como en la prehistoria, en los Estados Nación del S. XXI, todavía se mantiene una división en el trabajo. Esta división, en muchos Estados, mantiene un esquema comparable a la estructura social primitiva; por lo tanto, frecuentemente se mantienen distinciones en base al género, edad y rango social. En el globalizado S. XXI, los bienes y servicios se intercambian entre Estados Nación a través de un mercado organizado y regulado. No obstante, las divisiones en el ámbito del trabajo difieren en su dimensión nacional. También difieren las regulaciones existentes entre los Estados en cuanto a las condiciones de trabajo, específicamente en cuanto a las normas de contratación y condiciones en las que los trabajadores prestan sus servicios, lo que podemos denominar como Derecho del Trabajo.

La normativa laboral y regulaciones en cuanto a la contratación y condiciones de trabajo se define en esta tesis como ‘’Derechos de los Trabajadores’’. Tras un análisis más pormenorizado, bajo el paraguas de la globalización, surge la cuestión de si son, o pueden ser, estos ‘’Derechos de los Trabajadores’’ considerados como Derechos Humanos, y, en caso de serlo, ¿Qué implica esto para el sistema de mercado regulado y estructurado actual? Esta es la cuestión nuclear del presente Proyecto y su acercamiento se realiza desde el planteamiento presentado en cuanto al desarrollo histórico de la división del trabajo en el mundo desde la prehistoria hasta el S.XXI.

La concepción de los Derechos de los Trabajadores como Derechos Humanos ha venido siendo relevante desde hace más de 60 años tras los inicios de la Declaración Universal de los Derechos Humanos (DUDH). La DUDH categoriza los Derechos Humanos relativos a las libertades personales en sus artículos 1 al 19, los Derechos Humanos relativos a las relaciones sociales y económicas en los artículos 20 al 26 y los derechos de solidaridad comunitaria en los artículos 27 y 28. Tras un examen en

detalle, de los Derechos Humanos en su ámbito socio-económico, los artículos 23 y 24 hacen referencia directa a los Derechos de los Trabajadores. Hace apenas 22 años, los Derechos de los trabajadores fueron proclamados por la Organización Internacional del Trabajo (OIT) en su adopción en 1998 de la Declaración Fundamental de los Principios y Derechos en el Trabajo, que identifica cuatro derechos fundamentales de los trabajadores basados en ocho convenios básicos de la OIT. Sin embargo, se presenta problemática la falta de estricta adherencia a los principios resumidos en la Declaración, carentes en muchos Estados de la misma manera que ocurre con otros de los instrumentos de ‘’ley blanda’’ promulgados por la OIT. Esto es especialmente problemático en un mundo que cada vez tiende a una mayor interconexión y globalización económica, expandiéndose hacia países en vía de desarrollo que a menudo ofrecen una protección y ejecución inadecuados de los Derechos de los Trabajadores. Esto es particularmente evidente en países con gobiernos de corte autoritario, que no respetan los Derechos Humanos a pesar de ser admitidos al sistema de mercado internacional a través de la Organización Mundial del Comercio (OMC). La no-aplicación de los estándares de la OIT en las fábricas de producción en China son un ejemplo particularmente ilustrativo del problema mencionado. Siendo China el motor económico en el que se ha convertido en el S.XXI, la concepción de los Derechos de los Trabajadores como Derechos Humanos debería ser primordial, especialmente considerando la concepción autoritaria del gobierno y su pésimo historial de Derechos Humanos.

Sin embargo, el problema de la falta de respeto y de adherencia a los principios de la Declaración no se limita solamente a estados con gobiernos autoritarios. El descuido de los sistemas de seguridad y salud en el trabajo es frecuente en países completamente desarrollados económicamente y con gobiernos democráticos, como es el caso de los Estados Unidos de América, que ha ratificado los ocho convenios básicos de la OIT. En Estados plenamente desarrollados económicamente, con concepciones democráticas sobre la gobernanza, a menudo los Derechos de los trabajadores quedan relegados a un segundo plano por detrás de los derechos de sus empleadores. Esto se basa en el desarrollo histórico de la división del trabajo, la naturaleza económica del sistema y su ideología política que se basa en premisas de estructuras de clase en gran parte del mundo.

En el S.XXI, los aspectos e impactos de la globalización afectan a las personas y a las naciones en múltiples facetas. A efectos de este texto, la globalización se define como la aparición de una sociedad global dentro de la cual las actividades económicas, políticas, medioambientales y culturales en una parte del mundo tienen una repercusión en personas en otras partes del mundo. A medida que el mundo se interconecta a través de avances tecnológicos, la erosión de los controles de capital, el incremento del acceso a la información y los patrones migratorios de personas y empresas, favorecen un incremento del comercio internacional y la inversión extranjera directa. Esto ha propiciado la expansión de los mercados nacionales a la escala internacional, resultando en la aparición de corporaciones transnacionales, que se expanden y subcontratan a través de la cadena de valor mundial en países ‘’anfitriones’’ con un menor coste (a menudo en países en vías de desarrollo o subdesarrollados), como medida de arbitraje regulatorio, resultando en un descenso del coste de producción y operación, lo que se traduce en la maximización del nivel de beneficios, a menudo a costa de las condiciones de los trabajadores. Por tanto, se puede argumentar que, con la erosión de los controles de capital, la aparición de corporaciones trasnacionales y la expansión de los miembros de la OMC existe una verdadera ‘’carrera a la baja’’ en la medida que la disminución de los costes de producción (mano de obra) dan como resultado un incremento en la ventaja competitiva, favoreciendo a las corporaciones transnacionales que fervientemente buscan maximizar su valor por medio del incremento de sus ingresos minimizando sus costes de operación.

