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## The Potential for International Regulation of Gig Economy Issues

Tonia Novitz

### 1. Introduction

The rapidly increasing hire of labour through platforms or ‘apps’ has attracted considerable attention. Most current debates focus on whether those engaged in ‘gig economy’ work can be characterised as ‘employees’ or ‘workers’, such that they can claim access to working time protections and the national minimum wage.<sup>1</sup> Other concerns have been whether gig workers can access collective bargaining,<sup>2</sup> but also the ways in which gig work can entail forms of indirect discrimination on grounds of sex (and age), including that instantiated through the ‘algorithms’ which determine ratings and thereby access to work.<sup>3</sup> So, we are witnessing a flood of litigation taking place at the national level, some of which has been conducive to protection of employment rights for gig workers, but not inevitably so.<sup>4</sup>

We could continue in this vein, seeking *ad hoc* solutions at the domestic level. However, as national labour markets seem to be transforming in a common direction,<sup>5</sup> this article considers whether internationally set labour standards could be of assistance by providing overarching guidance.

The case for international regulation is examined in the following stages. The next (namely the second) part of this article explores three practical transnational aspects of gig economy work, which illustrate how the problems posed by gig work are not merely domestic in their

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<sup>1</sup> For example, *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] IRLR 252; discussed in Alan Bogg and Michael Ford, ‘Between Statute and Contract: Who is a worker?’ (2019) 135 *Law Quarterly Review* 347; and Sandra Fredman and Darcy Du Toit, ‘One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal’ (2019) 48(2) *Industrial Law Journal* 260.

<sup>2</sup> *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* CAC decision [2018] IRLR 84 and the unsuccessful judicial review: *R (on the application of IWGB) v CAC* [2018] EWHC 3342 (Admin), [2019] IRLR 249, although an appeal is pending at the time of writing. See also discussion in Michael Ford and Tonia Novitz, ‘**Error! Main Document Only.** There is Power in a Union? Revisiting Trade Union Functions in 2019’ in Alan Bogg, Jacob Rowbottom and Alison Young (eds), *The Constitution of Social Democracy* (Oxford: Hart Publishing, 2020).

<sup>3</sup> Miriam Kullmann, ‘Platform Work, Algorithmic Decision-making, and EU Gender Equality Law’ (2018) 34(1) *International Journal of Comparative Labour Law and Industrial Relations* 1; Miriam A. Cherry, ‘Age Discrimination in the on-Demand Economy and Crowdwork’ (2019) 40 *Berkeley J. Emp. & Lab. L.* 29.

<sup>4</sup> In the UK, see *Deliveroo* n.2; for a discussion of the limitations of Australian case law, see Andrew Stewart and Jim Stanford, ‘Regulating Work in the Gig Economy: What are the options?’ (2017) 28(3) *The Economic and Labour Relations Review* 420.

<sup>5</sup> Lucio Baccaro and Chris Howell, ‘A Common Neoliberal Trajectory: The transformation of industrial relations in advanced capitalism’ (2011) 39 *Politics & Society* 521, at 522 cited in Chris F. Wright, Nick Wailes, Greg J. Bamber and Russell D. Lansbury, ‘Beyond National Systems, Towards a “Gig Economy?” A Research Agenda for International and Comparative Employee Relations’ (2017) *Employee Responsibilities and Rights Journal* 247, at 250.

form or nature. The article then examines the argument for international labour standards from a global perspective, rather than emerging regional (including EU) policy positions.<sup>6</sup>

The third part of the article does so from a position of universality, citing the claims of gig workers to human rights protections, alongside a desire to set global terms for fair trade which include prevention of labour exploitation, potentially with reference to International Labour Organisation (ILO) core labour standards.<sup>7</sup> There is also the possibility to embrace in this context a broader idea of ‘decent work’ in sustainability terms and ‘responsive, inclusive, participatory and representative decision-making at all levels’ as envisaged by the United Nations (UN) Sustainable Development Goals (SDGs).<sup>8</sup> Global concern with precarious work is relevant here as well as the first nascent steps towards general forms of regulation at the ILO.

The fourth part of this article considers gig work, not only from the perspective of universal concerns with human rights, fair trade and sustainability, but as raising particular concerns which might best be tackled in a ‘sui generis’ instrument. This could be, for example, an ILO Convention or Recommendation devoted specifically to gig economy issues, which poses questions as to its potential regulatory content and effect. Another possibility may be transnational collective bargaining undertaken by Global Union Federations (GUFs) with multinational enterprises (MNEs). Here the experience of negotiating, concluding and enforcing international or, as they are more often termed, ‘global framework agreements’ (GFAs) is relevant. Via this means, it may be possible to address the specificities of certain types of gig work in which a corporation’s business engages. This does, however, require for its efficacy basic recognition of entitlement to collective bargaining for gig work at all levels.

