3

The ILO's Governance of Forced Labour

Forced labour represents the underside of globalization.

—ILO, 'More than 12 million are trapped in forced labour worldwide'

It makes less and less sense for the ILO to supervise its standards nation state by nation state, on the basis of freely ratified Conventions, when supply chains are cutting across those nation states.

—'Address by Guy Ryder, Director-General of the International Labour Organization', Paris, France, 20 June 2015

Recruited to the ILO in 2002 to head the newly established Special Action Programme to Combat Forced Labour (SAP-FL), Roger Plant faced a challenge: to 'convince politicians, diplomats, business leaders, and labour unions that slavery truly is a global problem'.[1] He oversaw the preparation and publication of two extremely influential reports on forced labour, which established the ILO as an authoritative source of knowledge about forced labour and human trafficking. What initially set these reports apart from the burgeoning literature produced by regional and international organisations, governments, and NGOs was their use of numbers; they quantified the number of people estimated to toil in conditions of forced labour and measured its economic cost. Quantification is an effective technique for attracting the attention of policy actors because it translates 'complex phenomenon into simplified numerical representations that make modern forms of governance

[1] ILO, 'Roger Plant, winner of the William Wilberforce Award'.

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possible'.[2] As Plant declared, 'We've got to persuade public opinion, and this is the importance of that headcount.'[3]

Knowledge production through defining, depicting, and measuring forced labour was part of the ILO's broader shift away from its traditional juridical mode of governance via the production of labour standards.[4] It also accounts, in large part, for the ILO's success in establishing itself as a key player in the global antitrafficking governance network, shifting the focus of the network away from an exclusive preoccupation with trafficking for sexual exploitation to include the labour dimension.

Drawing the border between forced labour and other forms of labour exploitation and mapping forced labour's relationship to human trafficking was critical to the ILO's governance agenda. Like other key actors in the antitrafficking governance network, the ILO treated sexual exploitation differently from labour exploitation. In the 1920s, both the ILO and its sister organisation, the League of Nations, regarded sex trafficking to be 'of a criminal character' and, thus, not within the ILO's jurisdiction. Since then, the ILO's deliberations over sex work have been an amalgam of workers protection, criminalisation, and moralism that has shifted over time and in different contexts.[5] In the 1980s, for example, HIV/AIDS prevention was the entry point for the ILO to treat 'sex work' as a form of labour. Although not explicitly recognised as work, the sale of sexual services was treated as a matter of occupational health and safety. However, for the purposes of legal recognition and standard setting, the ILO legal department was clear: 'Prostitution has never been considered as employment or occupation.'[6]

After making forced labour visible within the antitrafficking network, the ILO's next challenge was to erect a normative foundation for a distinctive labour approach to preventing it. The ILO Forced Labour Convention, 1930, defines forced labour as a crime and obliges states to prohibit it.[7] To utilise the traditional tools of labour law (labour standards, labour inspectors, and joint activities by social partners) to prevent forced labour and to provide redress for its victims, the ILO needed a new standard that would complement the

[2] Drubel, 'Regulation by visibility', 190.
[3] ILO, 'Roger Plant, winner of the William Wilberforce Award'; and Baccaro and Mele, 'Pathology of path dependency'.
[4] Ibid.; Jones, 'A "north star" in governing labour migration?'.
[5] Boris and Rodriguez García, '(In)decent work', 211.
[6] Ibid.
[7] ILO Forced Labour Convention, 1930 (No. 29), 28 June 1930.

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prohibition-and-punishment approach of criminal law and add another facet to the overarching multidimensional governance frame.[8]

However, to achieve a new standard, the ILO had to mobilise its tripartite constituents. It overcame the Employers' Group's resistance to new standards by linking forced labour to human trafficking and explaining that the proposed standard would simply extend the existing labour law tools to detecting and preventing forced labour and protecting its victims. In 2014 the ILO adopted the Protocol of 2014 to the Forced Labour Convention, 1930, which provides an alternative legal domain to the carceral one provided in the UN's Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000) (the Trafficking Protocol).[9]

Forced labour poses a scalar-governance dilemma for the ILO. Since two of the key drivers of forced labour – labour migration and global supply chains – are transnational, forced labour is difficult to tackle using only national instruments, which is the ILO's scale of governance. Labour standards and enforcement mechanisms, either through trade unions or public institutions, are primarily treated as a matter of national and territorial jurisdiction. The state in which the employment relationship or work takes place typically has legal jurisdiction to govern it. Labour law's governance domain is employment and work, and employment is understood primarily in bilateral and contractual terms. The ILO's distinctive governance mechanism, the corpus of international standards, exemplifies this approach. The overwhelming majority of conventions apply only to bilateral employment relationships and do not apply to third parties or business and commercial relations. ILO conventions, like international human rights instruments, only apply to states and not to employers and corporations. Moreover, to be given effect, conventions must be 'territorialised by states through ratification and integration into national labour laws'.[10] The problem is that the territorial scale of labour governance creates an incentive for transnational corporations to use their geographic flexibility to engage in regulatory arbitrage. In this way, global supply chains 'transcend territorial nation states and jurisdictions of labour law'.[11] Territorially based jurisdiction also makes it difficult to enforce laws designed to regulate chains of labour recruiters that operate across national borders since cross-border remedies are rare and extraterritorial liability for labour violations is limited.

[8] Andrees and Belser, 'Strengthening labor market governance against forced labor'.
[9] Kotiswaran, 'From sex panic to extreme exploitation', 31.
[10] Prentice, 'Labour rights from labour wrongs?', 1772.
[11] Ibid.

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Forced labour presented an opportunity for the ILO to rescale its distinctive governance mechanism – labour conventions. However, unlike the ethical business alliance – which, as we saw in Chapter 2, endorses forms of business regulation to promote transnational labour governance – the Secretariat for the Employers' Group at the ILO rejects the principle of mandatory due-diligence regulation, claiming 'it disregards state sovereignty and seeks transnational businesses to fill the on-the-ground governance gaps that exist in many parts of the world'.[12]

How did the ILO use its authority over forced labour to stake a claim in the global antitrafficking network and to steer global governance policy away from criminal and immigration law and towards labour and human rights law? How did scale operate as a contested technique of governance? To answer these questions, this chapter focuses on how the ILO used knowledge production and international labour standards to become a vital actor in the global antislavery network. It explores how and where the ILO draws the borders between free and unfree labour in interpreting and applying its definition of forced labour; how the ILO situates forced labour in relation to other forms of unfree labour such as human trafficking and modern slavery; and what makes the ILO's labour approach to ending modern slavery a distinct governance strategy. It also examines the ILO's attempts to shift scale to govern the activities of transnational supply chains and transnational labour recruiters.

REVITALISING THE ILO'S GOVERNANCE AGENDA

The ILO, whose authority had faded with the rise of neoliberalism, seized on the UN's adoption of Trafficking Protocol in 2000 to increase its visibility in the global governance debates, to deepen its connections with other international organisations, and to establish relations with a broader range of civil society actors.

Created to forestall an international race to the bottom on labour conditions after the First World War, the ILO provided a deliberative tripartite mechanism for adopting international labour standards that would then be ratified, implemented, and enforced by nation-states.[13] The resulting international code of labour standards was supposed to establish a level 'social' playing field, albeit one excluding 'native' workers in the colonies.[14] In 1944, the ILO

[12] IOE, Business at OECD, Business Europe, 'Joint business response to the Revised Draft Legally Binding Instrument'.
[13] Diller, 'Pluralism and privatization in transnational labour regulation', 329
[14] Blackett, 'On the presence of the past', 957; Kawar, 'Assembling an international social protection for the migrant'.

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deepened its social justice orientation, exemplified by its motto 'labour is not a commodity', by adopting the Declaration of Philadelphia, which endorsed freedom of association for both workers and employers and the right to collective bargaining, as part of its constitution. In 1946, the ILO became the first specialised agency of the United Nations.

The ILO epitomised embedded liberalism, an international governance regime that prevailed in industrialised capitalist countries until the early 1980s. Coined by John Ruggie, the author of the UN's Guiding Principles on Business and Human Rights (UNGPs), the term refers to a 'form of multilateralism that is compatible with the requirements of domestic stability'.[15] States were persuaded to accept international economic liberalisation and its associated welfare gains because they would retain the ability to intervene to 'tame the socially disruptive effects of markets'.[16]

The ILO is composed of three main bodies – the International Labour Conference (ILC), the Governing Body (GB), and the International Labour Office (Office) – and its tripartite membership sets it apart from other international institutions affiliated with the UN. Known as the International Parliament of Labour, the ILC meets annually to adopt labour standards and to set the ILO's broad policies. Each of its 187 member states sends two government representatives, one representative of a national employers' organization, and one representative of a national trade union. Workers' representatives are drawn from the trade union movement via national federations, which means there is no direct representation of nonunion workers and workers in the informal sector.[17] The International Trade Union Confederation (ITUC) serves as the Workers' Group's secretariat. The International Organization of Employers (IOE), which styles itself as the global voice of business, plays a similar role for the Employers' Group. Its members consist of national business organisations, not actual businesses, and these organisations do not represent transnational corporations.[18] The GB is the ILO's executive. It elects the director-general, takes decisions on ILO policy, sets the annual agenda of the ILC, and establishes the programme and budget, which it then submits to the ILC for adoption. Like the ILC, the GB is tripartite, and just over one-third of the government seats are reserved for the representatives of such key countries as China, India, the Russian

[15] Ruggie, 'International regimes, transactions, and change'.
[16] Ibid., 413. Like the ILO's international labour code with its separate treatment of 'native labour', the compromise of embedded liberalism was never fully extended to the developing countries, most of which were, or recently had been, colonies.
[17] La Hovary, 'A challenging ménage à trois?'
[18] Brudney, 'Hiding in plain sight', 280.