La brecha entre culturas y tradiciones y de la misma manera, entre estados desarrollados y en vías de desarrollo no existe solamente entre los estados o sus gentes, sino también de manera interna. Esto ha sido propuesto por múltiples estados miembros de la OMC como una objeción para la ejecución de los derechos de los trabajadores y al reconocimiento de los derechos de los trabajadores como derechos humanos, siendo el argumento que, la cultura, condiciones y desarrollo del derecho del trabajo no está tan extendido como en los estados desarrollados. A pesar la existencia de ciertas preferencias previas y excepciones, la OMC está diseñada para otorgar a todos sus miembros las mismas ventajas competitivas, siendo la no-discriminación entre sus miembros uno de los fundamentos de la OMC. Las diferencias en cuanto a las ventajas competitivas son una distorsión del campo de

juego en el mercado mundial dentro de los miembros de la OMC. En la economía globalizada del siglo XXI, ¿Cómo, o si quiera, es posible la superación de las diferencias los miembros de la OMC superarse que se alcance un consenso efectivo en cuanto a las normas orientadas a la protección de los Derechos Humanos, logrando así que los Derechos de los trabajadores sean conceptualizados como Derechos Humanos? En el fondo de esta cuestión cabe también el plantearse si los Derechos de los Trabajadores han sido parte de la visión en el diseño institucional y el esquema legal de la OMC, dentro del sistema de mercado contemporáneo en 2021. Estas cuestiones son la fuerza nuclear sobre las que se trata de profundizar en esta tesis.

Relevancia

Si bien el tema sobre los derechos de los trabajadores como derechos humanos y su enlace con la OMC ha sido debatida en múltiples ocasiones a lo largo del tiempo, con la elección de Donald Trump como el 45º presidente de los EEUU en 2016 y las consecuencias que de ello se desencadenaron, han revivido la discusión y el debate sobre la necesidad de reforma de la OMC. En 2017 los EEUU embarcaron en una guerra comercial focalizando a China, la Unión Europea y otros miembros de la OMC. Estas acciones y sus argumentos, reavivaron las discusiones sobre la reforma de la OMC. A pesar de la inexistencia de reformas en la OMC como institución dentro del mandato de la administración Trump (al margen de la paralización del Órgano Permanente de Apelación en 2019), el año 2021 acomodó al presidente número 46 de los EEUU, Joseph Biden. La administración Biden planea una ambiciosa agenda, planteando reformas estructurales en el ámbito nacional, a la vez que mantiene un dialogo abierto en el plano internacional, esto *podría* otorgar una oportunidad de reconexión con uno de los asuntos que históricamente han perseguido los EEUU y otros Estados a lo largo del tiempo: la unión del comercio a los derechos humanos, particularmente a los derechos de los trabajadores. Si bien, la faceta relativa a la remuneración por el trabajo no se analiza en detalle en este proyecto, está plenamente relacionado con el Derecho del Trabajo y es un aspecto que, si la visión expuesta de los Derechos de los Trabajadores como Derechos Humanos se probara como válida y aplicable, el coste de producción aumentaría en todos aquellos estados que actualmente fallan en la aplicación y adhesión a los Derechos de los Trabajadores

de manera efectiva; no obstante, el aumento del coste de producción no debe considerarse como una situación indeseable bajo esta premisa.

Considerando que los abusos y la explotación en el ámbito laboral han venido debatiéndose durante años, e incluso siglos, hasta llegar a la actualidad, la globalización del s.XXI, el flujo de información inmediata y accesible ha propiciado un incremento de la concienciación de las externalidades negativas enlazadas al mercado, que, a su vez, de manera frecuente, se relaciona con las corporaciones transnacionales. La cuestión de los Derechos de los Trabajadores como Derechos Humanos no es un debate íntegramente novedoso, pero siempre se ha sido debatido, con una falta de absoluta de consenso, entre los miembros de la OMC. Sin embargo, la situación global ha cambiado desde la última vez que se debatió abierta y activamente sobre el asunto y, dadas las actuales discusiones centradas en las reformas de la OMC, aparentemente es un buen momento de madurez para retomar el debate sobre la necesidad de enlazar los Derechos de los Trabajadores en el mercado internacional y los Derechos Humanos, de manera definida y desde el seno de la OMC.