There remain, of course, dangers in international legal norm setting in the gig field. There is the potential through formalization to merely endorse and reinforce the legitimacy of emerging exploitative practices, rather than correct these.<sup>9</sup> There is also, linked to this, the issue of the power dynamics within tripartite organisations like the ILO and in transnational collective bargaining, which suggest that norms may be skewed in favour of corporate (as opposed to worker) interests. There is therefore scope for further (structural) research to

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<sup>6</sup> See for example, Commission Communication, ‘A Strong Social Europe for Just Transitions’ COM(2020) 14 final; regarding the relevance of 2019 Directive on Transparent and Predictable Working Conditions 2019/1152, see Bartłomiej Bednarowicz, ‘Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union’ (2019) 48(4) *Industrial Law Journal* 604.

<sup>7</sup> See for example the ILO Declaration on Fundamental Principles and Rights at Work 1998.

<sup>8</sup> UN General Assembly Resolution 2015 Transforming our world: the 2030 Agenda for Sustainable Development. UNGA Res. 70/1, especially SDG 8 and SDG 16.7; see also Tonia Novitz, ‘Engagement with Sustainability at the International Labour Organization and Wider Implications for Worker Voice’ (2020) *International Labour Review*, forthcoming.

<sup>9</sup> Cf. Martti Koskeniemi, ‘What is Critical Research in International Law? Celebrating Structuralism’ (2016) 29 *Leiden Journal of International Law* 727, at 734: ‘What really is the relationship between, say, humanitarian law and the justification of killing, environmental law and the persistence of massive pollution, trade and investment law and the increase of massive inequality in the world?’ An issue elaborated on by Natalia Delgado in the context of the World Trade Organisation (WTO) in ‘Towards Work Liberalization: The WTO Discourse on Labour Standards and Policy’ (2019) 35(4) *International Journal of Comparative Labour Law and Industrial Relations* 455.

consider the scope for realization of a feasible transnational regulatory regime, which does not fall prey to these obvious potential pitfalls.

## 2. The transnational aspects of ‘gig work’ in practical terms

The difficulty with seeking to provide effective regulation of gig work at the national level is that the corporate bodies utilising this form of labour do not typically act nationally, but transnationally. This can be illustrated in at least three ways. Firstly, the contractual documentation relating to the hire of a gig worker often reflects a transnational business model. An illustration examined here is the case of United Kingdom (UK) Uber drivers,<sup>10</sup> following a business model established in the United States (US), managed through a Dutch subsidiary, and entailing contractual documentation envisaging arbitration of disputes in the Netherlands. Secondly, gig work itself can be performed across borders, when labour is hired through platforms. That confusion as to the appropriate jurisdiction means that the hirer of labour can dodge coverage of domestic regulation in any given State. Moreover, the uncertainty this creates for the gig worker offering their services may deter claims, for example for unlawful deduction of wages, that might otherwise be straightforward. A third point is that gig work is often dominated by migrant workers and their treatment is therefore of relevance to both their country of origin and the host state. These have scope to raise technical legal concerns, for example reflecting issues concerning conflicts of laws, but also wider issues regarding the desirability of global regulation of corporate actors<sup>11</sup> in the context of what has come to be termed transnational labour law.<sup>12</sup>

### a. Transnational business models and ‘gig work’

The transnational design of gig work is nicely illustrated by the facts of the UK case, *Uber v Aslam*, in which the appellant was a Dutch company, Uber BV (UBV), which held UK copyright in the Uber app. Use of the app was licensed to its affiliate Uber London Limited (ULL), a UK registered company. The operational workings of Uber therefore were determined outside the UK, and the written contracts signed by the drivers were with UBV rather than ULL. The passenger paid the fare to UBV (via the app) not ULL. It was also UBV (the Dutch company) that paid a weekly sum to the drivers dependent on the rides given and their prices.<sup>13</sup> In this instance, under paragraph 11 of the ‘2013 Partner Terms’, the agreement between the drivers and Uber was declared to be governed by the law of the Netherlands and, unless otherwise resolved, any dispute was to be referred to arbitration under the International Chamber of Commerce Arbitration Rules’. Ultimately, both the Dutch company and UK subsidiary accepted UK jurisdiction, but argued that Dutch law should govern the drivers’ contracts such that they had no protection under UK employment legislation,<sup>14</sup> a view that was ultimately rejected by a majority of the UK Court of Appeal (on the same basis as the original employment tribunal, namely that the reality was that ULL was the employer). The

<sup>10</sup> See *Uber v Aslam* [2018] EWCA Civ 2748 discussed in n.1.