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Federation, the UK, and the United States.[19] The Office, which is under the leadership of the director-general, is the ILO's large permanent secretariat and the centre of ILO's activities. Headquartered in Geneva, the ILO also has regional and national offices. Granted a substantial degree of autonomy under the ILO's constitution, the Office and director-general can orchestrate its constituents to endorse labour standards and policies that promote workers' rights.[20] An elaborate supervisory system helps to ensure that countries implement the conventions they ratify and examines member states' application of standards.

The ILO's corporatist structure adds greatly to the normative legitimacy of its international labour standards but makes the organization difficult to pilot. Albert Thomas, the ILO's first director-general, compared the ILO to a car in which the workers acted as the engine, governments as the steering wheel, and employers as the brakes.[21] National governments finance the ILO as well as decide whether to ratify the ILO's conventions. While the Workers' Group strongly supports international labour standards, the Employers' Group is increasingly reluctant to endorse any form of binding labour standard. What Thomas's analogy ignores, however, is the critical role the International Labour Office plays in orchestrating the ILO's tripartite constituents to adopt specific governance agendas and influencing the agendas of international agencies and organisations involved in global economic and social governance.[22] The Office, which is composed of different divisions and departments with distinct but overlapping spheres of authority, expertise, and interests, acts as arbitrator, researcher, and ideas producer. Through its field offices, the Office also provides technical assistance.

The ILO had a marked impact during the heyday of embedded liberalism, but by the 1980s, embedded liberalism was in crisis and neoliberalism promised to 'make markets work to their full potential and thereby rekindle the kind

[19] The GB meets quarterly and is composed of fifty-six titular members (twenty-eight governments, fourteen employers, and fourteen workers) and sixty-six deputy members (twenty-eight governments, nineteen employers, and nineteen workers). Ten of the titular government seats are permanently held by states of chief industrial importance (Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the UK, and the US). The other government members are elected by the conference every three years, and the employer and worker members are elected in their individual capacity.

[20] Maupain, *The Future of the International Labour Organization*, 118; Thomas and Turnbull, 'From a "moral commentator" to a "determined actor?"'.

[21] Maupain, *The Future of the International Labour Organization*, 123–124; Thomas and Turnbull, 'From horizontal to vertical labour governance'.

[22] Posthuma and Rossi, 'Coordinated governance in global value chains'; Thomas and Turnbull, 'From a "moral commentator" to a "determined actor?"'.

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of economic growth that managed capitalism had failed to deliver in the long 1970s.'[23] The collapse of the Soviet Union in the early 1990s signalled the end of the need for class compromise. Economic liberalisation expanded globally via 'free' trade agreements, and multinational corporations used chains of subsidiaries and suppliers to organise production across the national borders. In this context, the ILO's social justice mandate, its tripartite constituency, and its territorial and national scale of governance were called into question.

The withdrawal of ILO Director-General Michel Hansenne's invitation to the first World Trade Organization (WTO) Ministerial Conference in Singapore in December 1996 revealed the extent to which the ILO had been eclipsed by international economic governance institutions. Labour standards in trade agreements were portrayed as a form of outmoded protectionism. This episode convinced Hansenne, a former Belgian minister of employment and labour, that the ILO needed to align itself better with the prevailing policies of international economic governance. He promoted a new governance approach that emphasised a few key fundamental principles and rights.[24]

The Declaration on Fundamental Principles and Rights at Work (1998) identifies four fundamental rights: (1) freedom from forced labour, (2) freedom from child labour, (3) freedom from discrimination, and (4) freedom of association and the right to collective bargaining.[25] These rights were selected as they enable workers to participate freely in the market rather than imposing substantive standards that interfere with it.[26] The prohibitions against forced and child labour and discrimination were politically appealing on account of their close connection with general human rights discourses, and freedom of association and collective bargaining were already part of the ILO's constitution.[27] The declaration was designed to have a universal effect; countries were expected to respect its principles by virtue of their membership in the ILO, regardless of whether they had ratified the relevant conventions that embodied each of the fundamental freedoms. The ILO provided a distinctive follow-up mechanism that included global reports prepared by the Office, which would cover all four principles of fundamental rights within a four-year cycle. To appease the developing countries, the declaration stated that 'labour standards should not be used for protectionist trade purposes' and

[23] Gerstle, 'The rise and fall (?) of America's neoliberal order', 261.
[24] Ibid., 249.
[25] ILO, ILO Declaration on Fundamental Principles and Rights at Work, June 1998; and Rodgers et al., *The International Labour Organization*, 220.
[26] Maul, *The International Labour Organization*, 260–264.
[27] Ibid., 262.

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that it should not be used to call into question 'the comparative advantage of any country.'[28]

Despite the declaration's focus on a few enabling rights that were grounded in the existing conventions, its promotional nature, and its avowal that it should not be used in trade disputes, it barely achieved the required quorum at the 1998 ILC.[29] Throughout the 1990s, heightened normative and epistemic contestation among its constituents had contributed to the ILO's fading authority.[30]

In the process leading up to the UN's adoption of the Trafficking Protocol, the ILO stressed the linkages between human trafficking and existing conventions (especially those pertaining to forced labour) that already covered trafficking in persons for purposes of labour exploitation.[31] Most importantly, it used the declaration's follow-up mechanism and reports to stake out its claim to be recognised as a key actor in the global antitrafficking governance network. Plant, who had worked with the UN and other development agencies and had expertise on modern forms of slavery, was recruited by the ILO to write the first global report on forced labour.[32]

Written in the shadow of the Trafficking Protocol, the ILO's 2001 Global Report, *Stopping Forced Labour*, sought to make forced labour visible within antitrafficking policy.[33] Lamenting that forced labour was not a 'relic of a bygone era', the report characterised it as a widespread and growing problem that occurred primarily in the private sector. Two types predominated. The first involved 'traditional' forms of forced labour, such as bonded labour

[28] Maupain, *The Future of the International Labour Organization*, 145.
[29] Maul, *The International Labour Organization*, 261.
[30] Thomas and Turnbull, 'From horizontal to vertical labour governance', 200.
[31] Andrees and Aikman, 'Raising the bar', 362. Significantly, little emphasis was given by the ILO to the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), which specifically deals with 'illicit and clandestine trafficking in labour' by providing standards aimed at eliminating these abuses. This little-ratified convention is designed 'to suppress clandestine movements of migrants for employment and illegal employment of migrants'(Article 3) by requiring ratifying states to provide for the 'detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers, in respect of the organisation of movements of migrants for employment' involving human trafficking (Article 6). Even though Convention 143 is relevant to the UN's protocol against human trafficking, the ILO rarely refers to it in its publications on forced labour. This convention was briefly discussed in the first global report on forced labour (ILO, *Stopping Forced Labour*, 123), mentioned in the second global report (ILO, *A Global Alliance against Forced Labour*), and omitted from the third (ILO, *The Cost of Coercion*). My thanks to Leila Kawar for pointing out the significance of Convention 143.
[32] Plant, 'Foreword', vi.
[33] ILO, *Stopping Forced Labour*, 3.

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associated with agrarian feudalism in Asia and Latin America; the second, 'modern', type, involved human trafficking and could be found in every region in the world regardless of the level of development. Referring to human trafficking as the 'underside of globalisation', the report described 'an explosion in the number of persons trafficked across national borders and continents, and then forced into activities including sweatshop labour, domestic service, and even prostitution'.[34]

Although *Stopping Forced Labour* discussed prostitution, sexual exploitation, and trafficking into the sex trade, it did not raise the fraught question of whether the consensual sale of sexual services was a form of work that should be regulated like any other. The ILO simply treated the sale of sexual services differently from the commodification of labour generally, including the commodification of such intimate and gendered forms of labour as domestic work.[35]

The issue of the characterisation of the sale of sexual services was extremely contentious. An attempt in the mid-1990s by an ILO researcher to account for an increase in the number of women working in the commercial sex sector in Southeast Asia led to accusations that the ILO supported the legalisation of prostitution and threats by the United States to cut its funding. Thus, the ILO shied away from any discussion of the legal status of sex work.[36] The 2001 global report simply expressed the view that predominated in the anti-trafficking network: 'Prostitution is sometimes voluntary but overwhelmingly forced' and there is 'widespread regional and international trafficking for this industry'.[37]

The 2001 global report was pivotal for the ILO's governance agenda. By focusing on the private sector and treating labour trafficking as a subset of forced labour, it provided the ILO with a toehold into the prominent and well-resourced global antitrafficking governance network as well as a justification for talking about the need for labour-market regulation to respond to the excesses of economic liberalisation. *Stopping Forced Labour* concluded by calling for more research on forced labour, a task the ILO was eager to undertake. It also proposed 'a holistic approach' to the problem of forced labour that would add labour-market regulation to the criminal prohibition and the launch of a Global Alliance on Forced Labour involving governments and the social partners.