Este tema es, además, de interés personal por mi trasfondo como parte de la clase obrera, proviniendo de una familia trabajadora. A lo largo de mi carrera profesional he trabajado en una variedad de ocupaciones, comenzando con mi primer trabajo a tiempo completo como operario en una planta de producción no sindicada, complementándolo con mis estudios en la universidad. En los siguientes años de mi carrera traté de organizar un movimiento sindical dentro de la empresa, recibiendo represalias por parte de la dirección de la empresa cuando mis acciones llegaron a su conocimiento. Estas y otras experiencias a lo largo de mi carrera profesional instigan una conexión personal con el Derecho de los Trabajadores, de esta manera, este tema se refuerza por mi trasfondo personal. Dado que el debate de los Derechos de los Trabajadores como Derechos Humanos ha sido sujeto de un amplio abanico de posiciones y debates durante décadas y todavía no se ha adoptado un consenso, junto con la reforma de la OMC como objetivo de un gran número de académicos y la posición adoptada por los EEUU, la UE, China y otros estados de gran influencia económica, considero que es un buen momento para tratar de insuflar fuerza al asunto

de la consideración de los Derechos de los Trabajadores como Derechos Humanos dentro del contexto del mercado internacional.

Cuestiones de la investigación e hipótesis.

Las preguntas que se buscan responder con este estudio pueden ser definidas de manera amplia como, primeramente, ¿pueden los derechos de los trabajadores ser considerados Derechos Humanos? En caso afirmativo, ¿Pueden y deben los Derechos de los Trabajadores, en esta concepción como Derechos Humanos, relacionarse de manera directa con el comercio? Si es así, ¿Pueden los Derechos de los Trabajadores aplicarse y defenderse a través del actual sistema de resolución de disputas de la OMC? Incluso si la respuesta es afirmativa a todas las preguntas anteriores, ¿Sería más eficiente para la OMC fijar mínimos de protección en cuanto a los derechos de los trabajadores, incluyendo estándares mínimos de seguridad y salud en el trabajo? Profundizando más allá, ¿Hasta qué punto, ante la ausencia de medidas mínimas de protección de los Derechos de los Trabajadores, bajo los actuales acuerdos de la OMC, puede un Estado miembro obligar a otro a respetar los Derechos Humanos de sus ciudadanos o los Derechos de los Trabajadores conceptualizados como Derechos Humanos? ¿Y los definidos como derechos fundamentales del trabajo por la OIT, aún con la inclusión de un compromiso vinculante para proteger el derecho a la vida de los trabajadores a través de la imposición de medidas mínimas de seguridad y salud en el trabajo? Y ¿Qué acciones puede llevar a cabo la OMC para ejecutar una decisión del sistema de solución de disputas relacionada con la protección y aplicación de los Derechos de los Trabajadores?

Mi hipótesis es que los derechos de los trabajadores, tomando como referencia para su definición la empleada por la OIT para los derechos fundamentales de los trabajadores, con la inclusión de medidas mínimas de seguridad y salud en el trabajo, son derechos humanos básicos y fundamentales. Además, es parte de mi hipótesis que los miembros de la OMC pueden en la actualidad iniciar medidas para obligar a otros miembros que no garantizan, aplican y protegen los derechos de los trabajadores en su conceptualización como derechos humanos (o miembros de la OMC con un sistema de aplicación laxo) en las anteriormente mencionadas áreas con el objetivo de

proteger los derechos de los trabajadores. No obstante, también pienso que, con la base jurisprudencial histórica de la OMC, estos intentos en las condiciones actuales, probablemente serían infructuosos. Por ello, creo que sería más eficiente y efectivo para la OMC el adoptar un mínimo de derechos de los trabajadores como derechos humanos, siendo estos unos mínimos en cuanto a la salud y seguridad de los trabajadores y aquellos enumerados en la declaración de 1998 sobre los Derechos Fundamentales en el Trabajo de la OIT, como un anexo a los acuerdos de la OMC, con el objetivo de proporcionar una base mínima a los niveles de protección básicos como derechos humanos para los trabajadores en las áreas anteriormente expuestas, y usar el actual sistema de resolución de disputas con la cooperación institucional de la OIT como mecanismo de resolución de disputas dentro del área del Derecho de los Trabajadores.

Métodos y Fuentes de Investigación

Los métodos de investigación de esta tesis pueden ser primeramente caracterizados como interdisciplinares. Considerando el alcance y los objetivos de esta investigación y sus hipótesis, se ha empleado un enfoque interdisciplinar en cada parte de esta disertación, construida inicialmente desde un punto de vista histórico, teórico y filosófico, analizando los derechos en general. El enfoque del Desarrollo histórico de los derechos humanos, desde su primera codificación hasta los movimientos que pusieron límites al poder soberano de los estados en favor de los derechos individuales y los derechos positivos, que favorecen la acción frente a la inacción. Este análisis trata de identificar sus efectos en la teoría y la práctica del derecho internacional en materia de Derechos Humanos, sus conceptualizaciones y su desarrollo. A lo largo de esta investigación se emplea, de manera deliberada, un enfoque amplio y conceptual, con especial énfasis en los primeros códigos normativos y las primeras normas de derecho laboral como base para sustentar los argumentos sobre la visión de los Derechos de los Trabajadores como Derechos Humanos. Esta tesis bebe de un amplio abanico histórico y socio-legal, analizando como la sociedad ha ido progresando desde la edad antigua a la era industrial, la guerra mundial y sus secuelas y la época postguerra fría, donde comienza, a efectos de esta tesis, la época contemporánea.