<sup>11</sup> See Wright et al, n. 5 citing at 252, John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W W Norton & Company, 2013).

<sup>12</sup> Adelle Blackett, ‘Theorizing Emancipatory Transnational Futures of International Labor Law’ (2019) 113 *AJIL Unbound* 390; see also Ann Trebilcock, ‘Why the Shift from International to Transnational Law is important for Labour Standards’ in Henner Gott (ed), *Labour Standards in International Economic Law* (New York: Springer, 2018).

<sup>13</sup> *Uber* n.1 para. 20.

<sup>14</sup> *Ibid.*, para. 9.

artificiality of the documentation was highlighted by the majority judgment,<sup>15</sup> but remains revealing of the transnational dimension of the mode of hiring. Indeed, use of such transnational arbitration clauses are not unusual;<sup>16</sup> nor is it uncommon for gig work to be managed from abroad, so that instructions are sent, even in real time from an operator in another jurisdiction.<sup>17</sup> It can also be observed that Uber is not originally a Dutch model, but originated in the US where the concept was first put into action in San Francisco in 2009.<sup>18</sup>

### b. Platform work across borders

In his impressive analysis of the operation of the gig economy, *Humans as a Service*, Jeremias Prassl highlights the role of Amazon's Mechanical Turk or 'MTurk' for commissioning the performance of online tasks and also 'Upwork for higher-skilled work, including digital design and programming'.<sup>19</sup> These are 'digital labour intermediaries' as he terms them, which can operate nationally but also across-borders. Such forms of 'crowd-work' can be contrasted with the more personal delivery of services, which has been described as 'work-on-demand via apps'.<sup>20</sup> This has been described in the Indian context as 'effectively selling workers abroad', or more generously as 'delivering IT services off-site'.<sup>21</sup>

Another study focussing on African gig work has also recognised that in some platform crowd-work hire, 90% of transactions take place 'across international borders'. This has particular implications for workers, since the 'planetary scale of the labour supply for the platform work 'alongside other factors 'means that workers are both left to fend for themselves and compete against one another'.<sup>22</sup> Workers in places 'as varied as Kenya, Uganda, and Nigeria earned \$1 per hour or less for some of their jobs'.<sup>23</sup> Time differences

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<sup>15</sup> *Ibid* at para 54: '*Autoclenz* holds that the Court can disregard the terms of any contract created by the employer in so far as it seeks to characterise the relationship between the employer and the individuals who provide it with services (whether employees or workers) in a particular artificial way. Otherwise employers would simply be able to evade the consequences of *Autoclenz* by the creation of more elaborate contrivances involving third parties.'

<sup>16</sup> Miriam A. Cherry, *Regulatory Options for Conflicts of Law and Jurisdictional Issues in the On-Demand Economy* ILO Conditions of Work and Employment Series No. 106 (Geneva: ILO, 2019).

<sup>17</sup> See also an investigative BBC documentary into the hire of agency workers to carry out Amazon deliveries, found instructions coming from US sources to hand-held devices carried by the couriers. (<https://www.bbc.co.uk/news/uk-england-37912858>; <https://www.youtube.com/watch?v=8o6rVBY8n2s>).

<sup>18</sup> Jeremias Prassl, *Humans as a Service* (OUP, 2018), 18.

<sup>19</sup> *Ibid.*, 12.

<sup>20</sup> Valerio De Stefano, *The Rise of the 'Just-in-time Workforce': On-demand work, crowdwork and labour protection in the 'gig-economy'* (2016) ILO Conditions of Work and Employment Series Working Paper No. 71 (Geneva, ILO).

<sup>21</sup> Filipe Calvão and Kaveri Thara, 'Working Futures: The ILO, automation and digital work in India' (2019) 11(11) *International Development Policy/ Revue internationale de politique de développement* 223, at para. 19.

<sup>22</sup> Mark Graham and Mohammed Anwar, 'The Global Gig Economy: Towards a planetary labour market?' (2019) 24(4) *First Monday*, at 21.