[34] Ibid., 14.
[35] Boris and Rodriguez García, '(In)decent work'.
[36] Ibid., 204–209.
[37] ILO, *Stopping Forced Labour*, ix.

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The director-general, Juan Somovia, a Chilean diplomat with extensive UN experience who took office in 1999, used the 2001 report to elevate forced labour on the ILO's policy agenda, and the GB authorised a Special Action Programme to Combat Forced Labour (SAP-FL). Modelled on the ILO's International Programme on the Elimination of Child Labour (IPEC), SAP-FL was set up in 2002 and housed in the branch responsible for the follow-up to the declaration.[38] Plant was recruited to spearhead the programme and coordinate the forced labour global reports.

The SAP-FL provided the ILO with the institutional base from which to produce and circulate knowledge about forced labour and to develop a distinctive labour-market approach to trafficking that would complement the existing criminal prohibition and involve labour institutions and actors in coordinated antitrafficking activities.[39] The ILO was mindful of the 'opportunities and dangers of using the label "trafficking"'.[40] On the positive side, 'trafficking' is a rallying call under which resources can be mobilised to tackle forced labour.[41] On the negative side, 'increased attention on trafficking can be used to work against the interests of migrants and the legitimate right of people to move and to seek work', because the current approach to trafficking 'leans heavily on law enforcement, crime prevention and national security' and leads 'to calls for stricter border controls, sanctions on those who seek to move, and deportation for those who do so outside migration laws.'[42] Despite its concern about the collateral damage caused by the predominant carceral approach and its impact on migrants, instead of rejecting the term 'trafficking', the SAP-FL called for expanding the approach to trafficking to include labour regulatory and inspection mechanisms.

MAKING FORCED LABOUR LEGIBLE

The ILO released two more global reports on forced labour, the *Global Alliance against Forced Labour* in 2005 and the *Cost of Coercion* in 2009. These reports established the ILO as the authoritative source of knowledge on

[38] Established in 1992, IPEC became particularly concerned with the trafficking of children after the adoption of the Worst Forms of Child Labour Convention (No. 182) in 1999, under which the trafficking of children is considered a worst form of child labour to be abolished immediately. The SAP-FL worked closely with IPEC. Plant led the SAP-FL between 2002 and 2009.

[39] Plant and O'Reilly, 'The ILO's Special Action Programme to Combat Forced Labour'.

[40] ILO, *Trafficking in Human Beings*, 11.

[41] Ibid.

[42] Ibid.

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forced labour in the global economy and put labour trafficking on the global governance agenda.

The 2005 report identified three main types of forced labour. The first, exemplified by the 1996 complaint against the government of Myanmar, was the ILO's traditional focus: forced labour imposed by the state or the military.[43] The second, which was the target of the United States' Trafficking in Persons (TIP) antitrafficking regime and of special concern to the European Union, was forced labour imposed by private agents for commercial sexual exploitation. The third was forced labour imposed by private agents for economic exploitation, the ILO's primary preoccupation. The ILO also distinguished between forced labourers who were trafficked (which involved some form of migration, typically across international borders) and those who were not.

Using this typology, the ILO produced statistics that belied the conventional wisdom that trafficking primarily involved the sexual exploitation of women and children. The 2005 report estimated that 12.3 million people were in forced labour and that trafficking accounted for only 20 per cent (or 2.45 million persons) of this labour. Only 20 per cent of the total cases of forced labour involved state or military coercion; the vast majority, 80 per cent, of forced labourers worked in the private economy. Forced commercial sexual labour, in which women and children predominated at 93 per cent of the victims, made up 11 per cent of all cases in the private sector. In forced economic exploitation, women and girls represented 56 per cent of the victims, while men and boys accounted for 44 per cent.[44] This data fortified the ILO's case for expanding the reach of human-trafficking policy beyond sexual exploitation to include the labour dimension.

Identifying governance deficits in the migration process as a major cause of labour trafficking, the report pointed to private recruiters as posing a particular problem. It estimated that the total profits made by intermediaries who traffic people across borders and the employers who exploit them amounted to US$32 billion in one year.[45] Labour-market deregulation and global competition also contributed to the problem. The report revealed that, to lower costs and speed up supply, retailers and intermediaries put pressure on suppliers, who in turn squeezed labour contractors, who then, in extreme cases, resorted

[43] The ILO's focus on state forms of forced labour, with the exception of Myanmar, dissipated in the 1990s after the breakup of the Soviet Union and the abandonment of labour camps in many countries. Andrees and Aikman, 'Raising the bar', 361; Sweptson, 'Trafficking and forced labour', 411.

[44] ILO, *A Global Alliance against Forced Labour*.

[45] Ibid., 55.

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to coercive methods to manage their workers.[46] It portrayed forced labour as the 'combined failure of labour markets, institutions and regulations to provide for more efficient or more equitable outcomes'.[47]

The ILO's 2005 global report was influential within and outside the ILO. The GB called on the Office to develop a plan to build and support a global alliance against forced labour among its constituents. The Bush administration began to consider labour trafficking; for the first time, the 2006 TIP Report identified nonsex trafficking as a major cause for concern.[48]

The ILO's 2005 report also precipitated a debate over where to draw the borders between 'forced labour' and 'trafficking' for legal purposes. The United States rejected the ILO's distinction between forced labour and trafficking, treating them as the same on the ground that as a matter of US law, unlike the definition in the UN protocol, trafficking does not require movement.[49] The GB requested the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to conduct a general survey concerning the two forced labour conventions. The CEACR, a supervisory body of the ILO composed of independent legal experts, has jurisdiction over the application of standards. This supervisory system set the ILO's forced labour conventions apart from the UN's Trafficking Protocol, which does not have a centralised mechanism for determining the interpretation and application of the definition of human trafficking.

The 2007 general survey repeated the CEACR's earlier interpretation that 'trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour' provided in the ILO convention.[50] It also stressed elements in the definition of forced labour – menace of any penalty and voluntarily offer – that turn on coercion and lack of consent, taking care to point out that the employer and the state 'are not accountable for all external constraints or indirect coercion existing in practice: for example, the need to work to earn one's living could become relevant only in conjunction with other factors for which they are answerable'.[51] And, like the UN, the CEACR refused to take a stance on the contentious issue of whether prostitution was a form of exploitation in the absence of coercion.

[46] Ibid., 63.
[47] Ibid., 64.
[48] Chuang, 'Exploitation creep', 619.
[49] Ibid., 619–620. The US State Department justified this interpretation in legal terms by emphasising that 'harbouring' was one of the acts in the definition of trafficking.
[50] ILO, *Eradication of Forced Labour*, 41.
[51] Ibid., 20–21.

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Noting that neither the UN's Trafficking Protocol nor the ILO's forced labour convention imposed a duty to criminalise prostitution, it concluded that prostitution should be dealt with by individual countries in accordance with their national laws and policies.[52] By excluding the sale of sexual services from global labour standards, the ILO reflected and reinforced the borders between sexual and labour exploitation and the deployment of different governance strategies against them.

The ILO used the 2005 global report on forced labour to raise its stature in the global antitrafficking governance network. Plant tried to persuade key policy actors to incorporate the ILO's emphasis on labour-market institutions into the emerging multifaced approach to human trafficking.[53] He also reassured the United States that any differences between the United States and ILO over the relationship between human trafficking and forced labour were not fatal to their collaboration, noting that 'the ILO accepts that there will be different views on the best conceptual and legal entry points for tackling such coercive practices today, between forced labour, slavery and slavery-like practices, and trafficking for forced labour exploitation'.[54] Reaching out to US business, Plant stressed the reputational risks to business of being associated with forced labour in its business operations or supply chains and questioned whether voluntary corporate social responsibility initiatives were enough to eliminate forced labour or whether there should be binding legal obligations on companies throughout their supply chains.[55]

The next instalment of the global reports on forced labour, *The Cost of Coercion* in 2009, continued to attract public attention by quantifying the economic cost of forced labour, this time drawing attention to costs borne by the workers, which it estimated to be US$21 billion a year.[56] But its key contribution was to set out the ILO's labour-market approach and explain how it fit in the global governance of trafficking. The report began by addressing the tricky legal question of the relationship between forced labour and other abusive practices such as human trafficking, slavery, slavery-like practices, and debt bondage or bonded labour that hinge on the meaning of labour exploitation and whether coercion is a necessary element in the offence of human trafficking. Deferring to the jurisdiction of the ILO's supervisory bodies to offer an opinion on whether specific actions fall within the prohibition, the

[52] However, it was clear that coercive sexual exploitation and forced prostitution fell within the definition of forced labour. Ibid., 41.
[53] Plant, 'Forced labour, slavery and poverty reduction'.
[54] Plant, 'Trafficking for forced labour', 3.
[55] Plant, 'Forced labor: Critical issues for US business leaders'.
[56] ILO, *The Cost of Coercion*, 32.