A lo largo de esta investigación, se analizan los procesos subyacentes que afectan a la comunidad internacional, específicamente a través de un análisis comparativo de una selección de normas nacionales e internacionales en materia de Derechos Humanos y en materia de estándares de las medidas laborales, encuadrado en una vía de exploración de las concepciones teóricas de los Derechos Humanos y los Derechos de los Trabajadores. Los Derechos de los Trabajadores están protegidos por los marcos legales nacionales y a nivel internacional por instrumentos de ‘’ley blanda’’ enlazada a la normativa internacional sobre los Derechos humanos y reforzada por medio de acuerdos internacionales. A través de un análisis histórico-comparativo de las normativas nacionales e internacionales y a través de un análisis de los estándares recomendados por la OIT y otras organizaciones; mezclando, deliberadamente, legislación vinculante y ‘’leyes blandas’’ para enmarcar los Derechos de los Trabajadores como Derechos Humanos dentro del panorama histórico en materia económica internacional. A través de un análisis histórico de la jurisprudencia de la OMC, se busca una reflexión a futuro de las posibilidades de acción en materia de Derechos Humanos por los miembros de la OMC, con especial atención en lo tocante a los Derechos de los Trabajadores contextualizados como Derechos Humanos. Toda esta labor reposa también sobre una extensa base de fuentes secundarias, como libros, artículos académicos de académicos de renombre, notas de conferencias, actas de reuniones y publicaciones de organizaciones intergubernamentales, agencias estatales, publicaciones de organizaciones no gubernamentales y artículos periodísticos. Considerando el acercamiento multidisciplinar empleado en esta investigación, se han empleado fuentes de trasfondo económico, histórico, filosófico y socio-legal.

Desde el inicio, considero que los Derechos de los Trabajadores han de ser considerados como Derechos Humanos, no obstante, no tiene valor el derecho que no está codificado, que no es aplicable ni puede defenderse de manera efectiva. Es por ello que para que los Derechos de los Trabajadores sean efectivamente Derechos Humanos, en el contexto del mundo globalizado del s.XXI, es necesaria la protección y aplicación a nivel internacional, pudiendo ser la OMC una plataforma adecuada para su desarrollo en estos términos. A través de los métodos previamente descritos, se busca probar estas hipótesis y contestar a las cuestiones para construir mi tesis.

Estructura y Contenido

Con la debida consideración dada a mi hipótesis, metodología y fuentes, la investigación se ha estructurado en tres grandes secciones, siguiendo una línea temporal. La primera parte recorre las concepciones iniciales de los derechos humanos, con la aparición de los derechos humanos tras la finalización de la 2ª Guerra Mundial hasta la conceptualización contemporánea en su visión internacional de los Derechos Humanos en el S.XXI.

En la segunda parte, el concepto de los derechos de los trabajadores y su camino hacia los derechos Humanos es analizado en mayor profundidad, realizando un análisis histórico del desarrollo de los derechos de los trabajadores a nivel nacional y realizando una crónica de la propagación de los derechos de los trabajadores, que sigue a la industrialización de los estados, concluyendo con la internacionalización de los derechos de los trabajadores. La internacionalización de los derechos de los trabajadores ilustra la conexión entre los derechos de los trabajadores y los derechos humanos, habiendo ambos recorridos un camino similar, entrelazados con diferentes conceptualizaciones filosóficas a lo largo de su viaje, evolucionando en el tiempo e interconectándose en ocasiones.

La tercera parte se centra en el entendimiento del desarrollo histórico de la normativa económica, lo cual es fundamental como mi tarea, entendiendo que el producto del trabajo es un bien o servicio que se intercambia por otro, y que a medida que el mundo se interconectó, el comercio entre estados aumentó y a través de la exportación de la revolución industrial, los derechos de los trabajadores se extendieron. La aparición de un marco de referencia teórico de mercado libre frente a los distintos modelos económicos y políticos, que coincide con, se puede argumentar que fue un resultado de, y como respuesta a: la primera revolución industrial es diseccionado y analizado con el objetivo de entender el ímpetu de su desarrollo. El desarrollo de la normativa económica internacional se analiza desde el inicio de su desarrollo a finales del s.XVIII hasta la segunda guerra mundial, desde la finalización de la segunda guerra mundial hasta la guerra fría y culminando con la creación de la OMC, un régimen de comercio basado en normas, que se corresponde con la era contemporánea en este texto. La OMC es analizada a través de una visión en conjunto de la

institución en sí misma y del desarrollo de su jurisprudencia, con un enfoque especial en los aspectos que no están relacionados con temas puramente económicos, que, podría decirse, están estrechamente están estrechamente relacionados con los derechos humanos. Me embarco en un ejercicio hipotético, argumentando la utilización de la OMC para juzgar violaciones de los Derechos Humanos. Tras este análisis, se enfoca la argumentación en la concepción de los derechos de los trabajadores como derechos humanos y el actual dilema de la OMC, que crea oportunidades de evolución.

En las conclusiones y recomendaciones, refuerzo el concepto del Derecho de los Trabajadores como Derechos humanos y busco analizar y presentar argumentos a favor y en contra de esta conceptualización. Trato de hacer valer el argumento de la necesidad de cooperación interinstitucional en materias enlazadas entre comercio y trabajo en la OMC. El objetivo es conectar las cuestiones y la investigación realizada en las anteriores partes de esta tesis para conectar los derechos de los trabajadores y los derechos humanos. Por supuesto, este es el ápex de este estudio, que requiere una reflexión sobre las condiciones necesarias para los derechos humanos, sobre los derechos básicos y su conexión con los derechos de los trabajadores, la soberanía de los estados y su relación con los derechos humanos, el mercado mundial y su conexión con los derechos humanos y la relación entre las corporaciones transnacionales y los derechos humanos. El ápex de esta tesis llega a través de haber obtenido un profundo conocimiento del camino de los derechos humanos, el camino de los derechos de los trabajadores y la normativa internacional en materia económica.