<sup>23</sup> *Ibid.*, at 21-22.

between the place where the work was commissioned and where it was carried out also led to sleep deprivation for those providing their labour.<sup>24</sup>

Indeed, ‘economists have previously suggested that access to Internet-based marketplaces would permit a kind of “virtual migration” that offers economic benefits akin to physical migration’.<sup>25</sup> However, it is also clear that more concrete migrant labour across borders is also a feature of the gig economy internationally.

### c. Use of migrant labour in the gig economy

It is well known that migrant workers tend to be over-represented in so-called non-standard and precarious work.<sup>26</sup> There is also evidence that they are over-represented in many gig economy jobs and there has been a call for further research into how they are treated in this sphere.<sup>27</sup> While this an area that is arguably under-researched, we do know from at least one study that there are many migrant moped Deliveroo couriers in the UK, especially from Latin America, have engaged in spontaneous action in protest at their terms and conditions.<sup>28</sup> That study has observed that they have been less involved in the formal process of unionisation and representation by the Independent Workers Union of Great Britain (IGWB), seemingly due to their vulnerable migration status.<sup>29</sup> If so, this would be consistent with what we already know about the ways in which insecure migrant status in the UK (and elsewhere) compounds potential for exploitation at work.<sup>30</sup> What happens to these migrant workers is arguably both the concern of the host state in which they engage in the gig economy, but also their home state in which they are citizens. Again, there is a transnational element here which could be more rigorously investigated and scrutinized in legal terms.

### 3. Universality as a basis for international regulation

Despite these transnational dimensions of gig work developing in comparable and connected ways, there seems to be little uniformity of legal regulation. As Prassl has commented, ‘courts and administrative bodies across the world have developed competing tests’.<sup>31</sup> This

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<sup>24</sup> *Ibid.*, at 22.

<sup>25</sup> Mark Graham, Villi Lehdonvirta, Alex Wood, Helena Barnard, Isis Hjorth, and Peter D Simon, *The Risks and Rewards of Online Gig Work at the Global Margins* (2017) available at: <https://ora.ox.ac.uk/objects/uuid:8c791d5a-e3a5-4a59-9b93-fbabea881554>, at 2.

<sup>26</sup> Manoj Dias-Abey and Kevin Banks, ‘Migrant Workers: Contesting Definitions, Institutional Responses, and Rights’ (2019) 35(2) *International Journal of Comparative Labour Law and Industrial Relations* 153.

<sup>27</sup> Chris F. Wright and Stephen Clibborn, ‘Migrant Labour and Low-quality Work: A persistent relationship’ (2019) 61(2) *Journal of Industrial Relations* 157.

<sup>28</sup> Arianna Tassinari and Vincenzo Maccarrone, ‘Riders on the Storm: Workplace Solidarity among Gig Economy Couriers in Italy and the UK’ (2020) 34(1) *Work, Employment and Society* 35, at 42 and 47.

<sup>29</sup> *Ibid.* 47.

<sup>30</sup> Bridget Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’ (2010) 24(2) *Work, Employment and Society* 300; and Judy Fudge, ‘Illegal Working, Migrants and Labour Exploitation in the UK’ (2018) 38(3) *Oxford Journal of Legal Studies* 557.

<sup>31</sup> Prassl n.18, at 99.

poses a question as to whether a more universal model for international regulation could be desirable and, if so, made effective.

We could see international regulation as merely a pragmatic response to the inclusion of mandatory arbitration clauses in gig worker contracts, which seek to evade the jurisdiction of the courts in the country where the work is performed. This is advocated by Miriam Cherry.<sup>32</sup> Additionally, the application of universal international labour standards to gig work can be regarded as a principled approach, which addresses ‘the commonalities of gig work with other forms of precarious work’.<sup>33</sup>

As Valerio De Stefano has observed, gig work as a manifestation of casualisation, demutualisation of risk and commodification of labour can pose a threat to basic universal ‘Fundamental Principles and Rights at Work, as they are defined by the International Labour Organisation’.<sup>34</sup> This is a reference to the ILO Declaration of 1998, which states that all states by virtue of their very membership of the Organisation are required to respect certain core labour standards, itemised in Article 2, regardless of whether they have ratified the complementary ILO Conventions relating to each.<sup>35</sup> In other words, all workers ought to be able to claim:

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

In this context, De Stefano’s particular focus is on the significant status of collective labour law rights as human rights for non-standard workers.<sup>36</sup> Moreover, he also argues that to make all collective organisations of workers (of all kinds whatever their formal contractual status) immune from competition (or anti-trust) law would be in line with the statement in the ILO Declaration of Philadelphia that ‘labour is not a commodity’.<sup>37</sup>

The employers’ group at the ILO has fiercely protested against protection of the effective recognition of the right to collective bargaining, especially as regards access to a right to strike, so that since 2012 there has been pressure placed on ILO supervisory bodies not to make pronouncements on this issue.<sup>38</sup> The UN Committee on Economic, Social and Cultural

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<sup>32</sup> Cherry, n.16 above.