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report explained 'that there is a continuum including both what can clearly be identified as forced labour and other forms of labour exploitation and abuse' at one end and freely chosen employment at the other.[57] Between the two extremes exist a variety of employment relationships in which 'the element of free choice by the worker begins at least to be mitigated or constrained and can eventually be cast into doubt'.[58]

The Cost of Coercion set out the ILO's vision of 'the respective roles of criminal and labour justice' in the governance of forced labour and human trafficking.[59] Acknowledging that forced labour is a crime and that individual perpetrators should be punished under the criminal law, the report cast enforceable labour standards combined with effective labour-market institutions, such as public inspectors, as the most effective way of preventing forced labour.[60] While the legal definition of forced labour, with its emphasis on coercion and lack of consent, was narrow, a labour approach to forced labour and labour trafficking would address the broader labour-market failures that result in a continuum of labour exploitation. Calling for the resources allocated to prevention to be increased to match those apportioned to prosecution, Plant stated that 'prevention should be understood as addressing those systemic aspects of labour-market and migration governance which are at the root of much forced labour in the first place'.[61] Forced labour was an opening for the ILO to promote greater labour-market regulation, a matter of pressing concern in the wake of the 2008–09 global economic and financial crisis.

The SAP-FL was very effective in developing the ILO's governance strategy for forced labour and situating it within the antitrafficking governance network. By the end of its first decade, its efforts had established the ILO as the epistemic authority on forced labour and a critical node in the global antitrafficking governance network. In addition to producing statistics pertaining to forced labour, the ILO, along with the European Commission, developed an influential list of indicators, based on surveying experts, for officials to use in the field to assist them in categorising different forms of labour exploitation for legal purposes, and a training manual on forced labour for labour inspectors.[62] The ILO made forced labour legible in the antitrafficking governance network, partnered with a variety of international organisations, and played a

[57] Ibid., 8–9.
[58] Ibid.
[59] Ibid., 25.
[60] Ibid., 65.
[61] ILO Online, 'Questions and answers on "The cost of coercion"'.
[62] ILO, 'Operational indicators of trafficking in human beings'; Andrees, *Forced Labour and Human Trafficking*.

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prominent role in the UN Global Initiative to Fight Human Trafficking. It was no longer an 'add-on' at conferences that were concerned almost exclusively with criminal-law enforcement against sex trafficking.[63]

FABRICATING A LABOUR-MARKET APPROACH TO FORCED LABOUR AND TRAFFICKING

In 2012, the Obama administration shifted US antitrafficking policy towards labour exploitation, and 'modern slavery' became the umbrella term used in Anglo-American jurisdictions to capture the different forms of unfree labour.[64] It was a fertile time for the ILO to cultivate a labour-regulation approach and plant it in the global antislavery governance network. The ILO produced knowledge about forced labour and norms for eliminating it, which required the Office to coordinate two different groups of actors: (1) the global governance network of international institutions, leading states (who were also big funders), transnational corporations, and civil society actors and (2) its constituents, the tripartite actors.

The ILO competed with other governance actors – such as Kevin Bales, the International Organization for Migration (IOM), the US TIP regime, and the Walk Free Foundation – to come up with numbers for the victims of human trafficking, forced labour, and modern slavery and the economic cost of all this unfree labour.[65] Indeed, the ILO sought to become the authority on how to measure and quantify forced labour. Its 2012 report, *Hard to See, Harder to Count*, set out a new methodology, which the ILO promoted to other organisations and countries.[66] The ILO estimated the total number of forced labourers across the world at 20.9 million, which was significantly greater than the 2005 estimate of 12.3 million. The overwhelming majority of victims of forced labour, 90 per cent, were exploited by private individuals and enterprises; out of these, forced sexual exploitation accounted for 12 per cent of the victims whereas forced labour exploitation made up 68 per cent of the victims.[67] Unlike earlier reports, the 2012 report did not provide a separate breakdown of the numbers of victims of trafficking within the broader category of forced labour; instead, it presented estimates of the number of people trapped in forced labour as a result of internal or cross-border migration. It estimated that 29 per

[63] Plant, 'Trafficking for labour exploitation'.
[64] Chapter 1, this book.
[65] Chapter 2, this book; Merry, 'Counting the uncountable'.
[66] ILO, *Hard to See, Harder to Count*.
[67] ILO Global Estimate of Forced Labour, 2012, 13.

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cent of the victims ended up in forced labour after moving across international borders, with the majority being forced sex workers.[68]

The ILO also sought to draw political attention to fighting forced labour by calculating the economic cost of forced labour to states (through the nonpayment of taxes or diminished remittances, for example) and to the workers who were victimised. Using the 'universally legible' language of dollars and the estimates from its 2012 report, the 2014 report, *Profits and Poverty: The Economics of Forced Labour*, projected the annual profits attributable to forced labour to be US$150 billion, a dramatic rise from its earlier estimate of US$32 billion.[69]

Although there was growing support among key international actors for a labour approach to human trafficking that did not rely exclusively on criminal prosecution and did not focus only on sexual exploitation, the problem was getting the Employers' Group to adopt a new standard authorising a labour-market approach, since the existing conventions simply treated forced labour as a crime. In 2012, the GB elected Guy Ryder, former head of the ITUC, as the ILO's director-general, and his background raised concerns in the Employers' Group about the ILO's direction. As a form of general protest at the ILO's direction, the Employers' Group refused to participate in the final stage of the supervisory process at the 2012 ILC over the legal status of the right to strike in the corpus of international labour standards.[70] It took a great deal of effort by the Office and the support of a tripartite committee of experts to get the issue of a standard to address the gaps in the existing conventions on forced labour on the ILC's 2014 agenda.[71]

When the tripartite committee of experts met in 2013, there was general agreement over the need for a new standard to better address matters relating to prevention, protection, compensation, enforcement, and international cooperation. However, a trio of recurring issues dogged the legislative process: the relationship between forced labour and trafficking; the form the standard should take; and references to global supply chains. The committee simply avoided the definitional quagmire by stating that the standard should focus on forced labour, which included forced labour exacted because of trafficking. The experts also split over whether the new standard should take the form of a protocol or a recommendation, but they agreed that a new convention was not

[68] Fifteen per cent became victims of forced labour following movement within their country, whereas the remaining 56 per cent did not leave their place of origin or residence. Ibid., 17.
[69] Rittich, 'Representing, counting, valuing', 259; ILO, *Profits and Poverty*, 13.
[70] Thomas and Turnbull, 'From a "moral commentator" to a "determined actor"?,' 289; La Hovary, 'A challenging ménage à trois?'
[71] Andrees and Aikman, 'Raising the bar', 367–371.

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necessary. The employers' spokesperson also insisted that any reference to global supply chains be deleted from the committee's final conclusion, a position that would become the employers' bottom line when it came to the adoption of a new standard for forced labour.[72] The GB considered the expert committee's recommendations and conclusions, and it was persuaded by the Office to hold only one discussion of a standard on forced labour at the 2014 conference, although the normal procedure was to have a discussion at successive conferences.[73]

In a report that summarised the constituents' responses to a questionnaire about a possible new standard and examined member states' laws against forced labour, the Office made the case for a protocol and a recommendation to address the gaps in the existing legal framework on forced labour, claiming that 'a complementary, coordinated, and mutually supportive approach is required between labour and criminal justice systems'.[74] By focusing on prevention, victim protection (including compensation), and labour trafficking, the new standards, it argued, would add value to the existing laws and practices. The Office also prepared a draft protocol and recommendation to accompany its report, which were distributed to constituents in preparation for the 2014 ILC.[75]

At the 2014 ILC, the Committee on Forced Labour had ten days to hammer out new standards based on the Office's draft protocol and recommendation. The United Nations' High Commission for Human Rights and its Office of Drugs and Organised Crime were consulted by the Office and took part in the deliberations.[76] Among the 244 amendments the committee considered, the trio of issues raised at the meeting of tripartite experts was especially contentious. The decision about the ultimate form the standard would take was postponed to the end of committee's deliberations, a delay that was necessary to gain the Employers' Group's support. The Employers' Group also raised the relationship between forced labour and human trafficking as an issue of particular concern given the growth in cross-border labour mobility. This matter was resolved by reaffirming the definition of forced labour contained in the 1930 convention in the protocol and by specifying that measures to eliminate forced labour also include 'action against trafficking in persons for

[72] Ibid., 374–375.
[73] Ibid., 375–376.
[74] ILO, *Strengthening Action to End Forced Labour*, 63.
[75] Sweptson, 'Trafficking and forced labour', 412–413.
[76] Ibid., 404.

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the purpose of forced or compulsory labour.'[77] This manoeuvre also resolved the ILO's disagreement with the United States over the legal borders between forced labour and human trafficking.