Resultados de la Parte I

El principal objetivo de la Parte I (el camino a los Derechos Humanos) es proporcionar un marco teórico y metodológico para entender la evolución de los Derechos Humanos. Esto es básico para poder realizar posteriores observaciones sobre los Derechos de los Trabajadores como Derechos Humanos en el mundo contemporáneo globalizado y su mercado internacional regulado.

Primeramente, se trata la tarea de identificar y definir las concepciones primigenias de los derechos y, de esta manera, recorrer el camino de los derechos humanos a lo largo de su desarrollo. Esta tarea comienza con una revisión histórica empezando en la edad antigua, recorriendo cronológicamente el camino hasta la aparición de la normativa sobre Derechos Humanos contemporánea. A través de esta visión en conjunto se puede observar cómo se han desarrollado los Derechos Humanos, estableciendo un patrón histórico comparable, si bien no tan definido, a lo que actualmente llamamos Derechos Humanos. Este punto de vista fue obtenido tras el análisis del camino intercultural y su desarrollo a lo largo de los siglos. La conciencia social y el activismo, junto con los movimientos intelectuales y políticos, contribuyeron a la evolución y desarrollo de los Derechos Humanos.

En Segundo lugar, se busca el sentido de la dicotomía de las concepciones relativistas y universalistas de los Derechos Humanos. Se examinan y analizan argumentos a favor y en contra de cada una de estas conceptualizaciones de los Derechos Humanos. Este análisis es realizado a través de los trabajos de algunos de los académicos más sobresalientes, y un análisis textual de los instrumentos y declaraciones de Derechos humanos. Considerando la inclusión de personas de diferentes culturas, regiones y niveles de desarrollo económico, un diverso comité de trabajo, estoy de acuerdo con la concepción universalista de los Derechos Humanos, enumerada en la Declaración Universal sobre los Derechos Humanos y los dos convenios. Si bien es comprensible la división existente, no parece deseable; el mundo es un lugar amplio, con muchos tipos de personas, no obstante, como un rio, cambia su curso con el tiempo, de la misma manera que la sociedad global, sus valores, sus normas, el sentido de la justicia y también los Derechos Humanos.

Como ultima reflexión sobre la parte I, se ha logrado una comprensión en profundidad de la división en los instrumentos operativos para la Declaración Universal de los Derechos Humanos a través de dos convenios: El Convenio Internacional sobre los Derechos Civiles y Políticos y el Convenio Internacional sobre Derechos Económicos, Sociales y Culturales. Algunos Estados han ratificado solamente uno de los dos convenios. Los Derechos Humanos se han formulado a nivel regional, siendo algunas de estas formulaciones más exitosas que otras, como es el ejemplo del Convenio Europeo de Derechos humanos. Finalmente, dentro del concepto de

Derechos Humanos básicos, en engloba todos los derechos, solo unos pocos pueden ser considerados universalmente como prometedores en la avenida hacia la exploración de la protección de los trabajadores de manera específica.

Resultados de la Parte II

El principal objetivo de la parte II (El camino hacia los Derechos de los Trabajadores) es el de trazar y analizar el desarrollo histórico de los Derechos de los Trabajadores. Esto se materializa a través de un análisis de la normativa temprana sobre la regulación de la relación trabajador-empleador, comenzando con la normativa de Inglaterra, remontándose a la época de la primera revolución industrial. El análisis enfocado en estas primeras normas se realizó también desde el punto de vista del derecho a la negociación colectiva y los primeros indicios de la prevención de riesgos laborales, hitos que surgieron a raíz de avances técnicos de la época y debido a la presión social y la conciencia de la situación de los trabajadores. No obstante, la regulación entre la relación trabajador-empleador se remonta más atrás en el tiempo, durante la época de los sistemas feudales se fue germinando un cierto cambio en las dinámicas sociales que más adelante florecieron en la primera revolución industrial. La primera revolución industrial se manifestó a través de nuevas innovaciones en el proceso de producción, lo cual generó un incremento del comercio entre Estados, provocando el incremento de la interconexión y la dinamización. La llegada de los anteriormente mencionados avances tecnológicos cambió por completo la estructura social y económica. A través del análisis de las normas laborales más tempranas se cimienta la idea de que la normativa laboral contemporánea comienza conceptualmente en la primera revolución industrial.