<sup>33</sup> Valerio De Stefano, ‘The Gig Economy and Labour Regulation: An international and comparative approach’ (2018) 4(2) *Revista Direito das Relações Sociais e Trabalhistas* 68, 70.

<sup>34</sup> De Stefano n.20, at 9 – 12.

<sup>35</sup> Valerio De Stefano, ‘Non-Standard Work and Limits on Freedom of Association: a Human-Rights Based Approach’ (2017) 46(2) *Industrial Law Journal* 185.

<sup>36</sup> Valerio De Stefano and Antonio Aloisi, ‘Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers’ in Janice Bellace and Beryl Ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Cheltenham: Edward Elgar, 2019).

<sup>37</sup> Valerio De Stefano, ‘Labour is not a Technology – Reasserting the Declaration of Philadelphia in times of platform-work and gig-economy’ (2017) 2 *IUSLabor* 1, at 11-12; De Stefano n.33, 75.

<sup>38</sup> Discussed in Lee Swepston, ‘Crisis in the ILO Supervisory System: Dispute over the Right to Strike’ (2013) 29(2) *The International Journal of Comparative Labour Law and Industrial Relations (IJCLLIR)* 199; Keith D. Ewing, ‘Myth and Reality of the Right to Strike as a

Rights and the Human Rights Committee in 2019 issued a Joint Statement on ‘Freedom of association, including the right to form and join trade unions’, which also expressly recognises the right to strike.<sup>39</sup> This assertion of collective labour rights as human rights could act as a corrective to the employers’ resistance at the ILO, but there is no evidence at present of any change in their stance.<sup>40</sup>

Certainly, the statement that *all* those at work (regardless of employment status) have certain fundamental claims, for example to freedom of association, collective bargaining and a right to strike would enable the ILO to speak to a wider audience, ‘to resonate in the wider world’ and ‘catch fire’ with social movements.<sup>41</sup> The force of a human rights approach can be detected in the ‘Universal Labour Guarantee’ proposed by the Global Commission on the Future of Work<sup>42</sup> and even the gentle nod to that proposal in the ILO Centenary Declaration.<sup>43</sup> These initiatives are important because they go beyond what have been formally itemised as ‘core labour standards’ to include other components of decent work,<sup>44</sup> namely (as stated in the 2019 Declaration) an adequate minimum wage, maximum limits on working time, and safety and health at work. Also promising is the reference in the 2019 ILO Convention No. 190 on Violence and Harassment to, not only ‘workers’, but ‘other persons in the world of work’, including ‘persons working regardless of their contractual status’ (Article 2(1)). It is clear that Convention No. 190 applies to ‘all sectors’, whether in the formal or informal economy (Article 2(2)).

Notably, Nicola Countouris has proposed a further interpretive instrument (whether a Convention or a Recommendation) which could sit alongside existing ILO Conventions ensuring that the protections contained therein are to be understood as applicable ‘broadly, beyond the scope of formal, salaried employment, subject only to specific instruments expressly requiring a narrower scope’.<sup>45</sup> This instrument would apply to ILO supervisory bodies, but also ILO constituents and the International Labour Office.

However, there are other universal standards to which the ILO might have reference in regulating gig work. These include human rights and the ingredients of ‘decent work’, but also other basic norms underlying labour law. Some of these have been itemised in a Latin

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‘Fundamental Labour Right’ (2013) 29(2) *IJCLLIR* 145; Jeffrey Vogt et al, *The Right to Strike in International Law* (Hart 2020), 9 - 16.

<sup>39</sup> ‘Freedom of association, including the right to form and join trade unions’, Joint statement by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, 23 October 2019, E/C.12/2019/3-CCPR/C/2019/1. Available at: [https://www.ohchr.org/Documents/HRBodies/CESCR\\_CCPR\\_Joint\\_STM.pdf](https://www.ohchr.org/Documents/HRBodies/CESCR_CCPR_Joint_STM.pdf).