But the most intractable issue was businesses' role in the fight against forced labour.[78] The Workers' Group, along with some governments, supported an amendment that would require members to promote due diligence by private and public entities to prevent and respond to the risks of forced labour. The Employers' Group opposed the amendment on the ground that the primary duty was on the state, not business, to eliminate forced labour. A compromise was reached whereby members would be required to take preventative measures 'supporting' due diligence by both private and public sectors. However, a proposal by a government member to add a reference to supply chains in the nonbinding recommendation ignited the Employers' Group ire.[79] The Employers' Group claimed that businesses in the informal sector were the source of forced labour, and it disputed that there was evidence linking forced labour to supply chains.[80] Even though the government representatives argued that state obligations were already clearly established and that the principle that business should take measures to address forced labour and other human rights abuses in their supply chains was accepted in the UN's Guiding Principles on Business and Human Rights (UNGPs), the Employers' Group refused to budge. An informal working group eventually devised a compromise in which the term 'supply chain' was not used; instead, language modelled after the UNGPs ('in their operations or in products, services or operations to which they may be directly linked') was adopted. With these changes in place, the Employers' Group, the last holdout, endorsed the protocol and the recommendation, resolving the outstanding issue of the form the standards would take.[81]

Adopted with overwhelming support at the 2014 ILC, the Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29) consists of a short list of general principles (prevention, protection, remedy, and international cooperation) laid out in seven substantive articles, the details of which were to be developed by member states in consultation with employers' and

[77] Andrees and Aikman, 'Raising the bar', 378; Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29), Article 1 (3).
[78] Ibid., 378.
[79] Ibid., 379.
[80] Ibid., 379.
[81] Ibid., 380.

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workers' organisations.[82] Guidance on how to implement the principles was provided in the Forced Labour (Supplementary Measures) Recommendation (R203), which accompanied the protocol and was adopted at the same time.

Its preamble situates the protocol in the constellation of international human rights instruments, identifies trafficking in persons for the purposes of forced labour as a subject of growing concern, and states that its purpose is to address gaps in the implementation of the 1930 convention. The protocol provides an institutional framework, through the requirement of national policy and action plans, for states in consultation with the social partners to develop a systematic action to prevent and suppress forced labour (Article 1).[83] The mandatory preventative measures, along with protocol's embrace of tripartism, are its most distinctive labour-related contribution to antitrafficking governance techniques. The measures include ensuring that all workers and all sectors of the economy are covered by labour legislation and enforcement mechanisms, strengthening labour inspection services, protecting migrant and other workers from abusive and fraudulent practices during the recruitment and placement process, and supporting due diligence by both the public and private sectors to prevent and respond to the risks of forced labour (Article 2). The recommendation also identifies promoting freedom of association and collective bargaining to enable at-risk workers to join workers' organisations as a preventive measure.[84]

Protecting the human rights of victims of forced labour is another of the protocol's goals. It builds on earlier statements by the ILO supervisory bodies that cooperation between the labour inspectorate and immigration authorities should be carried out cautiously considering that the main objective of the labour inspection system is to protect the rights and interests of all workers and improve their working conditions, rather than to enforce immigration law.[85] It also advanced the protections offered to workers trafficked into forced labour beyond the existing international trafficking instruments, such as the UN Trafficking Protocol and, as we will see in the next chapter, the EU 2011 directive. The forced labour protocol requires member states to take effective measures to identify and protect victims, including providing them with

[82] Since the protocol supplements the forced labour convention, members states are required to ratify the convention before they are entitled to ratify the protocol. Recommendations, which are nonbinding, do not require ratification. The protocol also explicitly deleted the provisions in the 1930 convention permitting colonial practices of forced labour.

[83] National action plans are a device used by states to develop their antitrafficking policies. The ILO also adopted this mechanism for addressing the worst forms of child labour.

[84] Recommendation 203, 3(b).

[85] ILO, *Promoting Fair Migration*, para. 477.

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assistance and support (Article 3). Although member states opposed a strict nonpunishment provision prohibiting states from prosecuting people compelled to commit unlawful activities as a consequence of their forced labour, the protocol met the high-water mark for human rights for victims of trafficking by requiring states to give officials the authority not to prosecute (Article 4 (2)).[86] It also imposes an obligation on states to provide 'all victims of forced and compulsory labour, irrespective of their nationality or legal status in the national territory, with access to appropriate and effective remedies, such as compensation' (Article 4(1)). Unlike the UN Trafficking Protocol, these human rights protections are mandatory, and unlike the EU directive (which is discussed in Chapter 4), they do not hinge on a victim assisting a criminal prosecution.

The ILO's forced labour protocol added labour law regulatory techniques to the global antislavery toolbox.[87] It also fed into and reinforced two other items on the 2014 ILC governance agenda: fair migration and a standard designed specifically for global supply chains. These governance initiatives were important not only for tackling the transnational vectors of forced labour but also for addressing a much broader range of decent work deficits.

Although the ILO identified transnational recruiters as a key entry point to forced labour and human trafficking, its governance mechanisms for tackling the problem were weak. In 1997, the Employers' Group's campaign to repeal the previous ban on private recruitment agencies (C97) was successful, and a much weaker convention, C181, which sought to regulate the agencies, by, among other things, banning fees charged to workers for a placement, was adopted. C181 was virtually silent on the regulation of agencies to place migrant workers; it simply requires states 'to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies'.[88] The jurisdictional hook the ILO invoked to address the problem of abusive transnational labour recruiters was the

[86] Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, CETS 197.

[87] The ILO promoted ratification of the forced labour protocol through its 50 for Freedom campaign, which was designed to persuade fifty countries to ratify the 2014 protocol by 2019. The Governing Body's governance strategy also included facilitating and supporting partnerships with UN agencies and other organisations to 'enhance impact and policy coherence'. Swepston, 'Trafficking and forced labour', 414.

Following a 2015 decision of the Governing Body, the SAP-FL was amalgamated with the IPEC. The two programs, which offered technical cooperation, were rechristened the IPEC+ Flagship Programme and located in the Fundamental Principles and Rights at Work Branch of the ILO.

[88] See Article 8.

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nonbinding Private Employment Agencies Recommendation, which accompanied C181, and its requirement that states ensure the elimination of undefined 'unethical recruitment practices'.[89]

The ILO adopted a two-pronged strategy to address the problem of forced labour, which often took the form of debt bondage through the imposition of exorbitant recruitment fees, in transnational labour recruitment. It included provisions on licensing recruiters and banning fees in sector-based conventions where migrant workers predominated: the Maritime Labour Convention, 2006; C188 Work in Fishing, 2007; and C189 Domestic Workers, 2011. To supplement the two hard-law conventions on labour migration, which migrant-receiving states were unwilling to ratify, the ILO developed two soft-law instruments (the Fair Deal for Migrant Workers resolution, in 2004, and the Multilateral Framework on Labour Migration, in 2006), which offered guidance on how to regulate the recruitment process to combat labour trafficking.[90] While these instruments provided some techniques to address some of the practices of transnational labour recruiters associated with forced labour, they did not provide an immediate or holistic solution.[91]

The Fair Recruitment Initiative (FRI) is the ILO's attempt to provide a holistic solution to the problem of transnational labour recruiters. Launched at the 2014 ILC, it is part of the director-general's Fair Migration Agenda, and it reinforces the forced labour protocol's emphasis on measures targeting fraudulent and abusive recruitment practices. Led by the ILO, it is a multistakeholder initiative involving the ITUC, the IOE, governments, agencies of the Global Migration Group (in particular, the International Organization for Migration, the United Nations Office on Drugs and Crime, the Office of the High Commissioner for Human Rights, and the World Bank), and nongovernmental organisations. It is, the director-general explained, 'a more strategic response to address gaps in existing ILO standards and new forms of recruitment-related mistreatment of migrant workers.'[92] The idea is not to adopt new standards but to use existing ones, such as the forced labour protocol's call for states to adopt measures to address fraudulent and abusive recruitment practices, as a basis for developing voluntary guidelines on how to regulate to ensure that recruitment practices are fair. This approach avoided the Employers' Group's objection to new standards and allowed the ILO to

[89] Jones, 'A "north star" governing global labour migration?', 304.
[90] Ibid., 306.
[91] ILO, *The Cost of Coercion*, 9.
[92] Jones, 'A 'north star' govening global labour migration?', 304.

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concentrate instead on developing a new soft norm of fair recruitment, to be based on the ILO's research on recruitment practices, multistakeholder consultations, and tripartite deliberations.[93]

The Employers' Group was willing to accept multistakeholder and other voluntary initiatives, but it would not countenance a labour standard directed at supply chains. Its objection to any reference to supply chains in the forced labour protocol and recommendation was merely a skirmish in its bigger battle to prevent the ILC from discussing, let alone adopting, a standard directed at global supply chains. Even though the Workers' Group had raised the issue at every GB since 2007, the Employers' Group managed to stave off any consideration of a standard for global supply chains at the ILC until 2014.[94] Its specific concern was the ILO's attempt to shift its governance scale from the territorial to transnational and to impose duties on firms at the top of the global supply chain.