Como se sugiere, estas normas fueron el resultado de una combinación de fuerzas, a través, principalmente, del resultado de la respuesta social a las pobres condiciones de vida y los peligros a los que los trabajadores se exponían al trabajar en los centros de trabajo en los que no existía medida de prevención alguna. A la vez que la tecnología se expandió, también lo hicieron los Derechos de los Trabajadores, mientras que los Estados competían económicamente, se formó una sociedad global interconectada. La conciencia social con respecto a los diferentes conceptos a cerca de los derechos, ya

sea por motivos políticos o económicos, contribuyó a la internacionalización de los Derechos de los Trabajadores, materializando una institución internacional dedicada en exclusivo a los Derechos de los Trabajadores. La internacionalización de los Derechos de los Trabajadores, precede al desarrollo contemporáneo de los Derechos Humanos y también es así cuando hablamos de la institución que los defiende, siendo la Organización Internacional de los trabajadores una institución más antigua que las Naciones Unidas. La OIT fue fundada con el objetivo principal de establecer justicia social para los trabajadores. El núcleo del trabajo de la OIT es el desarrollo de estándares de trabajo internacionales, bien por medio de convenios o recomendaciones. Se presenta problemático, sin embargo, la aplicación de estas medidas y la naturaleza fragmentada de la adopción de los convenios en el ámbito internacional.

Mientras que la OIT fue pionera por medio de múltiples iniciativas para asignar responsabilidades en las corporaciones transnacionales con respecto a los Derechos Humanos (y los Derechos Fundamentales de los Trabajadores, ONU y la Organización para la Cooperación y el Desarrollo Económicos (OCDE) se mantuvieron también activas en este frente, pero con poco éxito. Las iniciativas con mayor grado de éxito son voluntarias, convirtiéndose las medidas vinculantes, en el pasado, en un proyecto fallido a nivel internacional. Aunque los convenios de la OIT son vinculantes una vez ratificados y adoptados, no existe un mecanismo de ejecución. No obstante, los Derechos Fundamentales de la OIT y sus ocho convenios básicos, son considerados por una multitud de académicos como universales y vinculantes.

La problemática yace, en los estándares de seguridad y salud en el trabajo y su no inclusión dentro de los Derechos Fundamentales de la OIT. Existen líneas argumentativas ampliamente debatidas sobre la necesidad de incluir derechos relativos a la salud y seguridad de los trabajadores, comenzando desde la declaración de la OIT de 1998, aunque se desprende que la omisión de estos derechos fue consciente y con el objetivo de tratar de lograr una mayor ratio de aceptación ante las reticencias de empresas y Estados. Este razonamiento parece acertado, esto ya ha ocurrido históricamente en más ocasiones, como con la oposición de la comunidad empresarial con respecto a las iniciativas vinculantes de la ONU y la inclusión de

medidas de prevención de riesgos laborales. Las corporaciones transnacionales a menudo usar arbitraje regulatorio para rebajar los costes de mantenimiento de sus operaciones, por lo tanto, desde un punto de vista egoísta y meramente económico, no tiene sentido una posición de apoyo a medidas que reduzcan estas oportunidades de explotación de negocio.

La decisión adoptada por la OIT en 2020 se presenta como prometedora, avanzando en la inclusión de medidas de seguridad y salud laboral, lo cual coincide con las visiones iniciales de este proyecto. La ONU está actualmente trabajando, por sexto año, en el borrador de un tratado vinculante sobre empresas y Derechos Humanos. No obstante, la última revisión del borrador se presenta excesivamente abstracta en ciertos aspectos y parece que sigue un camino similar al fallido Borrador de las Normas de la ONU de 2003.

Resultados Parte III

El principal objetivo de la Parte III (El camino hacia la normativa económica internacional) es presentar una visión en conjunto del comercio internacional, el desarrollo de las leyes internacionales en materia económica, con un especial enfoque en la normativa de comercio y su relación con los Derechos Humanos. Los capítulos de esta parte de la investigación analizan la concepción y desarrollo de la normativa económica y su coincidencia con la propagación de la revolución industrial. La base teórica del libre cambio, entre otras fuerzas motrices, marcaron el comienzo de la liberalización del mercado entre Estados. Una red internacional de finanzas facilitó el mantenimiento de la paz entre estados, entre otros factores, financiando la expansión de los medios de producción y el intercambio de bienes. Esto facilitó la creación de mercados estables, tanto para bienes como para la mano de obra, expandiéndose de manera continua a medida que los Estados adoptaban una posición librecambista. Las secuelas de la guerra mundial generaron los primeros intentos de institucionalización de la cooperación global, con la creación de la Liga de las Naciones, que resultó un fallo en gran parte por su diseño y la falta de membresía de los EEUU.

La Victoria del bando aliado en la segunda guerra mundial llevó, *inter alia*, a la reorganización de la vertiente económica global, por vía de la creación de dos

instituciones, el Fondo Monetario Internacional y el Banco Internacional para la Reconstrucción y el Desarrollo. Una tercera organización, planteada para gobernar el comercio internacional, la Organización del Comercio Internacional (OCI) falló en su concepción, pero su operativa documental, los Acuerdos Generales sobre Aranceles Aduaneros y Comercio (conocido como GATT de 1947, por su acrónimo en inglés), se establecieron como el marco operacional y las normas sobre las que se basó el comercio hasta la creación en 1994 de la Organización Mundial del Comercio (OMC). La OCI pretendía abarcar materias incluidas también dentro de la normativa laboral, propiciando la apertura e inclusión de organizaciones no gubernamentales en su fatídica Carta de la Habana. Sin embargo, esto no se materializó en la GATT1947, desarrollándose, durante medio siglo, la normativa en materia comercial sin consideración por los Derechos Humanos, a pesar de ciertos intentos a lo largo de los años de incluir una Carta Social a los GATT, todos ellos fallidos.