<sup>40</sup> Renate Hornung-Draus, ‘Cross-border Social Dialogue from the Perspective of Employers’ (2020) *European Labour Law Journal* 1, 5.

<sup>41</sup> Laurence R. Helfer, ‘The ILO at 100: Institutional Innovation in an Era of Populism’ (2019) 113 *AJIL Unbound* 396, at 400.

<sup>42</sup> ILO Global Commission on the Future of Work, *Work for a brighter future* (ILO, 2019), 38 – 39.

<sup>43</sup> Article III(B) of the 2019 Centenary Declaration discussed in greater length in Novitz, n.8.

<sup>44</sup> See ILO World Commission on the Social Dimension of Globalization, *A Fair Globalization, Creating Opportunities for All* (ILO, 2004); and the ILO Declaration on Social Justice for a Fair Globalization 2008, Article IA.

<sup>45</sup> Nicola Countouris, *Defining and Regulating Work Relations for the Future of Work* (Geneva, ILO, 2019), 18.



American tradition by Cesar Rosado Marzan and Sergio Gamonal.<sup>46</sup> Moreover, the broad agreement on the UN SDGs may offer some guidance regarding appropriate regulation of gig work.<sup>47</sup> SDG 8 reiterates the significance of various facets of ‘decent work’ for sustainability and in target 8.8 calls for protection of ‘labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment’. There are additionally what the International Labour Office has termed the ‘dynamic interlinkages’ between the SDGs,<sup>48</sup> which open opportunities to consider, for example, the intersections between work and issues of poverty (SDG 1), health and well-being (SDG 3), education and lifelong learning (SDG 4), gender (SDG 5) and innovation (SDG 9). Under SDG 16, provision is also made for access to justice and ‘responsive, inclusive, participatory and representative decision-making at all levels’ (target 16.7). The interesting question is whether application of these universal norms to gig workers is politically feasible, given tensions in tripartite governance and their implications for supervision of standards at the ILO at present.<sup>49</sup>

#### 4. Making international regulation particular to the platform

##### a. A sui generis ILO Convention

One outstanding question is whether there something peculiar about gig work which makes it different from other forms of non-standard work so that it requires its own specific international instrument that will apply *sui generis*. Arguably, there are some identifiable commonalities between even different kinds of gig work, such as crowd-work and app-work. De Stefano has observed that both forms ‘enabled by IT and make use of the internet to match demand and supply of work and services at an extremely high speed’ which ‘allows minimising transaction costs’.<sup>50</sup> As a result, it is possible to itemise with precision the exact hours worked and paid for with new consequences for the commodification of labour. Also endemic is the use of virtual feedback and ratings systems, which can be weighted in terms of the length of time a task takes or the level of satisfaction indicated by customers. While these calculations may vary, it has been demonstrated that algorithms can operate to deprive people of access to work, determine the extent of their payment and may have significant discriminatory effects.<sup>51</sup> This practice too seems particular enough to the gig economy to

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<sup>46</sup> Cesar Rosado Marzan and Sergio Gamonal, *Principled Labor Law: US Labor Law through a Latin American Method* (Oxford: OUP, 2019).

<sup>47</sup> See n.8 above.

<sup>48</sup> ILO International Labour Office, *Time to Act for SDG 8: Integrating decent work, sustained growth and environmental integrity* (Geneva: ILO, 2019) available at: [https://www.ilo.org/global/publications/books/WCMS\\_712685/lang--en/index.htm](https://www.ilo.org/global/publications/books/WCMS_712685/lang--en/index.htm), pp. x – xi and 2-3. See discussion in Tonia Novitz, ‘Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability’ (2020) 17 *International Organizations Law Review* 10.

<sup>49</sup> Claire La Hovary, ‘A Challenging Ménage à Trois? Tripartism in the International Labour Organization’ (2015) 12(1) *International Organizations Law Review* 204

<sup>50</sup> De Stefano n.33, 69.