In his first strategic report to the ILC, director-general Ryder indicated that he favoured charting a new governance strategy. He raised the question of whether it was possible to continue to rely solely on state responsibility for labour conditions in global supply chains given 'the fact that private actors are the drivers of the constantly shifting supply chains or production networks that increasingly characterise international trade and investment'.[95] In his view, the situation 'indicated additional opportunities for the ILO to promote decent work' in supply chains.[96] The significance of this governance rescaling was not lost on the tripartite constituents: the ILO was seeking to add to its traditional territorial and national scale of labour regulation 'by "intertwining" a new multiscalar system of labour governance along the supply chain'.[97] This is precisely what the IOE wanted to avoid.

It was not until the Rana Plaza building collapse in 2013, killing over 1,100 garment workers, many of whom had been making garments for global brands and global retailers, that the GB put the issue of a standard for global supply chains on the ILC's 2014 agenda. Even then, the ILO had to contend with the Employers' Group's unrelenting objections to a transnational standard that applied to supply chains.[98] To compensate for the Employers' Group's resistance, the ILO cultivated complementary governance strategies. It developed new and strengthened old voluntary mechanisms to foster transnational

[93] Ibid., 313.
[94] Thomas and Anner, 'Dissensus and deadlock'.
[95] ILO, *Towards the ILO Centenary*, para. 75.
[96] Ibid.
[97] Thomas and Anner, 'Dissensus and deadlock'.
[98] Ibid.

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accountability, and it reinforced its position in the global antislavery governance network.

JUMPING GOVERNANCE SCALES AND BUILDING A GLOBAL ALLIANCE

The Rana Plaza tragedy laid bare the failure of private and voluntary corporate social responsibility initiatives to protect workers. It catalysed the discussion of global supply chains and decent work at the 2016 ILO Conference, shaped the nature of the discussion, and influenced its outcomes. In the aftermath of the tragedy, NGOs and unions campaigned to make lead firms in supply chains take greater responsibility for the working conditions of their suppliers' workers. The ILO took on a key role in a legally binding multistakeholder initiative, including over two hundred global brands and retailers, to improve fire and building safety in Bangladesh. An unprecedented number of outside observers attended the supply chain discussion at the 2016 conference, where the central issue boiled down to whether the ILO's existing governance mechanisms adequately addressed the governance challenges posed by global supply chains.[99]

Director-General Ryder observed that the ILO's 'purely nation state approach to the behaviour of the globalized economy' – which depends on each member state ratifying a convention and then enacting laws to regulate employment relationships entered into or taking place in its national territory – 'risked missing the transversal integration of production networks across countries'.[100] A standard that targeted the key actors in global supply chains would help to rescale the ILO's jurisdiction to include cross-border activities. The 2014 protocol on forced labour was one of the ILO's few attempts to codify corporate due-diligence responsibilities in a mandatory standard. With the issue of supply chains and decent work on the 2016 ILC agenda, the ILO had another opportunity to persuade its constituents to adopt a standard that focused on a critical transnational actor.

The Office set out its case for a new governance mechanism for supply chains in the 2016 report to the ILC. Acknowledging that global supply chains can lead to economic and employment upgrading, *Decent Work in Supply Chains* also reported evidence of supply chains leading to decent work

[99] Posthuma and Rossi, 'Coordinated governance in global value chain'; Thomas and Anner, 'Dissensus and deadlock'.

[100] Ryder, address, quoted in Thomas and Anner, 'Dissensus and deadlock'.

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deficits, including forced labour.[101] Some of these deficits, it noted, were linked to lead firms' investment and sourcing decisions. A mismatch between the transnational scale of production and the national scale of the regulation was diagnosed as the source of the problem.[102] Lead firms contract with suppliers located in many countries, and since jurisdiction over labour regulation is primarily territorial and national, national labour laws and institutions govern the suppliers' employment relations. Some governments, according to the report, have been unable 'to cope with the rapid transformation brought about by exposure to the global economy, which has created governance gaps'.[103] Moreover, it explained, in cases where the contracts between a nonresident lead firm and resident suppliers influence the working conditions of the suppliers' workers – through cost pressures, delivery schedules, and penalty clauses, for example – the state where the suppliers and workers reside has no jurisdiction to hold the lead firm accountable. The traditional territorial conception of jurisdiction also restricts the capacity of a state to regulate the extraterritorial conduct of corporations headquartered within its territory.[104]

During the committee discussion of decent work in supply chains at the 2016 ILC, the Employers' Group rejected outright the need for a new governance instrument. Although it disputed the Office's evidence about supply chains leading to decent work deficits, its main objection to the idea of a governance gap was jurisdictional. Declaring 'the question of governance' to be 'at the heart of the debate about cross-border supply chains', the Employers' vice-chairperson went on to claim that it was up to each country to enact and enforce labour standards.[105] The failure of a government 'to meet its duty to protect', he went on, 'did not shift the responsibility to companies'.[106] By contrast, the Workers' Group insisted that it was time to examine whether the current international labour standards addressed the specific challenges posed by global supply chains, holding up the Maritime Labour Convention, 2006, as an example of a new approach to labour governance that went beyond national borders and did not focus on the direct employer.[107] Led by the EU and the United States under the Obama administration, the majority of state members agreed to keep the question of

[101] ILO, *Decent Work in Global Supply Chains*, 2, 7.
[102] Ibid., 2.
[103] Ibid.
[104] Ibid.
[105] ILO, *Reports of the Committee on Decent Work in Global Supply Chains: Summary of Proceedings*, para. 134.
[106] Ibid., para. 135.
[107] Ibid., para. 130.

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a new governance mechanism for global supply chains on the ILO's legislative agenda. However, they were not prepared to go so far as to recommend that a new standard be considered, preferring to take a more gradual approach.

With the grudging acceptance of the Employers' Group, the ILC adopted a detailed set of conclusions, which described the ILO as the institution 'best placed to lead global action for decent work in global chains'.[108] The Office was given a mandate to develop a programme of action to address decent work in global supply chains, consisting of research and technical assistance, and to work with other international organisations and provide leadership to drive policy among all multilateral initiatives and processes related to decent work in global supply chains. The GB was instructed, among other things, to convene a meeting to consider standards designed to reduce decent work deficits in global supply chains.

In response to the ILC conclusions, the GB adopted a programme of action, which included a lengthy deliberative process to consider different aspects of the relations between decent work and supply chains.[109] Instead of preserving the fragile consensus achieved at the 2016 ILC, the process gave the Employers' Group time to try to row back the ILO's position on global supply chains as the images of the Rana Plaza collapse faded and the political context changed. Under the Trump administration, for example, the United States did not support regulating supply chains, preferring trade sanctions instead, and this approach resonated with a growing number of right-wing governments.[110]

Throughout the process, tripartite deliberations were adversarial, and they finally broke down at the Technical Meeting on Achieving Decent Work in Supply Chains, held in February 2020. The Employers' Group repeated its refrain that there was no evidence that global supply chains were associated with decent work deficits, identifying the problem as an outgrowth of the informal economy, which was caused by a lack of state capacity to ensure compliance with laws and regulations.[111] Since supply chains were not the source of the problem, the Employers' Group insisted that 'there was no regulatory gap at international level, but rather an implementation challenge at national level'.[112] Remarking on its unhappiness with the 2016 ILC conclusions, the Employers' Group

[108] ILO, *Reports of the Committee on Decent Work in Global Supply Chains: Resolution and Conclusions*.
[109] ILO, *Follow-Up to the Resolution concerning Decent Work in Global Supply Chains*.
[110] See Chapter 1, this book, and Silva, 'The ILO and the future of work'.
[111] ILO, *Note on the Proceedings*, para. 14.
[112] Ibid.

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castigated the Office, declaring that it had 'lost faith' in 'its ability' to conduct an evidence-based and independent review of gaps in the ILO standards when it came to decent work in supply chains.[113] The Employers' Group rejected an attempt by sixteen states, led by the United States, to achieve a consensus on a set of conclusions that simply reiterated in a watered-down form those adopted at the 2016 ILC.[114] A senior ILO official at the technical meeting bemoaned the fact that the ILO was being surpassed by other organisations, such as the UN's Human Rights Council, which was making progress drafting a binding standard to address transnational business and human rights, building on the UNGPs.[115]

Although the 2016 ILC conclusions did not lead to a new standard for global supply chains, they did influence an old mechanism, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE).[116] A soft-law instrument adopted in 1977, the MNE provides guidance to enterprises (multinational and national) on procedural due-diligence elements to give effect to existing ILO standards. By directly addressing enterprises, the MNE is unique among ILO normative instruments. The 2017 revision incorporated new labour standards and, critically, integrated the UNGPs into the MNE. Among other things, it built on the Protocol of 2014 to the Forced Labour Convention, 1930, by making it clear that both multinational and national enterprises should take effective measures to identify, prevent, mitigate, and account for how they address the risks of forced labour in their operations or in products, services, or operations with which they may be directly linked.[117] Unlike the forced labour protocol, the MNE specifically refers to global supply chains, but it does not provide guidance on how it should be applied to them. It does, however, call on multinational enterprises to use their 'leverage with business partners to

[113] Ibid., para. 134.
[114] Ibid., paras. 112–170.
[115] Ibid., 41. The UN Human Rights Council has jurisdiction over the UNGPs and had established an open-ended intergovernmental working group (IGWG) to draft an international legally binding instrument on transnational corporations and other business enterprises.
[116] The ILC's conclusions on the discussion of supply chains instructed the MNE review process to consider the discussion of supply chains. ILO, *Reports of the Committee on Decent Work in Global Supply Chains: Resolution and Conclusions*. For a discussion of the voluntary compliance mechanism associated with the MNE, see Landau, *Human rights due diligence and labour governance*, 106–108.
[117] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)*, para. 25.