La OMC, fundada en 1994, es una organización internacional con personalidad jurídica, al contrario que los GATT 1947. El principio rector de la OMC es la no discriminación entre sus miembros en materia comercial, basados en el principio de ‘’nación más favorecida y el principio de ‘’trato nacional’’. No obstante, la OMC permite cierto tratamiento desigual entre sus miembros en situaciones concretas. La OMC, posee un sistema de resolución de disputas basado en normas codificadas, con un proceso de apelación y cuyas decisiones son vinculantes para los miembros de la OMC. La jurisprudencia de la OMC ha desarrollado y expandido normas para incrementar la apertura y transparencia de la organización en cuanto a los procedimientos de resolución de disputas y a través de limitada participación de ciertas ONG en estos procesos. Con la creación de la OMC, los EEUU y algunos países europeos presionaron para incluir una Carta Social vinculante, que protegiera unos estándares mínimos en materia laboral.

Los acuerdos de la OMC contienen ciertas excepciones, en las que pueden basarse los Estados miembros cuyas políticas internas distorsionan el comercio con otros estados. Estas excepciones se presentan como ruta prometedora para que los Estados puedan promulgar medidas de protección de los Derechos Humanos. Ya ha ocurrido en un cierto número de medidas Estatales, si bien no directamente relacionadas con los Derechos Humanos, estas clausulas se han diseñado para materias no económicas

como la protección del medio ambiente, la protección sanitaria y la protección de recursos nacionales finitos. No obstante, estas medidas no suelen ser sostenidas de manera eficaz dadas las dificultades para llegar a los estándares judiciales, desarrollados en la interpretación del Articulo 20 cuando éstas se evalúan.

Es prometedor para la defensa de los Derechos Humanos, las medidas de protección de la moral pública, aunque todavía es pronto para poder certificar la eficacia de esta vía dada la naturaleza subjetiva del concepto de moral pública. Sin embargo, es claro que, ciertamente, las medidas para la protección de los Derechos Humanos centrados en los Trabajadores, no serían aceptados si nos basamos en la jurisprudencia histórica de la OMC. Por lo tanto, las excepciones basadas en las distorsiones comerciales no parecen el instrumento más eficaz en la actualidad para proteger los Derechos Humanos de manera externa. Con esto en mente, ya se ha debatido sobre la inclusión de clausulas de excepción especificas sobre Derechos Humanos, incluso designando el comercio como un privilegio, con la premisa del reconocimiento previo de los Derechos Humanos. La OMC cumple 26 años y resurge de una parálisis debido al no funcionamiento del procedimiento de apelación, resultado del bloqueo por los EEUU, lo que derivó en conversaciones sobre la necesidad de reformar la Organización.

Desde la negociación de la infructuosa OCI y el establecimiento de la OMC, las políticas neo-liberales en el sentido económico han dominado el panorama, que, junto con las acciones de las Corporaciones Transnacionales y las empresas en general, han apagado la discusión sobre los Derechos de los Trabajadores y los países menos desarrollados no contemplan la idea de la inclusión de los Derechos Humanos como clausulas vinculantes en la OMC con mucho ímpetu. No solamente se crea una distorsión comercial por las condiciones laborales desiguales, se distorsiona la competición, ya que los bienes de estados provenientes de Estados con una aplicación laxa, nula o contraria a los Derechos Humanos compite con bienes de Estados que protegen y respetan los Derechos Humanos en su aplicación al trabajo. Este hecho se une al surgimiento de las corporaciones transnacionales -que no tienen lealtad por ningún estado- equivale a una ‘’carrera a la baja’’ en cuanto a los costes de producción, a menudo a costa de los derechos de los trabajadores, el medio ambiente y una cantidad de situaciones problemáticas ingentes.

Conclusiones y Recomendaciones

Las conclusiones son muchas y las recomendaciones escasas. Se procede a enumerar ocho como representativas de los aspectos más importantes de este proyecto.

1. Mientras que los Derechos Humanos son universales en términos de su visión histórica, solamente unos pocos son verdaderamente universales. Muchos de los Derechos recogidos en la Declaración Internacional de los Derechos Humanos son considerados como aspiracionales, que los estados se comprometen a, eventualmente, lograr. Existe una problemática en la adopción de instrumentos de protección y aplicación de los Derechos Humanos. Regionalmente, los sistemas nacionales proporcionan protección de los Derechos Humanos y acceso a la justicia, pero lo hacen de manera limitada y su eficacia difiere ampliamente entre estados.