<sup>51</sup> Jeremias Prassl, ‘What if your Boss was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work’ (2020) *Comparative Labor Law and Policy Journal* forthcoming, available online at: [https://ora.ox.ac.uk/objects/uuid:674dbed4-317d-47a9-b10a-688892aeaf34/download\\_file?file\\_format=pdf&safe\\_filename=The%2BAlgorithmic%2BBos](https://ora.ox.ac.uk/objects/uuid:674dbed4-317d-47a9-b10a-688892aeaf34/download_file?file_format=pdf&safe_filename=The%2BAlgorithmic%2BBos)

warrant specific regulation. On this basis, it has been argued that: ‘The ILO should further engage with forms of digitally mediated work and network governance, and develop a new understanding of digitised labour relations no longer tied to conventional working arrangements but to ways of monetising the self in a digital ecosystem.’<sup>52</sup>

Exactly what should be regulated and how is less easily determined. De Stefano notably led on addressing this issue while working at the ILO<sup>53</sup> and there has since been a helpful ILO survey undertaken by Janine Berg.<sup>54</sup> The most useful starting point may be the ten point Manifesto proposed in 2019 by Aloisi, De Stefano and Silberman.<sup>55</sup> This Manifesto is already far-reaching, covering: (1) employment contracts for ‘regulars’; (2) a code of conduct to address payment, transparency of ratings and information shared online; (3) clear payment rules; (4) action to prevent business exploiting the ‘grey area’ of legal uncertainty; (5) measures to address consequences of outsourcing; (6) working standards for all – professionals and amateurs; (7) protection of self-employed workers; (8) portability of ‘ratings’; (9) union representation of gig work; and (10) minimum working time. Some of their proposals are peculiar to gig work, while others are more general overarching entitlements which can be recrafted to address its specificity.

The authors of the ten point Manifesto never intended this list to be ‘a full package’. There remains scope to include other points and elaborate further on certain entitlements. An example is the issue of health and safety, which is mentioned briefly in relation to point (7) protection for the self-employed. We have recently witnessed how the coronavirus pandemic has exposed the vulnerability of gig work, for example in care, driving and courier delivery services, where there is exposure to infection and then movement between multiple sites without adequate personal protective equipment. Across the world, the result seems to have been infection of gig workers, which also has consequences for their clients and for public health.<sup>56</sup> There may now be an emerging consensus that health and safety for gig workers is a pressing concern deserving of greater attention.

Accordingly, through further participatory and representative discussions at multiple levels (as envisaged by SDG 16), an even broader and more detailed regulatory programme could be devised. At the international level, it may be worth exploring what more the ILO can or should do, again bearing in mind the complex difficulties posed by tripartite governance in

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<sup>52</sup> Filipe Calvão and Kaveri Thara, ‘Working Futures: The ILO, automation and digital work in India’ (2019) 11(11) *International Development Policy/ Revue internationale de politique de développement* 223, at para. 29.

<sup>53</sup> See especially De Stefano n.20.

<sup>54</sup> Janine Berg, ‘Income Security in the On-demand Economy: Findings and policy lessons from a survey of crowdworkers’ (2016) 37 *Comparative Labor Law and Policy Journal* 543.

<sup>55</sup> Antonio Aloisi, Valerio De Stefano and Six Silberman, ‘A Manifesto to Reform the Gig Economy’, in Pagina99 (29 May), available at:

<http://regulatingforglobalization.com/2019/05/01/a-manifesto-to-reform-the-gig-economy/>.

<sup>56</sup> See ILO webpage ‘State practice to address COVID-19 infection as a work-related injury’ available at: [https://www.ilo.org/global/topics/geip/publications/WCMS\\_741360/lang--en/index.htm](https://www.ilo.org/global/topics/geip/publications/WCMS_741360/lang--en/index.htm). Also the special issue on ‘COVID-19 and Work’ (2020) 13(1) *Italian Labour Law e-journal* available at: <https://illej.unibo.it/issue/view/868>.

relation to this issue. It will also be vital to secure effective collective representation of gig workers so that they have a genuine voice in formulating standards that affect them.

### **b. Transnational collective bargaining**

In 2018, Prassl envisaged that workers' self-regulation could be possible at the transnational level: 'In future, unions or workers' collectives might even set up their own platforms—or develop international certification standards for gig-economy operators who agree to design their business models in line with appropriate employment standards.'<sup>57</sup> These initiatives are now being actualised. An example is the collaboration between the German union IG Metall and the Swedish Unionen in a project relating to the platform 'FairCrowdWork' and the involvement of 'both these unions together with several other European and North American workers' organisations' in issuing the Frankfurt Paper, 'the first transnational joint statement on platform based work, calling for "transnational multi-stakeholder cooperation to ensure fair working conditions in digital labor platforms"'.<sup>58</sup>