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encourage them to provide effective means of enabling remediation for abuses of internationally recognised human rights', which would include grievance mechanisms for workers.[118] What distinguishes the ILO's approach to due diligence from other multilateral initiatives, such as the UNGPs, is the MNE's emphasis on 'meaningful consultation with . . . workers' organizations', taking account of the 'central role' of freedom of association, collective bargaining, and social dialogue in identifying and assessing adverse human rights impacts.[119]

The ILO was able quickly to incorporate robust due-diligence procedures into the MNE because it is a voluntary instrument and one that explicitly endorses the primacy of national laws and sovereignty.[120] The soft nature of the Principles and Operational Guidelines on Fair Recruitment also helps to explain their adoption by the ILC in 2016.

Developed through the FRI, the guidelines inform key stakeholders, such as governments, enterprises, public employment agencies, labour recruiters, and employers, about the measures they can take to address the types of recruitment practices that are associated with a variety of different forms of labour exploitation, including forced labour and labour trafficking. Instead of focusing narrowly on prohibiting forced labour, the FRI's approach was to develop guidelines to establish a norm of what is fair. One of the guidelines' key principles is that 'no recruitment fees or related costs should be charged to, or otherwise borne by, workers or jobseekers'.[121]

With the FRI, the ILO engaged its traditional tripartite constituents and brokered a new coalition of partners to develop a norm of fair recruitment.[122] This is an important, albeit limited, accomplishment given the Employers' Group's reluctance to agree to a new binding standard regulating labour recruitment and the states' unwillingness to tolerate restrictions on their sovereignty over immigration. For the IOE and its members, the regulation of international labour recruiters is a small price to pay for the freedom to use private employment and recruitment services domestically and internationally. States are also amenable to the multistakeholder initiative because it does not challenge how they govern temporary labour migration. The FRI focuses on a symptom, abusive private recruiters, of a much bigger problem:

[118] Ibid., para. 65.
[119] Ibid., para. 10(e); Brudney, 'Hiding in plain sight', 336.
[120] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)*, para. 8.
[121] ILO, *General Principles and Operational Guidelines on Fair Recruitment*.
[122] Jones, 'A "north star" govening global labour migration?', 317.

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transnational modes of production and migration based on low-cost, flexible, and disposable labour.[123]

Another way that the ILO could compensate for the Employers' Group's resistance to transnational labour standards and discord among its constituents was to cement its position in the global antislavery governance network. After the UN adopted its ambitious Sustainable Development Goals (SDGs) in 2015, the ILO played an increasingly prominent role in the network. By placing the elimination of modern slavery, forced labour, and human trafficking by 2030 (target 8.7) firmly under the decent work and economic growth goals, the UN boosted the ILO's authority.[124]

Target 8.7 galvanised the antislavery global governance network, and the ILO took the opportunity to position itself as a key node within it, orchestrating other networks and producing authoritative knowledge about modern slavery. The ILO launched Alliance 8.7, a global partnership of countries, international and regional agencies, workers' organisations, employer and business membership groups, civil society organisations, academic institutions, and other relevant stakeholders and networks to tackle modern slavery. Acting as the alliance's secretariat, the ILO's goal is to coordinate global action among UN agencies and national governments against modern slavery. The alliance also provides a means for the ILO to ensure that its 'value added in the UN – tripartism, normative action, and social dialogue – is fully recognized and incorporated in national, regional, and global SDG processes as well as in UN reform measures'.[125]

The ILO has continued to play a critical role in quantifying the problem of modern slavery. It expanded its influence by collaborating with other Alliance 8.7 partners. In 2017, the Global Estimates of Modern Slavery (GEMS) were released with a great deal of fanfare at the UN's General Assembly.[126] A collaborative effort between the ILO, the Walk Free, and the IOM, each

[123] The ILO is also attempting to broaden the governance debate to include ways to leverage the market power of employers to influence recruitment agencies' practices and for states to consider how their labour migration regimes may contribute to abusive recruitment practices. ILO, *Addressing Governance Challenges in a Changing Labour Migration Landscape*. The complaint against Qatar is a clear example of how a state's immigration policies can lead to forced labour. See Piper, 'The International Labour Organisation as nodal player'.

[124] In addition to targets on economic growth and productivity, the SDG 8 targets require states to take immediate and effective measures to eradicate forced labour, modern slavery, and trafficking (8.7) and to protect the labour rights of all workers, including migrant workers (8.8). UNDP, *The SDGS in Action*; and Kotiswaran, 'Trafficking: A development approach'.

[125] ILO, 'Update on the Alliance 8.7', 1.

[126] Ivanka Trump, representing the US, was flanked by Guy Ryder on one side and Andrew Forest on the other. Klein, 'Ivanka Trump delivers anti-human trafficking speech'.

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of which previously had released its own, competing, reports, the GEMS developed a figure to represent the extent of the problem and served as a benchmark for progress toward target 8.7. In 2016, it estimated there were 40.3 million modern slaves, and of these, 24.9 million were in forced labour and 15.4 million in forced marriage.[127] The GEMS adopted the ILO's existing typology of forced labour, separating forced sexual exploitation of adults and commercial sexual exploitation of children from forced labour exploitation and distinguishing between forced labour in the private economy and that imposed by the state. It also broke down the prevalence and types of slavery on a regional basis. But it did not rank countries based on slavery's prevalence or the antislavery initiatives they had undertaken. By contrast, the Global Slavery Index, produced by Walk Free, ranked countries on these two measures.[128] The ILO played no part in the index's production. This kind of ranking exercise could potentially impede future collaboration between the ILO and member states on initiatives to end forced labour.

Target 8.7 elevated modern slavery on the international political agenda. The final communique of the G20 Labour and Employment Ministers' meeting in 2017 embraced SDG target 8.7, calling on governments to consider ratifying and implementing the ILO's Protocol of 2014 to the Forced Labour Convention, 1930, and asking international organisations partnered with the Alliance 8.7 for a report on the worst forms of child labour, forced labour, and modern slavery in global supply chains.[129] In 2019, Alliance 8.7 published the report, the result of a collaboration between the ILO, the IOM, the Organisation for Economic Co-operation and Development, and the United Nations Children's Fund, which provided the first estimates by international organisations of child labour and trafficking for forced labour in global supply chains. It determined that, although child labour and forced labour are more likely to be found in production in the domestic economy, there is a non-negligible risk that such labour contributes to global supply chains.[130] It also reported a strong consensus for responsible business conduct through a comprehensive due-diligence approach, noting that such measures were especially important in the context of insufficient state-based enforcement of labour and human rights standards.[131]

[127] ILO and Walk Free Foundation, *Global Estimates of Modern Slavery*, 9, 10.
[128] As discussed in Chapter 2.
[129] G20 Labour and Employment Ministers Meeting – Germany, 'Ministerial declaration'.
[130] ILO, OECD, IOM, and UNICEF, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains*, 8, 31.
[131] Ibid., 48.

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A change in the broader political climate in 2021 meant that the Employers' Group was no longer able to stonewall tripartite discussion of a standard for decent work in supply chains. The pandemic revealed the fragility of global supply chains and the failure of lead firms to protect workers in the lower levels who lost wages and their jobs. The Biden administration was much more supportive of labour regulation than its predecessor, and the EU announced its intention to adopt a directive requiring corporations to engage in mandatory human rights due diligence. The GB approved a tripartite working group of ILO constituents to develop options to ensure decent work in supply chains.

Meeting in Geneva from 27 June to 1 July 2022, the experts group hashed out the building blocks of an ILO strategy on supply chains. Initially, the experts from the Employers' Group refused to recognise business 'contribution to weak governance – for example, the way in which enterprise put pressure on governments by making foreign direct investment conditional on low levels of social rights'.[132] However, government experts unanimously agreed that specific problems beset transnational supply chains, and they pressed the Employers' Group to compromise, noting that the Employers' Group had expressed support for the UNGPs and the MNE.[133]

In the end, the tripartite working group released a consensus report that reaffirmed the ILC 2016 Resolution and Conclusions concerning decent work in global supply chains and provided the basis for a five-year strategy for decent work in supply chains that was adopted by the GB in March 2023.[134] The Employers' Group was unable to veto the use of the terms 'supply chain' or 'due diligence', and an ILO standard specifically addressed at supply chains is back on the table. Going forward, the critical question is whether the ILO's Director-General (who since October 2022 is Gilbert F. Houngbo, a former prime minister of Togo with extensive experience working in the international organisations, including the ILO and UN) can steer the ILO's constituents towards a convention designed to regulate supply chains that operate across national borders.