2. Los Derechos Fundamentales de los Trabajadores, definidos en 1998 por la Declaración de la OIT, junto con la inclusión de derechos relativos a la seguridad y salud en el trabajo, están enlazados a Derechos básicos, como se concibe por Henry Shue y otros. Estos derechos están enlazados con la concepción de Shue del derecho a la seguridad física, el derecho a la libertad y el derecho a la subsistencia. La seguridad y salud en el trabajo debería añadirse a la Declaración de la OIT de 1998, dado que los ambientes de trabajo insanos y peligrosos significan que el trabajador no se encuentra físicamente seguro. El derecho a la libre asociación de los trabajadores y a la negociación colectiva está unido al derecho a la libertad, eligiendo unirse para tratar de logar mejores condiciones laborales. También está unido al derecho a la subsistencia, ya que los trabajadores que no tienen derecho a la negociación colectiva sufren peores condiciones al perder fuerza negocial de manera individual, estando obligados a aceptar condiciones de trabajo subóptimas creando la figura de trabajadores pobres (aquellos que a pesar de trabajar no pueden cubrir sus necesidades vitales minimas). De esta manera, los Derechos Fundamentales de los Trabajadores como se definen en este párrafo y en el resto de esta investigación son universales, Derechos Humanos básicos, que deberían ser vinculantes para todos los estados. La OIT ha realizado un

acercamiento prometedor en los últimos tiempos, tratando de acercarse a esta concepción e incluir previsiones de prevención de riesgos laborales como Derechos Fundamentales.

3. La internacionalización de los derechos de los trabajadores creció desde la revolución industrial, se promulgaron normas laborales en Inglaterra basadas en los movimientos de concienciación colectiva de clase ante la falta de condiciones laborales dignas. Las normas laborales primigenias permitieron el derecho a la negociación colectiva, algo que en muchos Estados estaba considerado como ilegal. El Derecho del Trabajo se expandió a otros estados a raíz de su industrialización. Marcando las diferencias entre clases, emergieron movimientos políticos basados en la protección de los Derechos de los trabajadores, lo cual también contribuyó a la internacionalización de estos Derechos. Los Derechos Fundamentales de los Trabajadores, como se han venido definiendo no son -pero deberían ser- vinculantes para los miembros de la OMC; esto provocaría la disminución de la brecha en las condiciones laborales entre estados y contribuiría además a la creación de un mercado más competitivo y justo.

4. La eliminación de violaciones en materia de Derechos Humanos por Corporaciones Transnacionales es difícil y problemático. Los esfuerzos para promulgar tratados vinculantes a nivel internacional han fallado históricamente debido a la presión ejercida por la comunidad empresarial, que prefiere trabajar sobre preceptos de aplicación voluntaria. Enlazados con el comercio, se mercadea con los Derechos de los Trabajadores como parte de los acuerdos comerciales entre Estados Miembros, las normas de la OMC lo permiten. Esto crea una regulación laboral fracturada y desigual, lo cual no es deseable.

5. La jurisprudencia de la OMC, en el pasado, ha venido indicando que si un Estado tratase de imponer medidas de protección de los Derechos de los Trabajadores y estas medidas tuvieran un objetivo externo, dirigidas a bienes

de Estados sin protección de esos derechos, sería una medida determinada como injustificable con la base del artículo 20.

6. Entendiendo que los Derechos Fundamentales de los Trabajadores, definidos en 1998 por la Declaración de la OIT, junto con la inclusión de derechos relativos a la seguridad y salud en el trabajo deben ser incluidos dentro de los acuerdos de la OMC, la vía más efectiva sería expandir el artículo 20 o crear un anexo que los determinara vinculantes para todos los miembros de la OMC y que el órgano de apelación consultara con los expertos de la OIT en disputas relacionadas con los Derechos de los Trabajadores. La cooperación interinstitucional es altamente deseable en disputas comerciales relacionadas con el trabajo.

7. Argumentar que las condiciones de trabajo opresivas puedan ser observadas como trabajos forzados podría ser difícil de sostener. No obstante, considerando las condiciones de trabajo inhumanas y las acusaciones de trabajos forzados en uno de los más grandes Estados exportadores, unido al abismal registro de infracciones en materia de Derechos Humanos, un miembro de la OMC podría aplicar una medida restrictiva a los bienes producidos en estas condiciones y basarse en la excepción general e) del artículo 20 que permite limitar la importación de bienes producidos por trabajos penitenciarios. Difícil sostener el argumento, sí, pero posible. La intervención estatal puede ser empleada como medida para que los individuos puedan tener opción de proteger sus Derechos básicos; incluso llegando por la vía de la argumentación a través de los derechos más fundamentales como el derecho a la vida, en el sentido de seguridad física.

8. La OMC cumple 26 años emergiendo de una crisis, envuelta en una amplia discusión sobre posibles reformas y bajo el liderazgo de la primera mujer y africana como Directora General. El asunto de la ‘’Carta social’’ de la OMC se ha discutido desde los inicios del GATT 1947. Dentro de las reformas de la OMC, la inclusión de una ‘’Carta Social’’ debería tener prioridad en la lista.

Los tiempos de crisis presentan desafíos y oportunidades. Teniendo en cuenta los logros y las deficiencias de la OMC podemos considerarlo como un ente efectivo en cuanto a la aplicación de normas, si bien necesita seguir refinándose. Tras reflexionar en los Derechos de los Trabajadores y los objetivos de la OCI, puede que sea el momento de volver a la visión presentada en la Carta de la Habana, incluyendo estándares mínimos en las condiciones de trabajo y un enlace directo con la OIT; bien como un anexo a los acuerdos de la OMC o como una expansión del artículo 20. La OMC, a pesar de las inerrelaciones políticas entre sus miembros, es un ente basado en normas, con un historial de 26 en resolución de conflicots entre sus miembros. La OMC debería ser reformada, añadiendo un mecanismo de control de los Derechos Fundamentales de los Trabajadores, con una vía de consulta o incluso en conjunción con la OIT.