Moreover, as De Stefano and Aloisi have noted, GUFs are starting to make demands for negotiation on these issues.<sup>59</sup> Transnational collective bargaining also has the potential to address the specificities of particular forms of platform work which an ILO Convention would not necessarily accomplish. If we accept that gig work has commonalities but is also heterogeneous,<sup>60</sup> constructive engagement between global unions and employers may craft norms which are responsive to the concerns of the workers affected. The International Transport Workers Federation has, for example, been engaged in helping craft overarching apps to assist members in collaboration with employers.<sup>61</sup>

There is also an exciting possibility for new synergies between more general overarching ILO standards and the specificity of gig work in 'international', or as they are now more frequently called, 'global' framework agreements (GFAs). 'It is increasingly common for ILO conventions to serve as benchmarks for [such] voluntary instruments ... between global union federations and MNEs.'<sup>62</sup> ILO instruments are also referred to in corporate codes of conduct, but GFAs seem a preferable regulatory mechanism as they are likely to be less deferential to corporate interests, because they engage with workers' collective agency and voice. They are known for containing 'stronger protections for regulating labour standards

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<sup>57</sup> Prassl n.18, 114.

<sup>58</sup> Agreed by Austrian Chamber of Labour (Arbeiterkammer); Austrian Trade Union Federation (ÖGB); Danish Union of Commercial and Clerical Workers (HK); German Metalworkers' Union (IG Metall); International Brotherhood of Teamsters Local 117 (USA); Service Employees International Union (USA); Unionen (Sweden). Discussed by De Stefano n.33, at 74; and Hannah Johnston and Chris Land-Kazlauskas, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy* Conditions of Work and Employment Series No. 94 (Geneva: ILO, 2019) at 10.

<sup>59</sup> De Stefano and Aloisi n.36, at 371 cite UNI Global Union, 'Global Union Sets New Rules for the Next Frontier of Work—Ethical AI and Employee Data Protection' (UNI Global Union, 11 December 2017) <http://uniglobalunion.org/news/global-union-sets-new-rules-next-frontier-work-ethical-ai-and-employee-dataprotection> accessed 20 December 2017.

<sup>60</sup> De Stefano n.37 at 13.

<sup>61</sup> See the example of 'UpTop' cited by Johnston and Land-Kazlauskas n.58 at 21-22.

<sup>62</sup> Wright n.5, at 252.

than codes of conduct'.<sup>63</sup> The difficulty is that, to date, GFAs have tended to operate at a very general level on the global stage providing for broad protections, which are enforceable merely through procedural mechanisms within the MNE signatory concerned.<sup>64</sup> It has however been suggested that GFAs could take different forms, the Bangladesh Accord (which has regulated fire and building safety in the ready-made garment sector) being one of the best examples of requirements for detailed standards alongside concrete mechanisms for enforcement.<sup>65</sup> More effective regulation may be possible than that which we have seen in standard GFAs to date, but once again this depends on committed engagement by corporations and the availability of effective collective representation for those engaged in gig work.

## 5. Conclusion

This brief contribution to the gig economy debate has considered the case for international regulation. The article began by analysing the significance of transnational business models, cross-border services and migration in gig work, concluding that crowd work and platform work are not merely nationally-based phenomena. Accordingly, inconsistencies in treatment of gig work in national legislation and domestic litigation indicate that international regulation is worth investigating. This article has outlined potential ways in which existing universal international labour standards might be applied to gig work, whether drawing on fundamental principles and rights at work, decent work norms or sustainability objectives. It has also suggested that a foray into *sui generis* regulation could be explored, potentially in the form of an international instrument such as an ILO Convention. Another option could be to further extend global collective bargaining, whether through GFAs or other multi-actor multi-level schemes (like the Bangladesh Accord). Further research into these regulatory possibilities now seems not only advisable, but urgent.

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<sup>63</sup> Chris Wright et al. 'Towards a New Web of Rules: An international review of institutional experimentation to strengthen employment protections' (2019) 41(2) *Employee Relations* forthcoming available at: <https://ora.ox.ac.uk/objects/uuid:f1d53f30-fd02-4fd4-8972-35884a960f8e>, 15-16.

<sup>64</sup> Discussed in Tonia Novitz, 'Exploring Multi-Level Collective Bargaining : Transnational Legal Frameworks that Promote Worker Agency' in Julia Lopez Lopez (ed.), *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century* (Oxford: Hart Publishing/ Onati International Series in Law and Society, 2019), 119-143.

<sup>65</sup> Reingard Zimmer, 'International Framework Agreements: New Developments through better Implementation on the basis of an analysis of the Bangladesh Accord and the Indonesian Freedom of Association Protocol' (2020) *International Organizations Law Review*, forthcoming.