CONCLUSION

The reference to forced labour as an example of exploitation in the UN's definition of human trafficking provided the ILO with an opportunity to

[132] ILO, Meeting of the Tripartite Working Group on Options to Ensure Decent Work in Supply Chains, para 119.
[133] Ibid.
[134] ILO, *ILO Strategy on Decent Work in Supply Chains.*

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revitalise its governance role at a time when the dominant neoliberal wisdom treated its traditional governance mechanism (labour standards, public inspections, and worker collective representation through trade unions) with suspicion. The ILO made forced labour legible by producing knowledge about it. On this basis, it reached beyond its traditional constituents to engage with a wider set of powerful new actors on the global antitrafficking stage. By enmeshing itself in the global antitrafficking network, the ILO put labour trafficking on the global governance agenda. The ILO works closely with key actors in the ethical business alliance; indeed, its collaboration with Walk Free on the global estimates of slavery boosted the foundation's credibility and expanded the ILO's sphere of influence.

The ILO developed a labour approach to modern slavery that sees it as rooted in labour market structures and best addressed using labour and market-based tools to enhance workers' bargaining power and capacities.[135] Linking forced labour to labour-market failure, the ILO distinguished between two usages of the term 'labour-market failure'. The first reflected how it is used by the ethical business alliance; 'in strictly economic terms, forced labour is a labour-market failure because it violates key conditions for labour markets to function efficiently, namely the freedom of workers to exercise choice and to receive sufficient remuneration for freely chosen employment'.[136] On this reading, free markets are an antidote to forced labour. However, the ILO has been careful to explain that it was using 'labour-market failure' more broadly 'to encompass the combined failure of labour markets, institutions, and regulations to provide for more efficient or more equitable outcomes'.[137] According to this interpretation, labour markets require institutional supports, including trade unions and embedded social norms, to eliminate labour unfreedom. The ILO advocates strongly in favour of labour-market regulation to increase workers' voice and power in the labour market.

Although the ILO refers to structural factors, such as globalisation, that are driving forced labour, it does not elaborate upon them or offer a critique of global capitalism. The ILO's mandate (employment and work), its tripartite structure, and its need for funding from key donors constrains its governance agenda and narrows its focus. These features distinguish the ILO's approach to forced labour from a broader development approach, which places

[135] Chuang, 'Exploitation creep', 642; Shamir, 'A labor paradigm'; Costello, 'Migrants and forced labour'.
[136] ILO, *A Global Alliance against Forced Labour*, 64.
[137] Ibid.

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transnational corporations and their supply chains 'within the global trade, investment, property, and tax regimes we have built'.[138] Such an approach also contemplates interventions 'to address the regulatory structures – the rules on FDI [foreign direct investment], labour migration, trade, and corporate tax law – that are endogenous to the formation and governance of some GVCs'.[139] This approach identifies key features of global capitalism as causing forced labour, and its solution involves reconsidering the social dimension of global trade, reconceptualising development from the perspective of countries in the Global South, and reimagining the role of the state in economic development.[140] The ILO's goal has been more modest: to devise and institutionalise a labour approach to the governance of forced labour.[141]

The ILO stresses the traditional mechanisms of labour regulation – freedom of association and collective bargaining, inclusive systems of social protection, and public labour inspectorates – and this view is gaining traction in the antislavery network (see Chapter 2).[142] Focusing on forced labour made the ILO's programmes more attractive to funders and a new protocol more palatable to its tripartite members.[143]

The Protocol of 2014 to the Forced Labour Convention is an international standard that incorporates the techniques of labour law – labour standards, public enforcement, and collective worker representation – into the governance of forced labour. It also integrates a human rights approach by imposing obligations on states to protect victims and to provide them with effective remedies. The forced labour protocol provides an alternative governance domain, one which tackles labour-market institutions and is preventative in orientation, unlike the criminal law, where the focus is on individual perpetrators and the goal is punishment. These features of the 2014 forced labour protocol help to explain why its rate of ratification is half that of the UN's Trafficking Protocol.[144]

The ILO has not repudiated a carceral approach to human trafficking, although it would limit its sphere of application. Like other international organisations, the ILO is careful to distinguish between protecting victims of

[138] Cockayne, *Developing Freedom*, 75, citing Milberg and Winkler, *Outsourcing Economics*, 123–124.
[139] Ibid.
[140] Ibid., 257; Kotiswaran, 'Trafficking: A development approach'.
[141] ILO, *Ending Forced Labour by 2030*, 27.
[142] ILO, Walk Free, and IOM, *Global Estimates of Modern Slavery*, 6.
[143] Phillips and Mieres, 'The governance of forced labour'.
[144] Six years after the UN adopted the Trafficking Protocol, 111 states had ratified it; in contrast, only 50 states had ratified the ILO's forced labour protocol six years after its adoption.

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forced labour and punitive immigration laws. It has also cautioned against 'powerful forces' that seek to 'conflate trafficking for forced labour in the Global North with the legitimate desire of people for migration from poverty and drought and for safe refuge from crisis and conflict'.[145]

The legal definition of forced labour in the ILO's 1930 convention hinges on consent and coercion, and the ILO's supervisory bodies have emphasised individual actors rather than structural factors when it comes to assessing consent. This definition builds upon and reinforces a neoclassical understanding of free wage labour as an individual exchange relationship.[146] By doing so, it excludes the broader structural and institutional factors, such as corporate concentration and immigration policies, for example, that constrain workers' freedom from consideration.[147]

In part, the narrowness of the definition in the 1930 convention can be explained by its purpose, which is to establish the scope of a criminal prohibition. While the borders between free and unfree labour are important for criminal law and victim protection, they are not central to a labour approach that is designed to prevent practices that may deteriorate into forced labour. By promoting labour-market regulation as a preventative measure, the ILO can tackle a broad range of labour exploitation.

Although the regulatory ambit of a labour approach captures a wide range of exploitive practices, it does not benefit sex workers since the ILO does not address the situation of those who sell sexual services. Despite pushing the gendered borders of work when it adopted a standard for domestic workers employed in private households in 2011, the ILO has yet to advocate for labour standards for the sex sector.[148] It has forsaken sex workers in the face of the moral and gendered concerns of the member states.

By requiring states to address fraudulent and abusive labour recruitment and to support due-diligence measures by both the public and private sectors, the forced labour protocol made important gestures to addressing the transnational vectors of forced labour. However, the ILO has only been able to muster its constituents to adopt voluntary norms, such as the FRI and MNE, when it comes to regulating the cross-border dimensions of forced labour. Even though it is the 'epicentre of global social dialogue on labour market issues', the ILO has been unable to sustain a serious tripartite discussion of a

[145] ILO, *Ending Forced Labour by 2030*, 21.
[146] Drubel, 'Regulation by visibility', 196; Fudge, 'Modern slavery, unfree labour and the labour market'.
[147] Lerche, 'A global alliance against forced labour'; Rogaly, 'Migrant workers in the ILO's Global Alliance against Forced Labour'; Phillips and Mieres, 'The governance of forced labour'.
[148] Wijers, 'How we got here'.

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labour standard for transnational supply chains. The European Union (as we shall see in the next chapter) has overtaken the ILO when it comes to devising enforceable standards that require a transnational corporation to exercise due diligence to make sure their businesses and supply chains respect human rights. Yet, unlike the ILO, the EU does not come at the task of designing governance mechanisms from the perspective of empowering workers. Thus, the ILO's MNE makes a distinct contribution when it comes to designing due-diligence initiatives. The GB's adoption in March 2023 of a strategy to ensure decent work in supply chains offers some promise that the ILO can develop a normative mechanism able to address one of the transnational vectors of unfree labour.[149]

Scale is a contested technique of governance within the ILO. The IOE, which represents the Employers' Group, has resisted cross-border business regulation to promote labour rights in supply chains, complaining that 'states are seeking to pass the buck onto private entities for their own failure or unwillingness to protect their people's rights'.[150] By contrast, the ethical business alliance promotes business regulation as a way of addressing the challenge that transnational supply chains pose to purely national forms of regulation.[151] In the next chapter, we will see how the key governance actors in the European Union mobilised a dynamic and multiscalar assemblage of jurisdiction to address the different forms of unfree labour that cross national and territorial borders, including mandatory human rights due-diligence legislation and market controls on goods made with forced labour.

[149] ILO, *Note on the Proceedings*, para. 177.

[150] International Organisation of Employers, 'IOE paper on state policy responses on human rights due diligence', 11.

[151] However, business objected to a form of extraterritorial jurisdiction proposed in the 'zero' draft of a legally binding instrument to regulate business regarding human rights on the ground that it would not respect national sovereignty. Krisch, 'Jurisdiction unbound', 510.

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